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## Preface

This important work challenges all New Zealanders, especially those with responsibility for the operation and reform of our current law and institutions, to re-examine the values and priorities which have become part of us during a lifetime of working within them.

It was prepared by Joanne Morris in her capacity as a Law Commissioner from 1994 to March 1999 as part of the response to terms of reference *Women's Access to Justice: He Putanga Mō Ngā Wāhine ki te Tika* approved by the Minister of Justice in September 1995. Its topic is two related issues, each of fundamental importance to New Zealanders. One is whether New Zealand women are treated properly by the legal system. That raises in turn a second – whether the New Zealand citizen has such access to legal services and advice as to be able to secure access to justice.

Both are, or should be axiomatic. The study however provides disturbing grounds for concern as to each and is essential reading for all to whom the well being of each of our citizens is important.

The study has already had considerable effect in bringing the issues to attention and influencing change. The Commission's report NZLC 53 *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*, another part of the response to the reference which was commenced by Commissioner Morris and concluded by Commissioner Henare, records major advances in understanding and practices within the justice sector as they affect Māori. The present study records developments during the term of the project, including the preparation and release of Miscellaneous Papers on a variety of topics and the successful Gender Equity seminar attended by the judiciary in 1997 to which the study contributed.

But the lesson of the present study is that there remains a long way to go.

The present study focuses on the problems that women have in simply getting access to legal services, and so getting any access at all to the justice system and why the system does not accommodate them as it should. It suggests some possible solutions to improve women's access to justice.

The study proposes further expenditure on legal aid. It does not extend to a review of what basic changes are needed to our current legal aid and advice system.

The continuing Commissioners consider that Commissioner Morris's study establishes pressing need for further work to investigate specific and effective options to improve access to legal advice and the optimum dispatch of court business, as has been attempted, not without controversy, in the December 1998 report of the Lord Chancellor's Department *Modernising Justice: the Government's*

### *Plans for Reforming Legal Services and the Courts*

For example, the great bulk of the civil legal aid budget is expended in Family Court proceedings. That important Court has major responsibility for dealing with the difficult issues relating to circumstances of families in New Zealand including custody, neglect and abuse of children and domestic violence. It seems that any review of the system of civil legal aid should logically be preceded by an examination of possible improvements to Family Court procedures and we have invited the Minister of Justice to refer such an examination to the Commission as a new project. He has given a positive response. The Chief District Court Judge, the Principal Family Court and Youth Court Judges and a group of Family Court Judges whom we have consulted, as well as members of the Family Court bar, have pointed to deficiencies in the existing law which impede the just and efficient discharge of their task; some are referred to in the study. We wish to examine how the existing system can be made to work most effectively.

In a new project *Battered Defendants* the Commission is undertaking an examination of the medical and legal issues advanced in *Lavallee* and *Oakes* – what has been called “Battered Women’s Syndrome”. And in its forthcoming *Evidence Code* and accompanying report the Commission offers recommendations building on the responses to its Preliminary Paper 26 concerning the evidence of vulnerable witnesses.

In a recent work *Dissonance and Distrust: Women in the Legal Profession* (Oxford 1996) Margaret Thornton, Professor of Law and Legal Studies at La Trobe University, describes her parallel project in Australia

“... I have rejected empiricism in favour of semi-structured, in-depth interviews designed to give voice to those who have long been silenced.

The subjectivity of these voices reminded me that I could not claim a non-existent neutrality since I devised the questionnaire, asked questions, shaped conversations, interpreted transcripts, developed a thesis, and selected exemplary excerpts. My work has also been informed by my own experiences as a feminist legal academic. In fashioning a text about women and law, I therefore acknowledge that I am playing an active role in constituting legal knowledge; I cannot pretend that I am merely interpreting it:

‘Discussions of the ‘situatedness’ of knowers suggest that the claims of every knower reflect a particular perspective shaped by social, cultural, political, and personal factors and that the perspective of each knower contains blind spots, tacit presuppositions, and prejudgments of which the individual is unaware.’

The disclaimer issued by judges that they do not make law, but merely interpret it, has long been exposed as a positivistic myth designed to occlude judicial partiality. Truth claims of all kinds have to be treated with caution.” (pages 4–5)

The nature of the issues is such that the present study also is inevitably one of a range of potential subjective analyses, each of which is necessary to a complete understanding of the deficiencies in our laws and institutions.

Commissioner Morris and the other current Law Commissioners agreed that the nature of the present study is such that it should be presented as hers, rather than as the normal collegiate document representing consensus following a process in which all Commissioners have participated. In recognition of the importance of expression and debate of the views expressed in the present work, the Commission has established a new series of publications – *Study Papers* – to accommodate it and other studies.

There has in recent years been considerable criticism of fundamental structural problems within the legal system which are said to keep women in situations of disadvantage (for example Edwards *Sex and Gender in the Legal Process* (1996), Kennedy *Eve Was Framed* Chatto and Windus (1992), Thornton (supra) and Fredman *Women and the Law* (Oxford: Clarendon Press (1997)). Fredman has asserted that truth and justice are not the objective realities that traditional liberal theory would suppose them to be. It is powerfully argued that law is not a disembodied neutral force. It is a force which is made by people in power, and it is influenced by prevailing political and economic ideologies, and the desires and prejudices of its makers. Although legislative changes have removed explicit inequalities, women (and other groups who differ from the 'benchmark', which is said to be male, white, able-bodied, heterosexual and possessed of particular political views) remain in fact disadvantaged. It is said with force that this is because the current liberal paradigm on which our legal system is based is fundamentally flawed.

The importance of the issues, recognised internationally by the Convention on the Elimination of all Forms of Discrimination Against Women, was the subject of Cooke J's judgment in *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 affirmed [1978] 2 NZLR 387.

Recent decisions of superior courts in our own and similar jurisdictions provide instances where the common law was changed by the superior courts to rectify the kind of abuse described in the present thesis: *R v Lavallee* [1990] 1 SCR 852 (Supreme Court of Canada) (followed in *R v Oakes* [1995] 2 NZLR 673 (CA)), *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA), *Reg v R* [1992] 1 AC 599 (HL), *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL) (followed in *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 (CA)); *Z v Z* [1997] 2 NZLR 258 (CA) and *W v Attorney-General* CA 239/98 (judgment 6 May 1999). In other spheres it has been necessary for Parliament to intervene: Domestic Violence Act 1995; Evidence Act 1908 ss 23AB and 23AC; Matrimonial Property Act 1976. This list throws up previous failures of the common law – to recognise the effect of physical and emotional abuse; to protect women from rape by an estranged husband; to credit them as competent to give credible evidence; to protect guarantors from the effects of undue influence; to deal justly with the consequences of dissolution of marriage; to understand the reasons for delay in commencing suit on the grounds of sexual abuse.

What may be thought striking, and deeply troubling, is how fundamental the issues are and how long the law has taken to react to injustice. The virtue of such works as John Stuart Mill *The Subjection of Women* 1869 (Classics of Modern Political Theory Oxford 1997), Thornton and Fredman is to challenge basic assumptions and require a reasoned response.

Commissioner Morris's account of the views of some 3000 women obtained at 100 meetings has a double importance: first the fact that such opinions are held; and secondly that the reiteration of individual views, any of which might if seen in isolation be open to challenge as subjective, is a strong pointer to their justification.

The Commission's responsibility in law reform includes the need to take heed of the warning expressed by James Harvey Robinson in a passage adopted in Cardozo's classic *The Nature of the Judicial Process* (Yale 1921) pages 175–176

“Our beliefs and opinions like our standards of conduct come to us insensibly as products of our companionship with our fellow *men* . . . We are constantly misled by our extraordinary faculty of ‘rationalising’ – that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong . . . we are ever and always listening to the still small voice of the herd, and are ever ready to defend and justify its instructions and warnings, and accept them as the mature results of our own reasoning.”

The noun now italicised makes, ironically enough, both Robinson’s point, and also that of Commissioner Morris. The study is a significant step towards justice for women and so for all New Zealanders.

*The Hon Justice Baragwanath*  
*President*

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## Acknowledgements

The project Women's Access to Justice: He Putanga Mō Ngā Wāhine ki te Tika, undertaken by the Law Commission, is the subject of this study prepared by me (Joanne Morris) while a Commissioner. The project could not have started, continued or been completed without the input of several thousand individuals and organisations from all parts of New Zealand. My sincere thanks go to all those who, as users, employees or other agents of the justice system:

- attended consultation meetings or made written or telephoned submissions to the project;
- assisted in the consultation programme as planners, facilitators, interviewers or advisors on the information collected;
- reviewed, before publication, the six consultation papers published during the project;
- assisted in the preparation of this publication.

The nature of the project demanded a high level of skill and dedication from those who worked on it during its four-year course. I thank all who are or were members or staff of the Law Commission in that period, particularly those most closely involved in this study of women's access to legal services, including Ms Michelle Vaughan, Ms Makere Papuni, Ms Bridget Laidler, Ms Moira Thorn, Mr Robert Buchanan and Ms Sarah McKenzie. I also thank Ms Angela Howell for her analysis of the Census data and Ms Joy Liddicoat (Strategic Legal Services) for her invaluable assistance in the latter stages of the study.

The contributions of two women stand out for special mention.

Hepora Raharuhi Young (Te Arawa), as kaiahi (leader) of the group which planned and facilitated the consultation programme with Māori women, took a leading role in all the project's activities until a few months before her death in December 1996. Hepora's love of people and of learning, her wisdom, sense of humour, charm and dignity were all brought to bear in the vital period of the project's development, to its enduring advantage.

Louisa Crawley, who was Deputy Director of the Ministry of Pacific Island Affairs at the time of her death late in 1995, also played a substantial role in the project's development. Louisa facilitated the consultation programme with Pacific Islands women around New Zealand, organising and attending all the larger meetings, and was always willing to discuss their content with the project team and provide further contacts and information.

This study represents a very small part of the legacies which Hepora Young and Louisa Crawley have left to New Zealand. It is dedicated to them.





# Purpose, premises and principles

## THE RULE OF LAW AND ACCESS TO THE JUSTICE SYSTEM

- 1 OUR SYSTEM OF CONSTITUTIONAL GOVERNMENT depends upon law and its observance. This is sometimes called “the rule of law”. Lawmaking by Parliament is one aspect of the rule of law. But just as important is the principle that individuals and the communities in which they live are entitled to the protection of law. This depends on citizens having access to processes to obtain the law’s protection.
- 2 The processes by which law is maintained constitute the justice system. Ultimately dependent on the courts (although not confined to the courts), the justice system provides the means for resolving disputes about the law’s meaning and application. It applies to disputes between citizens, and disputes between citizens and the state. The justice system is of such importance in the lives of all New Zealanders that it can be likened to a public building whose existence and location must be known by all. More than that, we must all be able to approach and enter the building, and to make our way through its corridors and floors to the rooms we need to visit, before leaving through its exit doors.
- 3 The public building metaphor highlights the fundamental importance of process in any system of justice. This is also evident from a recent English report’s statement that, to ensure justice, a justice system should:
  - be *just* in the results it delivers;
  - be *fair* in the way it treats litigants;
  - offer appropriate procedures at reasonable *cost*;
  - deal with cases with reasonable *speed*;
  - be *understandable* to those who use it;
  - be *responsive* to the needs of those who use it;
  - provide as much *certainty* as the nature of particular cases allows; and
  - be *effective*, adequately resourced and organised. (*Access to Justice Final Report*, 1996, 2)
- 4 Few would disagree with such general statements of the necessary features of a justice system. But there is a range of views on the precise meaning of each of those features and on the weight which each should be accorded. The diverse circumstances of the citizens for whom the justice system exists (in terms of wealth, education and culture, for example), and the various interests of those engaged in its operation (including the state, the judiciary and the legal profession), make that range of views inevitable.

- 5 This study presents information and recommendations to help policy makers and lawmakers understand better the views of New Zealand women about the essential features of a justice system. It is the product of a four-year inquiry that was centred on a programme of consultation with over 3000 women users and would-be users of the justice system. Extensive consultation with justice system personnel was also a vital component of the study.
- 6 The study is focused on women's access to legal services – the legal information, advice and representation services that women need if they are to discover and enforce their rights. It does not examine all the matters that might be examined under the heading of “women's access to justice” – the title given to the project at its inception and by which it was known throughout its course. Of all the areas that women highlighted for attention and that might have been studied in depth, the strength and consistency of women's concerns about impediments to their access to legal services demanded examination as a matter of priority.
- 7 The other area which demanded examination as a matter of priority was defined by the strength of the view, among the 900 Māori women consulted, that their experiences with the justice system revealed the inadequacy of its regard for Māori cultural values and the Treaty of Waitangi. That is the area explored in the Commission's report *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53).
- 8 All the work undertaken in this study confirms the existence of substantial barriers to New Zealanders' access to legal services. Further, it confirms that women are particularly likely to encounter these barriers when attempting to secure access to the justice system to protect their rights. The result is that:
  - some New Zealanders are unable to find out what they need to know about the justice system before they can begin to use it; and
  - some are unable to use the justice system even if they know about it.

In terms of the metaphor, some New Zealanders cannot find or use the pathways to the public building which is the justice system. Some cannot afford the price of entry. Some find the corridors to the rooms they need to visit so cluttered as to be impassable. They are compelled to exit through the building's windows rather than its doors. Barriers such as these thwart the achievement of the justice system's purpose – to secure the protection of law and just outcomes for all.

## THE ORIGINS OF THE PROJECT AND ITS TERMS OF REFERENCE

- 9 During 1994, representatives of a number of community groups informed the Law Commission of serious concerns among women about the accessibility and operation of the justice system, and asked that a study be undertaken which paid full attention to those concerns. Shortly afterwards, the Courts Consultative Committee (CCC), whose members include senior judges, justice sector officials and lawyers, invited Commissioner Joanne Morris to join a CCC subcommittee to recommend a course of action to address issues of “gender equity” in New Zealand's courts. The connections between those separate approaches to the Commission, and its own knowledge of the justice system, led to its decision to undertake the project *Women's Access to Justice: He Putanga Mō Ngā Wāhine ki te Tika*.

- 10 The project's terms of reference were developed by the Commission in mid-1995, with assistance from the Ministry of Women's Affairs and the members of Te Roopu Uho (the group of senior Māori women, led by the late Hepora Young, who planned and conducted the nationwide programme of consultation with Māori women (see Appendix, para A26)). By that time, there had been a preliminary round of consultation meetings and interviews with women users of the justice system and with justice system personnel, but it was known that the further consultation which lay ahead, including the targeted consultation with Māori women, would be critical to the task of defining precisely the study's boundaries. Accordingly, the description of the study that was included in the terms of reference was couched broadly, to embrace all the matters which could, on the basis of the information gathered to that time, become the subject of in-depth examination. In this, the terms of reference were (and are) unusual for Law Commission projects, for they cannot be read in isolation from an understanding of the qualitative research methodology that the project employed. That methodology is described in chapter 2 and the Appendix.
- 11 The outcomes of the project were, however, plain from the outset: to ensure that the lessons learned from a study of women's experiences in securing access to the "building" which is the justice system could in future be applied to bring about improvements not only in the parts of the building studied in most depth but also more generally. That is why, in stating the project's outcomes, the terms of reference give priority to the goal of identifying "principles and processes to be followed by policy makers and lawmakers . . . which will promote the just treatment of women".
- 12 Approved by the Minister of Justice in September 1995, the terms of reference state:

WOMEN'S ACCESS TO JUSTICE:  
HE PUTANGA MŌ NGĀ WĀHINE KI TE TIKĀ

The Law Commission: Te Aka Matua o te Ture will examine the response of the legal system to the experiences of women in New Zealand, recognising the importance of the Treaty of Waitangi in the examination of Māori women's experiences.

The Law Commission: Te Aka Matua o te Ture will take account of the multi-cultural character of New Zealand society and New Zealand's obligations under international law.

Priority will be placed on examining the impact of laws, legal procedures and the delivery of legal services upon:

- family and domestic relationships,
- violence against women, and
- the economic position of women.

At all stages of the project, there will be widespread consultation with women throughout New Zealand. The project will also draw upon, and complement, the work of other government agencies, the Judicial Working Group on Gender Equity and other Law Commission projects.

The Law Commission: Te Aka Matua o te Ture will report to the Minister of Justice concerning:

- principles and processes to be followed by policy makers and lawmakers,
- specific law reforms, and
- educational and other strategies

which will promote the just treatment of women by the legal system.<sup>1</sup>

- 13 As had been anticipated, the exact boundaries of the Commission's study of "women's access to justice" were defined as a result of the consultation that was conducted after the terms of reference were approved. Four major factors influenced the definition process:
  - the priority which Māori women accorded to the Treaty of Waitangi in any consideration of their access to justice (the subject of the Commission's report *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53));
  - the priority which women from all social groups accorded to their concerns about barriers to their access to legal services;
  - the Commission's financial and human resources; and
  - the fact that various relevant initiatives were being undertaken elsewhere in the justice sector. (For example, during the early stages of the project, reforms to the domestic violence laws were introduced and passed (the Domestic Violence Act 1995); bills were being prepared (and later introduced) to change the laws governing the division of matrimonial property and the property of de factos; and the Department for Courts began implementing its Change Programme.)
- 14 While not claiming to be a comprehensive examination of "women's access to justice", this study of women's access to legal services provides insights that are relevant to any consideration of the justice system's responsiveness to women's needs. One reason is that an inquiry into the accessibility of legal services is an inquiry into the accessibility of the processes available to people to discover and take action to enforce their lawful rights. Since processes are integral to the entire justice system, the lessons learned in the legal services area, which is closest to consumers, can be expected to be of more general value.
- 15 Further, the delivery of legal services involves all three of the sectors which participate in the organisation of New Zealand society:
  - the state sector (which is involved in the provision of legal services through government funding of the legal aid schemes and the courts, for example);
  - the private sector (which is involved through the legal profession's dominance in the provision of legal advice and representation services); and
  - the not-for-profit sector (which is involved through community groups' vital role in providing legal information and advice services).

Since a study of women's access to legal services requires an examination of some of the activities of all three of those sectors, it provides a solid foundation for the primary task set by the terms of reference: to identify "principles and

<sup>1</sup> The terms "legal system" and "justice system" are used interchangeably in this study. Both refer to the system (of laws, legal procedures and other processes) by which law is made and upheld.

processes, to be followed by policy makers and lawmakers . . . which will promote the just treatment of women by the legal system”.

## THE STUDY'S SCOPE

- 16 An overview of the scope of this study is needed before the premises on which it is based are discussed. Details of the methodology employed are provided in chapter 2 and the Appendix. For present purposes, it is sufficient to note that the first concern of the Commission's project team was to find out whether there are barriers which impede some women's best efforts to invoke the law to uphold the rights which it grants to all New Zealanders. It was to this end that the extensive consultation programme, which reached more than 3000 women, was conducted.
- 17 The results of the consultation with women were the primary focus of six papers, published by the Commission between October 1996 and November 1997. They provided the basis for the further consultation, research and analysis that has been undertaken since. The titles of the six papers reveal the study's focus on the barriers to women's access to legal services:
  - *Information About Lawyers' Fees* (NZLC MP3);
  - *Women's Access to Legal Information* (NZLC MP4);
  - *Women's Access to Civil Legal Aid* (NZLC MP8);
  - *Women's Access to Legal Advice and Representation* (NZLC MP9);
  - *Lawyers' Costs in Family Law Disputes* (NZLC MP10); and
  - *The Education and Training of Law Students and Lawyers* (NZLC MP11).
- 18 Five major themes pervaded women's accounts of the impediments they encountered in their efforts to obtain legal services suitable to their needs. They are:
  - **Communication** – which refers to a range of difficulties women had experienced in obtaining sufficient information to decide whether and how to use the justice system to resolve particular problems affecting them and their families;
  - **Culture** – which refers primarily to the difficulties experienced by Māori women and women from other minority ethnic groups when seeking legal services responsive to their cultural values;
  - **Caregiving** – which refers to the difficulties that women caregivers had experienced in obtaining legal services appropriate to their needs;
  - **Cost** – which refers to the cost of legal services and the difficulties women had experienced in obtaining services they could afford; and
  - **Control** – which refers to the cumulative effect of the various difficulties women had experienced: an unduly limited ability to participate in the management and resolution of their legal problems.
- 19 An assessment of why and how those themes describe barriers to women's access to legal services, and what may be done to remove them, requires an understanding of women's social and economic circumstances, as well as an understanding of legal services delivery in New Zealand. Three sets of information provide the context for that assessment, and they are the subject of chapters 3 to 5 of this study. The contextual information consists of:
  - a summary of what women told the Commission's project team about their access to legal services (chapter 3);

- a statistical account of the circumstances of women in New Zealand (chapter 4); and
  - a description of the legal services that are available to New Zealanders (chapter 5).
- 20 The focus of chapters 6 to 11 is on the range of legal services available to women. Among the matters that are explored for their responsiveness to women's diverse needs are:
- the mix of legal services available from community-based sources and private lawyers;
  - the civil legal aid scheme;
  - the regulation of the quality of private lawyers' services; and
  - the education and training of law students and lawyers.
- 21 That general introduction to the scope of the study enables its premises to be examined. Three matters are critical to the approach that it takes to women's access to legal services: equality, gender and the diversity of women's life experiences.

## EQUALITY BEFORE THE LAW AND BETWEEN WOMEN AND MEN

- 22 It is a fundamental principle that all are equal before the law. The diversity in New Zealanders' social and economic circumstances means, however, that we are not all equally well placed to obtain access to the justice system to protect our lawful rights. While the justice system is not the cause of the social and economic differences among New Zealanders, the fairness of its processes is properly measured by their responsiveness to the range of needs which exists as a result of those differences. In particular, if the means of obtaining access to the justice system are not responsive to the needs of those who are already disadvantaged in social and economic terms, their ability to obtain the law's protection will be prejudiced. For this reason, the means by which access to the justice system is obtained are critically important to the achievement of equality before the law. (See further, Harris 1995, 282.)
- 23 In light of that, a study of New Zealand women's experiences in securing access to the justice system is important because, although New Zealand is committed to achieving the equality of women and men, women do not enjoy social and economic equality with men. Further, the causes and effects of the disparities between women's and men's lives are not well understood by all of those who are in positions to help redress the imbalance. Statistical evidence of those disparities is provided in chapter 4 of this study. By way of example:
- the median<sup>2</sup> annual personal income of New Zealand women is \$12 600 while the median annual personal income of men is \$22 000;
  - 34 percent of working-age women are employed full time in paid work while 59 percent of working-age men are employed full time in paid work;
  - women employed in full-time paid work earn 80 percent of the earnings of men in full-time paid work;
  - 86 percent of dependent children who live in one-parent families live with their mother;

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<sup>2</sup> The median income is the income earned by the middle person in the group. Therefore, half of the group earn less than the median amount and half earn more than that amount.

- one-parent families have a median annual income of \$16 900 while two-parent families have a median annual income of \$50 200;
  - in the year to 30 June 1998, 91 percent of the 7195 applications for protection orders (for domestic violence) were made by women and 91.5 percent of all applications made were against male respondents.
- 24 The government's recognition of the need to understand better the causes and effects of the differences between women's and men's lives is demonstrated by the existence and work of the Ministry of Women's Affairs. The Ministry not only provides gender-specific advice to the government but also seeks to share its knowledge and experience with other state sector agencies as well as with private and not-for-profit sector organisations. The activities of all three sectors are relevant to the government's international obligations in respect of the status of New Zealand women. This is apparent from the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which requires state parties (including New Zealand) to take action to prevent discrimination against women. Article I of the Convention defines discrimination to mean:
- any distinction, exclusion or restriction made on the basis of sex which has the effect or the purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (Human Rights Fact Sheet No 22, 1995, 7)
- 25 The laws which implement New Zealand's international obligations to prevent discrimination against women include the Bill of Rights Act 1990 (s 19), the Human Rights Act 1993 (s 21)<sup>3</sup> and the Domestic Violence Act 1995 (s 5). Laws such as those, and the attitudes which underlie them, have been particularly effective in preventing direct (or overt) discrimination against women. However, the persistence of social and economic inequalities between women and men suggests that indirect discrimination, by policies and practices which have the effect of prejudicing women as a group compared to men as a group, remains an obstacle to the achievement of their equality. Section 65 of the Human Rights Act 1993 is focused on that type of discrimination. It makes it unlawful to discriminate, in any of the circumstances to which the Act applies (including in employment matters, access to places, and the provision of goods and services), by means of:
- any conduct, practice, requirement or condition that . . . has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination . . . unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

## Gender

- 26 Understanding of the concept of gender has been enhanced by the considerable efforts that have been made world-wide to comprehend why discrimination against women is a resilient feature of social organisation. Gender does not refer merely to the fact of the biological differences between the sexes. As the Australian Law Reform Commission explains:

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<sup>3</sup> The relevant prohibited grounds of discrimination are those of sex (which includes pregnancy and childbirth), marital status and family status (Human Rights Act 1993, s 21(1)(a), (b) and (l)).



Gender describes more than biological differences between women and men. It includes the ways in which those differences, whether real or perceived, have been valued, used and relied upon to classify women and men and to assign roles and expectations to them. The significance of this is that the lives and experiences of women and men, including their experiences of the legal system, occur within complex sets of differing social and cultural expectations. (*Equality before the law*, DP 54, 1993, 1 (emphasis added))

- 27 Accordingly, gender is a social construction: the product of a society's history of understandings about women and men and of the incorporation of those understandings in social institutions, including, for example, those of the family, the marketplace and the law. Simply put, gender is part of a society's culture – part of what it knows about the world (*Equality before the law*, DP 54, 1993, 2 citing *Fontana Dictionary of Modern Thought*, 1988, 348).
- 28 The fact that gender is part of a society's culture provides insights into why it is so difficult, even for a society that is committed to achieving the equality of women and men, to implement changes that will achieve that goal. It also reveals that laws which prohibit discrimination are just a small part of the efforts needed to bring about that result. What is needed most of all is:  
an opportunity to think in a different way; to challenge stereotypical thinking; to see new opportunities to assist, deliver and improve performance for individuals, communities and organisations. (*The Full Picture: Te Tirohanga Whānui*, 1996, Foreword by the Minister and Associate Minister of Women's Affairs, 4)

### Substantive equality

- 29 Part of the challenge now being made by policy makers and lawmakers to “stereotypical thinking” about women's and men's roles is the result of increasing awareness that assumptions which are prejudicial to women are incorporated in some understandings of what is meant by the equality of women and men. For example, a prevalent view (known as the “formal equality” of treatment, or the gender-neutral approach) is that the equality of women and men requires, as a general rule, that women and men should be treated identically, as if there were no relevant pre-existing differences in their circumstances. That approach to equality would, however, justify any policy which set eligibility conditions for some social asset (such as paid employment or promotion in employment) that are less likely to be met by women as a group than by men as a group.
- 30 An example of a policy which depends on the formal equality approach would be one which limits eligibility for certain kinds of employment to people over six feet tall. Plainly, the biological differences between the sexes mean that women are less likely than men to meet such a condition. A less obvious example would be a job promotion policy which, openly or otherwise, rewards only those workers who devote large amounts of time to their jobs in addition to ordinary working hours. In a social context in which women perform the majority of unpaid work in the home, whether or not they are also in paid employment, that condition for promotion will be less likely to be met by women than by men. Increasingly, it is accepted that a major reason for the continuing social and economic inequalities between women and men is the durability of formal equality policies which, regardless of their intention, have the effect of entrenching pre-existing differences between women and men.
- 31 Another approach to equality (the “differences” approach) is rarely visible in New Zealand today. It justifies treating women less advantageously than men

when there are differences between them which are believed, by those in positions to decide the matter, to be so significant as to require that approach. The differences approach to equality would justify the wholesale exclusion of women from eligibility for some social asset that is available to men (such as particular kinds of education or employment) on the basis that the biological or social differences between women and men are so great that women are not equipped to possess that asset. Notably, it was this approach that justified New Zealand women's exclusion by law from membership of the legal profession until 1896, from the vote until 1893 and from standing as candidates for Parliament until 1919.

- 32 The weaknesses in the formal equality and differences approaches have been described as follows:

What they have in common is that both use men as the benchmark: the first requires women to be the *same as* men; while the second stresses women's *differences from* men. Neither challenges maleness as the standard. Emphasizing women's similarity to, or difference from, men has the effect of distracting attention from the major issues of systemic inequality between women and men. (Graycar 1995, 22 (emphasis in original))

- 33 The modern understanding of what is needed to achieve the equality of women and men is known as the "substantive equality" approach. It recognises that the achievement of equality depends on the implementation of policies and laws which produce outcomes (results) which are equitable between women and men. And, because the existing differences between women and men (produced by the social construction of gender) are often relevant, it also recognises that the achievement of equitable outcomes between women and men may require the implementation of policies or laws which treat them differently.<sup>4</sup>

- 34 As has been noted, the Convention on the Elimination of All Forms of Discrimination Against Women prohibits policies or practices which have the effect (not merely the purpose) of impairing the recognition, enjoyment or exercise of women's human rights in all fields of social endeavour. There is now a body of authority which emphasises the need for state parties to the Convention to adopt a substantive approach to the equality of women and men in their local policies and laws. For example, a series of Commonwealth Regional Judicial Colloquia on the promotion of the human rights of women and the girl child has resulted in the Victoria Falls Declaration of 1994, the fifth principle of which is that:

The participants recognised that discrimination against women can be direct or indirect. They noted that indirect discrimination requires particular scrutiny by the judiciary. The participants, further, emphasised the need to ensure not only formal, but also substantive equality for women and, for that purpose, affirmative action may be adopted if necessary. (Commonwealth Secretariat 1997, 5)

That Declaration was reaffirmed in the 1996 Colloquium for senior judges in the Asia and South Pacific regions, which includes New Zealand.

- 35 Momentum has been given to the implementation of substantive equality between women and men by the adoption, at the Fourth World Conference on

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<sup>4</sup> For an account of the evolution of the substantive equality approach, see eg, Mahoney (1993), especially 120–128; Graycar and Morgan (1990), chapter 3; and the Hon CA Fraser CJA (1997), especially 8–15 and 35–41.

Women in 1995, of the Beijing Declaration and the accompanying *Platform for Action*. They state why and how governments will accelerate the removal of the obstacles to women's active participation in all spheres of public and private life. The *Platform for Action* specifies twelve critical areas of concern and the strategic objectives and actions that are needed to tackle them. Many of the specified actions are directly relevant to women's access to legal services that are responsive to their needs. For example:

- Ensure access to free or low-cost legal services, including legal literacy, especially designed to reach women living in poverty (Actions 58(p) and 61(a), to be taken by governments);
- Support and develop gender studies and research at all levels of education, especially at the postgraduate level of academic institutions, and apply them in the development of curricula, including university curricula, textbooks and teaching aids, and in teacher training (Action 83(g), to be taken by governments, educational authorities and other educational and academic institutions);
- Promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women; actively encourage, support and implement measures and programmes aimed at increasing the knowledge and understanding of the causes, consequences and mechanisms of violence against women among those responsible for implementing these policies, such as law enforcement officers, police personnel, and judicial, medical and social workers, as well as those who deal with minority, migration and refugee issues, and develop strategies to ensure that revictimization of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices (Action 124(9), to be taken by governments);
- Disseminate information on national legislation and its impact on women, including easily accessible guidelines on how to use a justice system in order to exercise one's rights (Action 233(c), to be taken by governments and non-governmental organisations . . . as appropriate). (United Nations, 1996)

- 36 At the conclusion of the Beijing World Conference, the Secretary-General of the United Nations spoke of the importance of translating commitment to the equality of women and men into action:

The movement for gender equality the world over has been one of the defining developments of our time . . .

Despite the progress made, much, much more remains to be done. While women have made significant advances in many societies, women's concerns are still given second priority almost everywhere. Women face discrimination and marginalization in subtle as well as flagrant ways . . .

The sign at the entrance to the NGO [non-government organisations] Forum . . . calls on us to "Look at the world through women's eyes". For the past two weeks, the world has done just that. We have seen that, despite the progress made since the First World Conference on Women, 20 years ago, women and men still live in an unequal world. Gender disparities and unacceptable inequalities persist in all countries. In 1995 there is no country in the world where men and women enjoy complete equality.

The message of this Conference is that women's issues are global and universal. Deeply entrenched attitudes and practices perpetuate inequality and discrimination against women, in public and private life, on a daily basis, in all parts of the world. At the same time, there has emerged a consensus that equality of opportunity for

all people is essential to the construction of just and democratic societies for the twenty-first century. The fundamental linkages between the three objectives of the Conference – equality, development and peace – are now recognized by all. (United Nations, 1996, 2)

- 37 The most familiar New Zealand measures designed to achieve substantive equality (equitable results) between women and men are those found in some sectors of the labour market in the form of Equal Employment Opportunities policies. Working against the more general acceptance of such measures, however, is the strength of the network of social attitudes, values, practices and behaviours which classify women and men, and which have been built into the operations of society's institutions as part of the "way things are done". Indeed, it is the very "ordinariness" of the disadvantages that flow to women from the social construction of gender that is referred to by the expression "systemic bias" or systemic discrimination against women.
- 38 To talk of systemic gender bias in a social institution, such as a justice system, is not to assert that some, let alone all, who are associated with it consciously act in ways which prejudice women. Rather, systemic gender bias refers to the range of ways by which the ordinary practices of the system have the effect, however unintended, of discriminating against women by making it more difficult for women as a group than men as a group to use the system for the purposes for which it exists.
- 39 Although it is novel in New Zealand for a study to focus on systemic gender bias in any part of the justice system, there have been many overseas studies of a similar kind. Most numerous are those which have examined how particular courts' practices and procedures may unwittingly be prejudicing women's interactions with them, whether as clients, court staff, lawyers or judges.<sup>5</sup> It is significant that all of those studies have concluded that some of the procedures and practices of each court, and some of the laws which each applies, have the unintended effect of disadvantaging women as a group compared to men as a group. It is significant too that all have identified the reason to be that the differences between the social and economic circumstances of women's and men's lives render women less likely to meet the standards or assumptions which underlie the particular procedures, practices and laws.

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<sup>5</sup> For example, by 1993, in the United States, some 38 States had conducted gender bias inquiries by means of taskforces led by the judiciary. See, for example, *Women in the Courts* New York Taskforce (1986); *Gender and Justice in the Courts* Washington State Taskforce (1989); *Justice for Women* Nevada Supreme Court Gender Bias Taskforce (1989); *Final Report Gender Bias Taskforce* Wisconsin Equal Justice Taskforce (1991). The first Federal inquiry was reported in *The Effects of Gender in the Federal Courts, the Final Report of the Ninth Circuit Gender Bias Task Force*, July 1993. Relevant reports in Canada include the *Report of the Gender Bias Committee* Law Society of British Columbia (1992); *Gender Equality in the Canadian Justice System* Federal/ Provincial/ Territorial Working Group of Attorneys-General Officials (1992) and, in Australia, *Gender Bias and the Judiciary*, Senate Standing Committee on Legal and Constitutional Affairs (1994) and the *Report of Chief Justice's Taskforce on Gender Bias* (Western Australia, 1994). (For overseas and New Zealand reports on women in the legal profession, see chapter 8, notes 24 and 26 and para 648.)

## THE WIDER SOCIAL CONTEXT AND THE DIVERSITY OF WOMEN'S LIVES

- 40 An assessment of existing and proposed policies for their achievement of equitable outcomes for women and men requires an examination of the context within which the policies operate. Of critical importance is an understanding of the differences between women's and men's lives, and of how those differences may influence the policies' effects on women and men. On its own, however, such an examination will not reveal the effects of all of the other social constructions (apart from gender) that also play vital roles in the lives of all New Zealanders and that differentiate among groups made up of both women and men. Other social constructions well recognised for their significance in the lives of the groups identified by them include race, ethnicity, physical and mental ability, sexual orientation and age.
- 41 The social context within which policies and laws operate therefore contains a complex mix of "dimensions", each of which influences the results that will flow from particular policies and laws to different groups of New Zealanders. The task of policy makers and lawmakers involves taking account of all those different dimensions. But that is an exceedingly difficult task because, like everyone else in society, individual policy makers and lawmakers "inhabit" only some of the various social dimensions. Inevitably, this distorts their understanding of the larger social context.
- 42 What are needed, therefore, are means by which policy makers and lawmakers can be assisted to look at each of the different dimensions which make up the social context that surrounds their work. It is helpful to imagine these means as a set of lenses for policy makers and lawmakers to look through. Each lens provides a clear view into one social dimension and offers insights to its connections to the other dimensions, and all the lenses are needed to see the complex construction of the whole.
- 43 This leads to a further reason why a study of women's experiences in securing access to the justice system is of particular importance. It stems from the fact that women are represented in the full range of social groups that can be identified by their members' race, ethnicity, physical and mental ability, sexuality, age or, indeed, any other factor which is accorded social significance. As chapter 4 indicates, there are substantial disparities among the social and economic circumstances of New Zealanders from many of the majority and minority groups identified by social factors other than gender, as well as between the women and men who make up their numbers. Further statistical information about the disparities between Māori and non-Māori New Zealanders and between Māori women and men is provided in *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, chapter 4).
- 44 In addition to the reciprocal obligations between the Crown and Māori that are undertaken in the Treaty of Waitangi, New Zealand has accepted international obligations to prevent discrimination against the members of a range of social groups. These have been implemented in local laws, most notably the Bill of Rights Act 1990 and the Human Rights Act 1993.<sup>6</sup> Again, however,

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<sup>6</sup> In addition to the prohibited grounds of discrimination listed in note 3, s 21 of the Human Rights Act prohibits discrimination on the grounds of religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion and employment status.

and despite the work of such agencies as Te Puni Kokiri (Ministry of Māori Development), the Human Rights Commission, the Ministry of Pacific Islands Affairs and the Ministry of Health, the causes and effects of the inequalities among different social groups are not well understood by all who are in positions to help redress the imbalance.

- 45 A study of women's experiences which also seeks to highlight the differences among the experiences of women from different social groups can, therefore, provide insights to the various "dimensions" of New Zealanders' lives – dimensions that are relevant to groups made up of both women and men. In this way, the study can provide cross-references which match the diversity of New Zealand communities.
- 46 The Law Commission was well aware of that fact when it began its study of women's access to justice. Accordingly, particular care was taken in the design of the consultation programme so that it reached substantial numbers of women across the range of groups identified by their members' race and ethnicity, physical and mental ability, sexuality, age and religious beliefs. This was made possible through the generous assistance of community groups, government agencies and individuals with strong links with women from the various social groups (see further chapter 2 and the Appendix). As a result, this study of women's access to legal services provides insights that are relevant to all New Zealanders' access to those services.
- 47 The focus on the significance of gender in this study does not seek to diminish the significance of other socially constructed differences among New Zealanders which have the effects of disadvantaging groups made up of both women and men. Instead, it is intended to ensure that the effects of gender on women from all social groups are better understood by justice system personnel and, particularly, by those who are responsible for providing the legal services which are the prerequisite for any New Zealander's use of the justice system.
- 48 The appropriateness of the study's emphasis on gender was the subject of considerable discussion, both at its outset and during the consultation programme, with women who identify strongly with other social groups, and particularly with Māori and Pacific Islands women. The view taken by the great majority of those women was that the fact of being female in New Zealand society, with all that it entails, provides a degree of unity in the life experiences of women from different groups which is of particular importance to their experiences of the justice system. For example, women from all groups consulted were acutely aware that women have had, and continue to have, limited roles in the justice system as lawmakers, judges and lawyers. And, significantly, the women saw that fact as limiting the ability of both the law and the processes by which it is maintained to be responsive to all women's needs. Further, women from all groups emphasised the importance of accessible legal services because such services were seen to be the prerequisite to relying on the law to help achieve the equality of women and men.
- 49 That commonality of view did not, however, obscure the fact that women's membership of different social groups leads to substantial differences in their life experiences and in their experiences and views of the justice system and justice. This was nowhere more evident than in the accounts that Māori women gave of how their experiences and understandings are shaped by Māori cultural values and by the Treaty of Waitangi which protects those values. It is those foundation-stones of the women's experiences and understandings that are

explored in the Commission's report *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53). That report offers policy makers and lawmakers a contextualised analysis of the systemic barriers to Māori women's access to justice that were described in the consultation programme with Māori women around the country. Accordingly, it explores the history of Māori women's experiences of the justice system that was introduced with English settlement, as well as fundamental Māori cultural concepts and the contemporary demographic profile of Māori women. It then fashions a Treaty-based analytical tool for use by policy makers and lawmakers in their efforts to promote the just treatment of Māori women by the justice system.

- 50 This study is premised on the view that the "Treaty lens", the "gender lens", and many others besides, are needed by all who are in positions to promote the just treatment of New Zealand women by the justice system. It does not claim to have used to their fullest effect all the "lenses" on society which would enable every one of its important dimensions to be revealed in fine detail. It has, however, through extensive consultation with and further input from substantial numbers of women from the range of social groups, highlighted numerous situations in which some groups of women encounter far greater difficulties than others in obtaining access to legal services that are responsive to their needs.
- 51 The result is that it is sometimes very apparent that the causes of particular difficulties for some women are less closely associated with the social force of gender than with other factors which make up the multi-dimensional network of New Zealand society. This is the case, for example, when women with physical disabilities are impeded from obtaining access to legal services because of the design or location of service providers' premises, or when women who are not fluent in English are impeded in their efforts to obtain legal information and advice in their own languages. Accordingly, this study offers insights into the way in which our society defines the effects of physical ability and disability, of English language skills and the lack of them, and a range of other factors which are invested with social significance.
- 52 Sometimes, too, it is apparent that the difficulties experienced by Māori women are symptomatic of the far deeper causes of their disadvantage that are explored in the Commission's report *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53). Again, this study offers insights into those matters, but always in the knowledge that the in-depth exploration conducted in that report provides the context and analysis that is needed to more fully understand the experiences of Māori women.

## SOCIAL CONTEXT ANALYSIS

- 53 To this point, the lenses metaphor has been used to highlight the importance of policy makers and lawmakers having the analytical tools to take best account of the multi-dimensional nature of the social context which surrounds their work. It has not meant to imply that there exists in New Zealand a full set of those tools, all of them expertly crafted and in regular use by all. The reality is far removed from that. Instead, there are different groups of policy makers (in the state, private and not-for-profit sectors) and different groups of lawmakers

(Parliament, its delegates and the courts) who are concerned with different parts of the spectrum of social activity at different times and for a range of different reasons that are tied to the aspirations which each group is seeking to achieve. The result is that there is a mixture of tools in use by the various policy makers and lawmakers and some have been fashioned without particular regard for the need to understand the differences between the lives of women and men or among the lives of different groups made up of both women and men.

- 54 Further, it is the case that the tools of social context analysis in New Zealand are not yet fully developed and that those which exist present challenges for new users. One reason for the difficulties posed to new users is that social context tools employ a range of information sources and skills in order to achieve their purpose, and some of these are unfamiliar to people who are accustomed to using different analytical tools. Another reason is that the purpose of the tools is not necessarily well understood by all who are in positions to use them. The most obvious example of misunderstanding is when such tools are disparagingly labelled as being for “politically correct” purposes. And, where there is misunderstanding about the purpose of the tools of social context analysis, it may be that even their names (for example, “gender analysis”, “Treaty analysis”) will be disconcerting for some potential users.

## Gender analysis

- 55 The form of social context analysis which has been developed in New Zealand by the Ministry of Women’s Affairs (and which it calls gender analysis) is the result of that Ministry’s accumulated experience in providing gender-specific advice to government on major public policy issues affecting women. In 1996, a decade after its establishment, the Ministry published guidelines for use by all policy makers – whether in the public, private or not-for-profit sectors – to enable the social context tool of gender analysis to be more widely employed. This was consistent with the specification made in the *Platform for Action* that governments, intergovernmental organisations, academic and research institutions and the private sector should:
- Develop conceptual and practical methodologies for incorporating gender perspectives into all aspects of economic policy-making, including structural adjustment planning and programmes; and
  - Apply these methodologies in conducting gender-impact analyses of all policies and programmes, including structural adjustment programmes, and disseminate the research findings. (*Platform for Action*, Action 67(a) and (b))
- 56 The Minister and Associate Minister of Women’s Affairs wrote in the Foreword to the publication:
- This Government has a commitment to achieving equity for women. This tool will assist in delivering on that commitment. We would urge all those involved in policy and service design to use these guidelines. (*The Full Picture: Te Tirohanga Whānui*, 4)
- 57 The publication explains at the outset that gender analysis is “complementary to other policy guides, and therefore does not address all issues to be considered in the formulation of policy advice or service delivery”. (*The Full Picture: Te Tirohanga Whānui*, 5) Rather, it:
- examines the differences in women’s and men’s lives, including those which lead to social and economic inequity for women, and applies this understanding to policy development and service delivery . . .



provides a basis for robust analysis of the differences between women's and men's lives and this removes the possibility of analysis being based on incorrect assumptions and stereotypes . . .

makes women and women-dominated population groups visible. (*The Full Picture: Te Tirohanga Whānui*, 7–9)

- 58 The benefits of this type of social context analysis are then explained at some length (see *The Full Picture: Te Tirohanga Whānui*, 10–14). For public sector agencies, four social and economic benefits are identified; namely, that gender analysis:
  - assists in ensuring maximum participation by women [which] increases benefits to society from women's skills;
  - ensures better targeting of policies and programmes;
  - broadens the focus of economic analysis to inspire different questions to be asked and issues raised; and
  - enables agencies to analyse systematically whether the outcomes of policies and services are equitable. (*The Full Picture: Te Tirohanga Whānui*, 10)
- 59 For private sector organisations, the use of this form of social context analysis is said to make good business sense as it can provide them with a mechanism for ensuring:
  - a quality approach to products and services;
  - improved management practice;
  - an enhanced customer focus. (*The Full Picture: Te Tirohanga Whānui*, 12)
- 60 The premises of gender analysis, as stated by the Ministry of Women's Affairs, will be familiar from the earlier discussion in this chapter. Gender analysis recognises that:
  - women's and men's lives and therefore experiences, needs, issues and priorities are different;
  - women's lives are not all the same; the interests that women have in common may be determined as much by their social position or their ethnic identity as by the fact they are women;
  - Māori women's life experiences, needs, issues and priorities are different from those of non-Māori women;
  - the life experiences, needs, issues and priorities vary for Pacific women and other groups of women (dependent on age, ethnicity, disability, income levels, employment status, marital status, sexual orientation and whether they have dependants);
  - different strategies may be necessary to achieve equitable outcomes for women and men, and different groups of women. (*The Full Picture: Te Tirohanga Whānui*, 7)
- 61 The prerequisites for the use of gender analysis in the policy process are explained by the Ministry to be, first, for government agencies at least, familiarity with the requirements that are to be found in government policy direction documents (including Strategic Result Areas) and the Treaty of Waitangi. Second, gender analysis requires the ability to use both data-based and consultation-based methods of information gathering. The data which is needed must be "relevant, reliable and up-to-date" and include both quantitative data, collected and analysed "by gender and ethnicity as a minimum base from which to predict outcomes", and qualitative data, to assist in

interpreting the quantitative data. That is because “statistics alone do not provide reasons or explanations for gender differences, patterns and trends”. The consultation strategy that is needed must enable “an assessment to be made of the views of those who are directly affected by policy decisions or design of services”. An important part of that strategy, particularly when existing policy is being reviewed, is the provision of community feedback: “Interested members of the community, users and providers and key stakeholders are all likely to provide useful feedback. This enables the range of different effects to be considered in the policy process”. (*The Full Picture: Te Tirohanga Whānui*, 17–26)

- 62 The previous two paragraphs have outlined only the premises and prerequisites to use of the tool of social context analysis developed by the Ministry of Women’s Affairs. The actual process of developing and implementing policy by means of that analysis, as described by the Ministry, involves six steps, three of which utilise the information gathering methods outlined above (see *The Full Picture: Te Tirohanga Whānui*, 16 and 18–21). The point, for present purposes, is that what is required in order to begin using this form of social context analysis is far from being familiar to all policy makers. Indeed, the most basic of the information sources on which the analysis depends – quantitative data collected and analysed by sex and ethnicity – may not be available to some because the analytical tools they have always used have never required that information. And the consultative methods of information gathering on which the analysis depends will pose particular difficulties for policy makers who have not fostered close links with the communities affected by their decisions.
- 63 It is pertinent to note here that quantitative data about the justice system often fails to meet the minimum requirements of being collected and analysed by sex and ethnicity. In some areas of the justice system, including some for which state agencies are responsible, neither the sex nor ethnicity of users of its services is known. For example, information about the sex and ethnicity of parties to court proceedings is not routinely gathered. In the legal services arena there are numerous gaps in the available quantitative data about the users of different types of services. For example, there has been no collection of data about the sex and ethnicity of legal aid users, and even sample studies of legal aid files cannot assist in revealing ethnicity. There is no database of private lawyers’ clients (for commercial reasons). Many community-based providers of legal services do, however, collect and publicise demographic data about their clients (including sex and, where possible, ethnicity data). One reason is that many such providers need to demonstrate to the funders of their services how and for whose benefit the funding is being used.

## PRINCIPLES AND PROCESSES

- 64 It will be recalled that the primary task set by the terms of reference is to identify “principles and processes to be followed by policy makers and lawmakers to promote the just treatment of women by the legal system”. From all the work undertaken in this study of women’s access to legal services, and which has been conducted in the light of the understandings (outlined above) of equality, gender and the diversity of women’s life experiences, six principles have been distilled to guide New Zealand policy makers and lawmakers. They are the principles of:

- **Diversity** – diverse responses must be made to meet the diversity of needs;
- **User focus** – services must be responsive to users' needs;
- **Informed participation** – users of the justice system must be kept informed about the application of the system to their circumstances;
- **Community participation** – the laws, procedures and services of the justice system must be developed with community involvement;
- **Co-ordination** – the range of justice system services must be co-ordinated; and
- **Accountability** – justice system procedures and services must be regularly monitored, evaluated and reviewed.

- 65 As can be seen, those principles are general statements of values which are meaningful for all New Zealanders. In particular, their emphasis on diverse responses to meet diverse needs, and on community participation in the development of the laws, procedures and services of the justice system, demands that the values and needs of all social groups be understood by policy makers and lawmakers. As has been discussed, however, the necessary understanding of diverse groups' values and needs cannot be assumed. Rather, it must be cultivated, by processes designed for that purpose. Indeed, that is part of the requirement of the principle of accountability.
- 66 This study of women's access to legal services has revealed that the process which should be followed by policy makers and lawmakers if they are to understand New Zealand women's needs and values involves all four of the following components:
- the use of an analysis which recognises, in the identification and definition of problems, the differences between the lives of women and men, and among the lives of different groups of women and men;
  - appropriate consultation throughout the process of policy development with women, community groups and other relevant organisations;
  - the development of proposals designed to meet the problems identified and the diverse needs of women, the outcomes of which are measurable; and
  - the creation of systems to monitor, evaluate and review the effectiveness of policies and laws in meeting the diverse needs of women.
- 67 Plainly, that process requires the use of what the Ministry of Women's Affairs calls gender analysis. As has been explained, that form of analysis is not the only analytical tool which is needed by policy makers and lawmakers. But it is an essential tool in all efforts to promote the just treatment of women by the justice system. Accordingly, one of the recommendations made in this study is that all future inquiries into the effectiveness of the justice system should be conducted in light of the six principles and by means of the four part process which the study has identified as being essential to promote the just treatment of women.
- 68 All of the recommendations made in subsequent chapters for enhancing women's access to legal services (and so their access to the justice system) have been reached by reference to the six principles distilled from the study itself. In addition, the methodology employed throughout the study has been true to the analytical process of gender analysis. The result is that this study of women's access to legal services fulfils the wisdom of a message imparted to the Law Commission's project team at one of its earliest meetings with representatives of community groups on the subject of women's access to justice. At that meeting, the team was advised of the steps it must take to ensure that all groups

of New Zealand women had the opportunity to participate in the study. One representative summed up that advice by saying, “The process followed in the study of women’s access to justice must be a model for the outcomes which it intends to achieve”.

## THE STRUCTURE OF THIS STUDY

- 69 The study is presented in five main parts:
- Part 1 (chapters 1 and 2), which introduces the area of study and explains the methodology used;
  - Part 2 (chapters 3 to 5), which provides the context for the later chapters’ examination of women’s access to legal services;
  - Part 3 (chapters 6 and 7), which explores issues relating to the choice that is available between community-based and private lawyers’ legal services, and to the sufficiency of the civil legal aid scheme;
  - Part 4 (chapters 8 to 11), which explores, with particular reference to the responsiveness of private lawyers’ services to women’s needs, issues relevant to communication, diversity in service provision and legal education; and
  - Part 5 (chapter 12 and Summary of Recommendations), which offers comment on the direction of further studies of the justice system to promote the just treatment of women, and sets out all the recommendations made.
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## 2

# How the study was conducted

## INTRODUCTION

- 70 **T**HE LAW COMMISSION is a central advisory body established to review, reform and develop the law. All its members and research staff are lawyers, and the Commission is heavily reliant on legal research, which involves the reading and analysis of primary sources of law (cases and statutes) as well as legal texts, articles and reports. But law does not exist in a vacuum. This fact is recognised in the Law Commission Act 1985 which requires the Commission to take into account te ao Māori (the Māori dimension) and to give consideration to the multicultural character of New Zealand society (s 5(2)(a)). It is also the reason why consultation is a significant part of the Commission's work processes. The study was conducted by a project team headed by Joanne Morris and completed by her.
- 71 This chapter summarises the major components of the qualitative research methodology used in this study of women's access to justice. Further information is provided in the Appendix, including an explanation of qualitative research methodologies and information about all of those who were consulted.

## THE METHODOLOGY

- 72 The project team adopted a qualitative (consultative) research methodology for several reasons. At the outset, it was clear that the first aim of the research was to learn from women what their experiences of access to justice were, not to test any preconceived assumptions of what those experiences might be. The use of a quantitative (survey-based) methodology would have contradicted that objective. The second aim was to ascertain whether there were any problematic systemic issues in women's access to justice and, if so, to highlight them. Again, an inquiry of that kind lent itself to a qualitative rather than a quantitative approach.
- 73 The methodology used had six steps:
- (a) the gathering and reading of relevant local and international literature (with an emphasis on literature from countries such as Australia and Canada which have a similar cultural and social context);
  - (b) the development of a consultation guide setting out the broad areas of inquiry;
  - (c) a preliminary consultation to test the broad areas of inquiry and define more precisely appropriate areas for the terms of reference;
  - (d) the development and approval of the terms of reference;

- (e) more extensive consultation and presentation of findings; and
- (f) further consultation, research, analysis and preparation of the two publications.

- 74 What follows is an outline of the major components of each of steps, except step (d) (the development and approval of the terms of reference) which has already been outlined in chapter 1 (paras 10–12).

## LITERATURE REVIEW

- 75 The first step was to review New Zealand and international literature relevant to women's access to justice. The Commissioner responsible for the project was also a member of the sub-committee established by the Courts Consultative Committee (CCC) to review the literature on gender issues in the courts, and to a large extent the two reviews overlapped. The bibliography compiled for the CCC (*Report and Recommendations of the Subcommittee on Gender Issues*, 4 November 1994, Appendix A, 1–7) was a far shorter version of the extensive database of reports, texts and articles gathered by the project team early in the life of the women's access to justice project (and expanded since). Significantly, the literature review revealed comparatively little New Zealand gender-specific research and writing about the justice system but a substantial body of international (particularly Australian, Canadian and American) reports and academic texts and articles.
- 76 The focal points of the available gender-specific literature are:
- equality jurisprudence;
  - rules of the substantive law (especially criminal, family, employment and personal injury laws) which may be inequitable between women and men;
  - the responsiveness to women's needs of particular courts' procedures and practices; and
  - discrimination against women lawyers in the course of their employment.

## DEVELOPMENT OF A CONSULTATION GUIDE

- 77 The next step was the development of a proposal to review women's access to justice. The initial proposal was to seek the views of women on the operation of the New Zealand justice system in order to find out whether there were problematic systemic issues for women and, if so, to identify them and obtain women's views on how they could be remedied. To assist, a consultation guide was prepared which identified broad issues relating to the substantive law, court procedures and access to legal services that were considered likely, in light of the literature review, to be of concern. As the consultation process developed, so too did the consultation guide.
- 78 The preliminary consultation meetings with women users of the justice system were not tightly structured. Members of the project team explained the purpose of the study, outlined the range of issues which the literature review suggested were relevant and then opened the meetings for discussion of the women's own views and experiences of the barriers to their "access to justice". The role of team members was to ensure that all in attendance had the opportunity to speak, to ask questions to obtain further information about the experiences women recounted, to answer questions, minute the discussion and, at its conclusion, summarise its content to check that it had been understood.

- 79 Importantly, during the 26 preliminary meetings held over a 12 month period, women emphasised the thematic nature of their concerns about their access to justice. This provided a very useful framework within which the project team could hear and consider the women's experiences and views. In particular, it considerably reduced the risk that team members' own views of the barriers to women's access to justice would impede their understanding of the women's concerns. During the course of the preliminary consultation meetings, women identified 11 major themes which ran through their diverse experiences of seeking to obtain access to justice: communication, cost, culture, credibility, conditioning, confidence, control, choice, community, caregiving, and connectedness. (See further Morris J, 1996)
- 80 By the conclusion of the preliminary consultation process, it was apparent that the predominant focus of the women's concerns about their access to justice was on the barriers which they experienced when seeking to obtain legal services responsive to their diverse needs. The project team did not, however, want to constrain the scope of the more extensive consultation programme that lay ahead, especially because the bulk of the targeted consultation (including with Māori women) had yet to be conducted. At that stage, therefore, the 11 themes which women had identified became the basis of the consultation guide that was used in all later meetings.

## PRELIMINARY CONSULTATION

- 81 The preliminary consultation process spanned the period from September 1994 to September 1995. It was conducted by means of public meetings, interviews with individual lawyers and women clients, and meetings with women lawyers' groups and with government agencies.
- 82 Twenty six public meetings were held, in the five main centres and in Gisborne. These were facilitated by the Commissioner responsible for the project together with the researcher who was project manager from late 1994 until early 1998. Other researchers in the project team also attended a number of the meetings. Over 500 women attended (including numerous community workers and representatives of national and other women's groups) and spoke about their experiences and understanding of the barriers to their access to justice. Detailed minutes were taken.
- 83 In addition, on the project team's behalf, three women (one lawyer and two senior law students) interviewed 15 lawyers in the Wellington and Christchurch areas who were known to have a significant proportion of women clients. Also interviewed (separately) were 15 of the lawyers' women clients. Four Māori lawyers and three Māori women clients were among those interviewed. All the interviews were audiotaped and written up by the researchers in the form of reports to the Commissioner responsible for the project.
- 84 Meetings were also held (facilitated by the Commissioner and project team members) with each of the seven women lawyers' groups in the five main centres and, in Wellington, with officials from 16 government agencies, to hear their views of the issues most relevant to a study of women's access to justice. Again, detailed minutes of those meetings were taken. (See Appendix, paras A13–A17, for further information about the preliminary consultation process.)

## CONSULTATION AND PRESENTATION OF FINDINGS

- 85 In this step of the project, which ran from September 1995 until late 1997, the consultation programme was extended. This required proactive measures to ensure the project team reached groups of women most likely to experience difficulties obtaining access to the justice system. As the preliminary consultation had indicated, a very large proportion of the concerns women raised in the extended consultation programme were focused on the legal services arena. Particular attention was given to investigating the context for those concerns. This required more intensive consultation with the agencies most interested in and affected by the issues raised and the use of existing (mainly quantitative) data, especially Census data. It also required the project team to encourage justice system institutions to expand their collection of data about the provision of legal services.
- 86 The product of this stage of the project was the six consultation papers, published between October 1996 and November 1997, which presented for discussion and comment the urgent concerns that had been raised about women's access to legal services.
- 87 There were six major components of this step in the project's development:
- consultation with individual women and specific groups of women;
  - consultation with community groups;
  - consultation with members of the legal profession and judiciary, and with government agencies;
  - the provision of feedback on the consultation process;
  - the use of other (quantitative) research to contextualise the concerns voiced about women's access to justice;
  - the publication of the six papers as the basis for further discussion and comment.

Each of those components is outlined in turn. (Further information is to be found in the Appendix, paras A18–A49.) It was by the end of this stage of the project that input had been received from more than 3000 New Zealand women.

### **Consultation with individual women and specific groups of women**

- 88 The consultation with women was made possible by the generous assistance given by Te Puni Kokiri (Ministry of Māori Development), the Ministry of Pacific Island Affairs and many community-based service groups. All used their own networks to publicise the project team's meetings and the written and telephoned submissions processes, and to introduce members of the project team to women in their communities. As a result, the meetings with women took place in venues as diverse as marae, refugee and migrant centres, civic buildings, community law centres, women's prisons, citizens advice bureaux, farmhouses, community halls, churches and the offices of the IHC, the Foundation for the Blind, Te Puni Kokiri, the Ministry of Pacific Island Affairs and the Law Commission.
- 89 All the meetings held throughout this stage of the study were, unless otherwise stated here or in the following paragraphs, facilitated and attended by one or more members of the project team. The project manager and Commissioner



responsible for the project together facilitated nearly all of the meetings, other than those conducted by consultants and the hui with Māori women around the country. One member of the project team, with the assistance of a panel of Māori women (see Appendix, para A27), facilitated all of the 48 hui held with Māori women around the country. Other team members attended a wide variety of the meetings, including some of the hui and the meetings conducted by consultants.

90 At this stage, the project team:

- received 292 written and telephoned submissions from individual women and community groups, the contents of which were read by at least two team members so that they could be categorised by the subjects they dealt with then scanned into a computer database which allowed their recall by subject;
- held more than 20 general meetings in various New Zealand centres, attracting some 560 women;
- held 48 hui with Māori women around the country, attracting some 900 women;
- expanded the Māori women's group which organised the hui, and obtained the advice of the larger group on the contents of each consultation paper as it was prepared;
- held four meetings (in Auckland, Wellington and Christchurch) arranged by the Ministry of Pacific Island Affairs and attended by some 150 Pacific Islands women;
- brought together a group of 10 Pacific Islands women to provide input into each of the consultation papers as they were prepared;
- contracted two Pacific Islands women lawyers practising in Otahuhu to conduct and report on a series of interviews and meetings with 60 Pacific Islands women in Auckland;
- held a series of meetings with women with disabilities and with service providers, made possible through the engagement of a consultant who also provided input to the consultation papers and conducted further meetings with disabled people about their content;
- contracted two lesbians (a Māori community worker and a lawyer) to conduct and report on a series of meetings with lesbians in five New Zealand centres;
- held meetings with rural women in different parts of the country, assisted by workers from REAP (the Rural Education Activities Programme);
- held meetings in two refugee and migrant centres, and secured continuing input to the project by service providers who work with new immigrants; and
- held three meetings with women prisoners.

### **Consultation with community organisations**

91 Hundreds of representatives of over 85 community groups attended the consultation meetings and made written and telephoned submissions. Among the national community organisations represented were:

- The New Zealand Association of Citizens Advice Bureaux,
- The National Collective of Independent Women's Refuges,
- Rape Crisis,
- The Māori Women's Welfare League,
- Pacifica,

- Barnardos,
- IHC,
- REAP,
- The Federation of Voluntary Welfare Organisations,
- Catholic Social Services,
- The Salvation Army,
- The National Council of Women,
- Women's Division Federated Farmers, and
- The Federation of University Women.

Most of those groups continued to contribute to the project throughout its duration. Many other service groups also had substantial input, including local groups working in Māori communities, in Pacific Islands communities, with disabled people and with new migrants.

### **Consultation with members of the legal profession and judiciary, and with government agencies**

- 92 During this stage of the project, the project team also maintained or established contact with hundreds of individuals and groups in the legal profession and throughout the justice sector and other parts of government.
- 93 One major initiative resulted in more than 200 written submissions from lawyers. The project team arranged with the 14 district law societies for a contact person for the project to be appointed in each district. Through those contacts, a questionnaire prepared by the project team was circulated, asking for lawyers' comments on a range of matters connected to practices about which women had consistently voiced concerns. Most of the written responses from lawyers included several paragraphs of handwritten explanations and comments. These were collated and scanned into the submissions database using the same range of subject headings as were used for other submissions.
- 94 Other major activities included:
  - meetings with groups of District Court (especially Family Court) judges and with individual judges;
  - maintaining regular contact with the Judicial Working Group on Gender Equity through the membership on that body (and its executive group and seminar planning group) of the Commissioner responsible for the project;
  - meetings with groups of men and women lawyers in various parts of the country;
  - meetings with the women lawyers' groups;
  - regular attendance at meetings of the Women's Consultative Group of the New Zealand Law Society to report on the project;
  - maintaining contact with the Executive Director and staff of the New Zealand Law Society through meetings;
  - maintaining contact with the Secretary of Justice through meetings;
  - reporting in writing to justice sector agencies the nature of the concerns about their activities which had been raised with us by women; and
  - maintaining contact with the Legal Services Board, through meetings and by the appointment of the project manager to the review panel overseeing its quantitative research on contributions and charges in the civil legal aid scheme.

- 95 Finally, quite apart from the separate meetings held with groups from the justice system, local lawyers and other justice system workers were frequently represented at the project team's public meetings with women users and would-be users of the system.

### **The provision of feedback on the consultation process**

- 96 Everyone who attended a meeting or who made a written or telephoned submission, and any group they represented, was invited to join the mailing list to receive newsletters published throughout the consultation stages of the project. In addition, the newsletters were sent to all Members of Parliament, judges, government ministries and departments, law societies and university law schools. Some 2300 individuals, groups, organisations and agencies received the seven newsletters about the project, containing information about where the project team had been, who it had talked to, what it had been told, where it was going next, how to inform it of any criticisms or suggestions, and how to obtain a free copy of the consultation papers as each one was published.
- 97 In addition, throughout the project, and especially at this stage, the Commissioner responsible for the project was regularly invited to speak about its progress at various community groups' meetings. Often, those sessions concluded with workshop or open discussions among those present, providing further input to the project. Groups from the legal profession, judiciary and government also invited and received presentations about the project.

### **The use of other research to contextualise women's concerns**

- 98 In the process of preparing the six papers published in the project, considerable use was made of available research relevant to the social circumstances of New Zealand women and to the provision of legal services, most of it quantitative in nature. The Census has been the major source of data about the social context of women's experiences with the justice system. Throughout much of the inquiry, the 1991 Census was the most recent. Only after the six consultation papers were published was the project team able to obtain the data collected in the 1996 Census.
- 99 Data relevant to legal services provision was not abundant at the outset of the project, and the project team encouraged those in positions to collect it to improve its quantity and quality. A major research initiative of the New Zealand Law Society involved conducting three polls, of lawyers, the public and law firms, which asked for responses to statements about lawyers' values, skills, knowledge and other matters relevant to the quality of their services. Released in 1997, the poll results have been of considerable value to this study.
- 100 Another very valuable source of information has been the sample study, commissioned by the Legal Services Board in 1996, of 2316 civil legal aid files opened in 1994 and 1995. That study provides a demographic profile (excluding ethnicity) of civil legal aid recipients as well as information about the contributions paid by and charges imposed on the property of recipients.
- 101 Research commissioned by the Judicial Working Group on Gender Equity in 1996 has also been of assistance. A questionnaire designed to elicit their views about gender equity was sent to all New Zealand judges late in 1996, and the

results, together with information gathered from focus-group discussions with judges from each of New Zealand's courts, were reported in 1997.

- 102 During the course of the project there have been other advances in the collection and collation of data about the operations of the justice system. Of particular relevance are the Legal Services Board's computerised legal aid records, which now allow the rapid retrieval of a considerable amount of quantitative data that was previously inaccessible except through labour-intensive sample studies of files. Also relevant is the New Zealand Law Society's recently established database of members.
- 103 Despite such initiatives, and as was noted in chapter 1 (see para 63), there remains room for improvement in the quality and quantity of the data that is collected on a continuing basis about the justice system's operation. The Department for Courts' Change Programme, with its emphasis on improved management of cases and the use of technology, will facilitate the collection of more detailed data about those who are most directly involved in litigation. (See *Justice: The Experiences of Māori Women*, *Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, chapter 4), for further explanation of the limitations of present data collection methods within and outside the justice system.)

### **Publication of six consultation papers**

- 104 A total of 4000 copies of the consultation papers were distributed to community groups, government agencies, lawyers' associations, university law schools and libraries as well as to individual New Zealanders who requested copies. In the order in which they were published, the papers are:
- *Information About Lawyers' Fees* (NZLC MP3);
  - *Women's Access to Legal Information* (NZLC MP4);
  - *Women's Access to Civil Legal Aid* (NZLC MP8);
  - *Women's Access to Legal Advice and Representation* (NZLC MP9);
  - *Lawyers' Costs in Family Law Disputes* (NZLC MP10); and
  - *The Education and Training of Law Students and Lawyers* (NZLC MP11).
- 105 Each of the papers attracted considerable publicity within and beyond the legal profession. For example, the New Zealand Law Society published summaries of each one in its fortnightly magazine *LawTalk*, which is received by every practising lawyer in New Zealand. Many nationally based community groups published the major points from each paper in their own newsletters to members. Doubtless this contributed to the wide range of considered written submissions which were made in response to each paper. In total, 164 written submissions were received.

### **FURTHER CONSULTATION, RESEARCH, ANALYSIS AND PREPARATION OF THE TWO PUBLICATIONS**

- 106 The final step of the project has embraced all the additional research and consultation required to: follow up the six published papers; analyse the mass of information gathered during the project's four-year course; prepare, for discussion, drafts of this publication and *Justice: The Experiences of Māori Women*, *Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53); and finalise their texts.

- 107 Part of the task involved in the final step of this study has been to consider each of the 164 written submissions made in response to the six consultation papers by government agencies, judges, lawyers, community organisations and individual users of the justice system. In addition, there has been continuing consultation with key groups working in or near the justice system, in order to elicit the greatest possible range of comment on the issues raised in those papers. The willing co-operation of the New Zealand Law Society and the Legal Services Board, in particular, has been invaluable in this process.
- 108 Finally, to assist the Commissioner responsible for this study, a review group of 12 members was brought together late in 1998 to consider and provide comment on earlier drafts of this publication. Members of the review group included senior judges and a number of lawyers with considerable knowledge and experience across the entire “landscape” of New Zealand legal services. (See Appendix, para A50)

## CONCLUSION

- 109 It is not claimed that this study offers the “definitive” statement about New Zealand women’s access to legal services. Indeed, no study, whatever its methodology, can legitimately claim that status. It is acknowledged that another group of researchers, coming from perspectives different from those of the project team which conducted the study, may well have given more emphasis to some of the points raised during its course, and less to others. Despite such differences, all the information that is available clearly supports the conclusion that there are substantial barriers to many New Zealanders’ ability to obtain the legal services they need to invoke the justice system’s protection. And, because of the nature of those barriers, it is clear that women are particularly adversely affected by them.
- 110 The value of this study and of the methodology used is its capacity to add depth to the discussion of women’s access to justice within a context which is now mapped in greater detail and is more fully understood. Further research, which will build on, qualify and challenge the findings of this study, is welcomed.
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## INTRODUCTION TO PART 2

THE NEXT THREE CHAPTERS provide the basis for the subsequent analysis of women's access to legal services.

In chapter 3, the written and oral submissions made by New Zealand women are summarised under the five main themes emphasised in the consultation process: communication, culture, caregiving, cost and control.

In chapter 4, the social context for women's concerns is further explored using statistical information about women in New Zealand based on Statistics New Zealand's 1996 Census of Population and Dwellings.

Chapter 5 contains a descriptive, factual overview of legal services provision in New Zealand, thereby supplying the institutional context for women's concerns.

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### 3

## Women's experiences

"This is why the consumer perspective never gets heard and it's not respected because women know what's happening to them, lesbians know what is happening to them, Māori would know what is happening to them and they state what's happening to them but the law can't hear that – we don't fit." – *Report on Consultation with Lesbians*, 19

### INTRODUCTION

- 111 THIS CHAPTER CONTAINS a summary of the oral and written submissions made by women during the consultation programme. Their submissions, which were also summarised in the six papers published during the course of the project, make up one part of the picture of women's access to legal services. Two other parts of that picture are the social context of New Zealand women's lives and the institutional context within which legal services are provided to women. These are described in chapters 4 and 5 respectively. In the subsequent chapters, the implications of those three sets of information are explored in the light of the further information gathered during the course of the project, including the submissions made by all other parties who had input to the study.
- 112 What women told the project team is conveyed here largely in their own words so as to present their experiences as directly as possible. Later chapters make further use of the women's words for the same purpose. Women's concerns are presented here under five broad headings identified in the consultation meetings as being major themes of women's experiences in seeking to obtain access to the justice system. These are the themes of communication, culture, caregiving, cost and control. The chapter concludes by noting the two main strategies for change which women identified as being necessary to remedy their concerns. They are strategies which ensure a choice of legal services to meet women's diverse needs and which involve community-orientated responses to those needs.
- 113 There are three preliminary points to be made before turning to the major themes of the women's oral and written submissions. The first two arise from the nature of the study undertaken. The third is a general point about the content of the women's submissions.

## **Confidentiality and anonymity**

- 114 The subject of the study made it likely that the women consulted would not only divulge personal information but also make criticisms of particular people and justice system institutions. In order to allow all who were consulted to speak or write freely about their own experiences, the project team gave the assurance that any personal information supplied would be treated confidentially and used only for the purposes of its study of women's access to justice. It also gave the assurance that no individual would be identified by the use made of any information supplied.
- 115 The inevitable result of those assurances was that when women, at the meetings or in written or telephoned submissions, described their own experiences in ways which were critical of individual justice system personnel, those individuals could not be approached for their comments about the particular circumstances. Instead, as is apparent from chapter 2, all efforts were made to encourage individuals and institutions connected with the justice system to have their own input to the project, including by providing comments in response to the six consultation papers which presented an array of direct quotations from women's submissions.
- 116 The fact that the project team was unable to investigate the details of particular women's experiences to discover if the other people involved in them held different views of what had occurred may seem strange, or even unfair, to those who are accustomed to seeking and assessing the truth of particular assertions and counter-assertions. But that sort of investigation was never the purpose of the consultation process. Rather, as has been explained in chapters 1 and 2, its purpose was to identify any systemic issues adversely affecting women's access to justice and obtain women's views on how they could be remedied.
- 117 In light of that, it is not claimed that each of the thousands of accounts which women gave of their experiences with the justice system represents the only view that could be held of the particular situations described. Indeed, it is often readily apparent that different views of the situations would be held by others involved in them. What is significant about the women's accounts of their experiences is, first, that so many of them were critical in tone, a fact which reveals that the women perceive that the justice system does not operate fairly for all New Zealanders. In itself, this is of concern because public confidence in the justice system depends not only on justice being done but also on it being seen to be done.
- 118 Second, the women's accounts of their experiences are significant because of the striking degree of similarity among the very numerous criticisms that were made by different groups of women in different parts of the country and in response to different consultative strategies. Since sufficient information was provided to show the sincerity of the criticisms made, the fact of their consistency is explicable only on the basis that they have substance. That explanation is supported by the contextual information and further research presented in subsequent chapters.

## **The records of the women's experiences**

- 119 The second matter arises from the fact that, in order to secure input from women across the range of social groups, the project team relied on different



consultative methods which produced different records of the women's experiences and opinions. As the Appendix reveals, the records include: minutes taken by project team members of all the general meetings and some meetings with particular groups of women; more than 400 written submissions from individual women and community groups (including the submissions on the six consultation papers); the project team members' written records of 75 telephoned submissions; transcripts of the 48 hui held with Māori women; and reports prepared by consultants from the audio-taped interviews and meetings they conducted with Pacific Islands women and with lesbians.

- 120 One thing that all the records have in common is their attention to the words used by women when describing their experiences. The importance of recording women's own words for use in the material published in the study was brought home to the project team as a result of reading numerous reports of qualitative research studies. It was the team's view that the reports which used the words of the people consulted were not only more credible records of the studies that had been conducted but also more interesting, and meaningful, to read.
- 121 Naturally, the written submissions provide their own record of the words women used to describe their experiences. However, it was known from the outset of the study that written submissions were less likely to be made by some groups of women than others and that particular care would be needed to obtain a record of the words of women from all social groups. In planning the targeted consultation processes, it became plain that different groups of women had different views about the records that should be kept of the meetings and interviews to be held in their communities. Some favoured the taking of minutes. Some favoured audio-tapes being made and transcribed for use in the project, with the tapes being kept by the project team and/or in archives of their own choosing. And some favoured audio-tapes being made and transcribed for use in the project but did not want the tapes kept by anyone. Reasons for wanting the tapes destroyed included keeping the women's anonymity secure and ensuring that the information was used solely for the purposes of the project team's study of women's access to justice.
- 122 Those different views led to the various approaches that were taken to the matter of obtaining a record of the words of women from different groups. In every case, the project team was and remains entirely satisfied with the reliability of the different records. The reason for noting their differences relates solely to the matter of their citation throughout this report as the source of the quotations that have been selected to convey, in the words of some of the women consulted, the nature of the concerns that were raised most frequently and urgently.
- 123 The decision to be made was whether to cite the various sources of the quotations used. To cite them would mean that in some instances it would be apparent to readers that the women quoted identify with particular social groups. This is the case, for example, when the source of the quotations is the transcript of the 48 hui with Māori women, or the consultants' reports entitled *Report on Consultation with Pacific Islands Women* and *Report on Consultation with Lesbians*, or the minutes of meetings held with women with disabilities. In other instances, however, it would not be apparent from the source of the quotations which social groups the women quoted might identify with. This is the case, for example, when the source is the record of a general meeting held

with women (at which demographic details about those in attendance were not collected) or a written or telephoned submission (each of which was numbered but not classified by demographic information unless that information was volunteered).

- 124 The result is that citing the various sources of the quotations could give the false impression that all of the women who attended the general meetings or made written and telephoned submissions were Pakeha and heterosexual. However, not citing the sources could give other false impressions. On balance, it has been decided to cite the source of each of the quotations presented in this study. Readers are encouraged to read the women's words in the spirit in which they are presented: to convey both the unity that gender gives to diverse women's experiences in seeking to obtain access to legal services responsive to their needs and the diversity that other social factors give to the experiences of different groups of women.

### **The justice system's distance from women's everyday lives**

- 125 The final preliminary matter relates to the content of the women's submissions. It warrants emphasis that most women spoke of the justice system as being particularly mysterious and daunting. Reasons given for this included the complexity of the law, its specialised language, the array of institutions which play some role in upholding the law, the formal rituals of the courts, the elite image of judges and lawyers, the cost of lawyers' services, and the weighty nature of the tasks performed by the justice system. All these were regularly mentioned as factors which distance the justice system from women's everyday lives.
- 126 Women also regularly referred to the fact that women have played, and continue to play, minor roles in the design and administration of the justice system. They saw this as having the effect of distancing the system even further from their daily lives. Among Māori and Pacific Islands women, the distance was increased by the fact that both women and men from those groups are significantly under-represented in the legal profession and judiciary and in influential positions in state sector justice agencies. Of course, it was not merely the numerical under-representation of their own people that was of concern to the women. Rather, that fact was seen to exemplify the predominance in the justice system of values and attitudes different from those of the groups to which they belong. As has been noted, the systemic nature of the justice system's failure to respect Māori cultural values and the concerns of Māori women is explained in *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, see especially chapter 3).
- 127 Women emphasised as well that while the justice system is largely remote from their everyday lives, the problems which lead to their need to interact with it are very often central to their lives. The most commonly mentioned problems were those relating to family relationships (especially relationship breakdowns), the care and protection of children, income and child support, violence against women, other criminal conduct by family members, and employment.
- 128 With those preliminary comments, the main factors which women identified as inhibiting their access to the justice system, and to legal services in particular – communication, culture, caregiving, cost and control – are now considered in turn.

## COMMUNICATION

- 129 Communication problems pervaded women's concerns about their access to the justice system. The problems related to written information about the system as well as to face-to-face interactions with people involved in it. Women said they need information to provide a bridge between their everyday lives and the justice system: information which will allow them to understand how the system works and so allay their concerns about becoming involved with its unfamiliar rules, personnel and processes. In particular, women said that they need information:
- in everyday language;
  - in everyday places;
  - from people who understand their everyday lives; and
  - about how their dealings with the justice system will impact on their everyday lives.

However, as the following paragraphs reveal, many women had experienced fundamental problems which prevented their communication needs being met.

### **Women need information in everyday language**

- 130 Women were highly critical of both:
- the effectiveness of written material as a means of conveying legal information; and
  - the interpersonal communication skills of legal services providers, most notably lawyers.
- 131 Women gave four reasons why they did not rely on written material as the primary means of obtaining legal information. First, many had problems understanding written information either because of the complexity of the language used (particularly legal terms), or because of their limited English-language ability and the difficulty of obtaining information in other languages. Second, women said the information in written material is often too general for them to apply it to their particular problems or to help them obtain more specific assistance. Third, women with disabilities, particularly visual and hearing disabilities, said they could rarely use the written materials they could find. Fourth, and for all the above reasons, women generally had a preference for oral rather than written information.

"Some of our people can't even read or write, so where do they get information from?" – *Transcript of hui with Māori women, Rohe 3*

"Pacific Islands people are not pen and paper people." – *Meeting with Pacific Islands women in Wellington, March 1995*

"There was some criticism of the pamphlets, as they were written, long, and would not always answer your questions." – *Submission 245*

"Most of the information is printed. Production of more visual legal resources is needed. Polynesian people are more orally orientated towards information-gathering than Pakeha producers of material generally." – *Submission 8 on NZLC MP4 (community group)*

“Simple, pictorial information, coupled with verbal explanations (preferably by a woman) is well worth considering.” – *Submission 43 on NZLC MP4*

“Many women with disabilities face additional barriers to access legal information. They may be unable to read the telephone book because they are blind or have partial sight, they may not be able to hold a telephone book, or they may be illiterate. They may not have enough speech to communicate by telephone. Further information they are provided with may not be in an accessible format, and/or people working on those organisations may not know how to work with women with disabilities.” – *Submission 6 on NZLC MP4*

- 132 One of the strongest criticisms was of lawyers’ use of alien legal language.

“The lawyer talks to you in big words. They think you can understand, but they never ask, ‘Do you understand me?’” – *Report on Consultation with Pacific Islands Women, 3*

“It’s very difficult to understand. You need a dictionary to understand a lawyer. It should be everyday language.” – *Report on Consultation with Lesbians, 33*

“Even though I can speak English OK it was still really hard for me to understand what was going on in court. I didn’t know what a psychologist was and why one had to see my children. I didn’t understand words like *ex parte*, applicant, respondent, counselling, until much later on. Everyone just assumed that I knew these terms but they are out of my world.” – *Report on Consultation with Pacific Islands Women, 3–4*

“Much legal jargon does not make sense to many women, eg *ex parte*. This creates a communication gap between women and the law. It causes women attempting to access the law to feel ‘dumb’. Women are afraid to ask questions of police and judges – because of feeling/sounding ‘dumb’. There is a general lack of knowledge of information about the law, and no suitable/practical explanations are available, eg meaning of non-molestation order.” – *Submission 228*

“People in courts always use too much jargon amongst themselves and they forget that we are there too. We are their clients yet they don’t know or won’t even try to communicate properly to us.” – *Transcript of hui with Māori women, Rohe 11*

- 133 Women found communication failures caused by legal services providers’ use of complex language to be particularly inexcusable when they needed advice about situations which were obviously stressful. In these circumstances, the need for clear communication was paramount, and the lack of it reinforced women’s fears that the justice system was not responsive to their needs.

### **Women need information in everyday places**

- 134 Women emphasised that when they need information about particular problems which have legal implications, they usually turn to family and friends first. For

many women, however, family and friends cannot provide reliable information, except at a very general level. Some women cannot even turn to friends and family, because this would threaten their safety or their need for confidentiality.

“Another related issue includes the woman victim (or witness) fearing ‘leaks’ in confidentiality where a small ethnic community is concerned and anonymity is not easily maintained.” – *Submission 2*

“The biggest problem was how much difficulty women in rural areas have in accessing information without the whole town knowing their business.” – *Submission 7 on NZLC MP9*

“They go to their friends, to their whanau or someone who has been through the same situation as them. A lot of our women don’t even know about the community law centre. It’s frightening for them because they are scared their partners are going to find out.” – *Transcript of hui with Māori women, Rohe 9*

“In 1989 our relationship had deteriorated to such an extent that I urgently needed legal advice to protect myself and my assets (1) if I stayed in the marriage and (2) if I left it. That was a major difficulty – a small community where we were well known and I wanted advice I could make decisions on, not inadvertently triggering a reaction that could impact on my life and well-being nor that of our family . . . the nearest city was 100 kms away and I needed another ‘reason’ to be able to go there so my purpose was not revealed.” – *Submission 233*

- 135 From what women said, it was clear that most did not know lawyers whom they could go to for early assistance with a legal problem. Accordingly, most women said that after friends and family, they had sought, or would seek, relevant information from other sources in their own communities.
- 136 Citizens advice bureaux were the most commonly mentioned community-based sources of information, although variations were reported in the law-related services that different bureaux are able to provide. Women also said that, even with a bureau’s best assistance, they can still be insufficiently informed about how to choose lawyers and make the best use of lawyers’ services. Further, citizens advice bureaux are not accessible to all women, for reasons which include cultural, language and linguistic barriers, geographical distance, no telephone, unease at the prospect of talking about personal matters, and embarrassment at not knowing how to frame questions so as to get relevant information. And citizens advice bureaux are not known by everyone who might otherwise use them.
- 137 Women also said that they go to community law centres, or would go to a “one-stop shop” of that kind if there was one in their community.

“WDFF strongly supports a nationwide network of Community Law Centres in all provincial towns as well as the cities. Women frequently are reluctant to ask for help in a small area where their family may be known and they do not want to disclose the problem to the local solicitor.” – *Submission 9 on NZLC MP9*

“Ideally Auckland should have its own Pacific Islands Community Law Centre. Run by Pacific Islanders for Pacific Islanders. Surely with Auckland being known as the Polynesian capital of the world, the need is clearly established.” – *Report on Consultation with Pacific Islands Women*, 36

“There needs to be a paralegal service whereby women can go and find out the basics of what they have to do before they go to a lawyer, so they know what they need and what their options are, which may not necessarily be legal, but just what their options are.” – *Report on Consultation with Lesbians*, 69

“There needs to be a centralisation of information – a one stop help shop.” – *Transcript of hui with Māori women, Rohe 1*

“I really think we need a law advocate in town. So when someone has a concern with the police, or with a lawyer or anything, even if they just want advice, we would have someone that people could ring here. Someone who could go with people to help them out. We could solve a lot of the negative attitudes and some of the imbalance which exists today.” – *Transcript of hui with Māori women, Rohe 6*

“I didn’t know where to get information to help me decide what to do with my daughter so I was forced to go and see a lawyer. I now know I could have gone to Social Welfare or CAB to get the info I needed to make a decision. I learned the expensive way.” – *Report on Consultation with Pacific Islands Women*, 23

“If the centre was Māori orientated, with Māori faces to greet them, then I feel that more Māori women would seek help for their situations . . . we really do need a community law centre. That’s a priority here.” – *Transcript of hui with Māori women, Rohe 8*

“The grass roots people in our community don’t know where to get information from or who are the community groups out there to help them with their problems.” – *Transcript of hui with Māori women, Rohe 7*

“I would strongly recommend that we set up an advocacy group with the concept of a one stop shop in mind.” – *Transcript of hui with Māori women, Rohe 4*

- 138 It was also said that most other community groups are not equipped to provide the information women need.

“They do not know where to go. There is no one-stop shop. They think that they will have to pay if they phone a lawyer. In [name of provincial city] there is no Community Law Centre and not everyone knows about the CAB. They also feel inadequate in the face of some lawyers who use a patronising manner, and there are a lot of them. There is also no clear information on who to phone to find out if a lawyer is woman-friendly. There is very much a ‘don’t care’ attitude amongst some organisations.” – *Submission 49 on NZLC MP4 (community group)*

- 139 It was made clear that women need to receive information about legal problems in places that are convenient and comfortable, given their everyday

circumstances. Those circumstances mean, for example, that women may:

- need to take others (such as their children, a partner, support person, kaumatua or church minister) with them when they are seeking legal information;
- need to receive information or advice in ways and at times that do not disrupt the schedules of others who rely on them (such as their children, partners and employers);
- need to receive information in ways that do not put them at risk of harassment or violence;
- be unable to get to legal services because they live in an isolated rural area or do not have their own transport;
- have limited mobility and be unable to get to legal services, because of disabilities or age.

140 Many women said they had experienced major problems in having these needs met.

“People need to come down to [town] for information. That’s a two hour drive. [Public transport is] really expensive. If you can afford it then you’re lucky. If not, you just have to hitch – kids and all.” – *Transcript of hui with Māori women, Rohe 2*

“For the rural women access is a problem. Not everyone has a phone and to get help they have to travel away from home.” – *Transcript of hui with Māori women, Rohe 3*

“Lawyers’ offices sometimes feel uncomfortable for mothers. Often there is no recognition that mothers may need to bring children with them to an appointment.” – *Submission 331*

“... the only time that he could find to give appointments was at 7.30am in the morning and [I] had a pre-schooler and 2 school age children. Now you can imagine to get to a lawyer’s office by 7.30am you’ve got to get the children up an hour early, get them all dressed and washed, and you’ve got to either take the toddler to a friend or bring a friend. I had to call on a friend to mind the children and then someone else to get them off to school.” – *Submission 65*

“Women from violent relationships need to be taken seriously by the court . . . . Lawyers also could be more sympathetic. In a small town such as [name] lawyers talk amongst themselves and there really isn’t the confidentiality there should be. This leads to some women going to [the nearest city] to get a lawyer, which adds to the costs of the whole process.” – *Submission 210*

“For that first contact, I’d want the space to be safe, whether it’s in a coffee shop or in a park and its just the initial ‘hello’. These are the issues I’ve come with and then I’ll suss you out whether you are what I want as a lawyer.” – *Report on Consultation with Lesbians, 70*

“We would see an 0800 legal advice service as having a very useful but distinctive role in the system of providing accessible legal services. Like any advice service it must be oriented to empowering people to make their own decisions about taking the next steps to accessing resources and solving problems in their own ways. Thus, we feel it would need to be able to provide both general advice and a referral service.” – *Submission 412 (community group)*

- 141 When women talked about their need for more general information about the justice system and their legal rights, they also emphasised the need for initiatives targeted to their everyday life circumstances. There was very clear support for increased efforts to deliver law-related information to women in their homes and communities by such means as talkback radio sessions, local television dramas, regular features in local newspapers and women's magazines, and speakers at community group meetings. Another clear message was that many women prefer to receive information that is "personalised" by its use of people (real or fictional) with whom, and situations with which, they can readily identify.
- 142 Women also commended efforts such as the Law in Schools programme which encourages young New Zealanders to reflect on the role of the law and its various agents, and the role of citizens, in maintaining a peaceable society. In fact, it was frequently suggested that schools should take every opportunity to involve parents and other family members in their children's law-related education. Women saw this as a sure way of dispersing the benefits of school programmes more rapidly throughout the community and, especially, to women.

"[Legal education] needs to start at secondary school when our young men and women are learning their life skills curriculum. It wouldn't need to take much to arrange such a workshop. Right from the beginning our young people need to learn that background information that gives them choices." – *Transcript of hui with Māori women, Rohe 5*

"They [the school] are now asking parents if kids can participate in life skill courses that includes sexuality and sex education. I actually find issues pertaining to law just as important." – *Transcript of hui with Māori women, Rohe 5*

"It needs to start at the schools and at the home together. It is no use just educating our kids and then they go home to an environment which has not had the same opportunities to learn about the law." – *Transcript of hui with Māori women, Rohe 7*

### **Women need information from people who understand their everyday lives**

- 143 Women said they felt most comfortable going to friends, family and community sources for legal information because those people were most likely to understand their everyday lives and the problems for which women need legal help. Accordingly, those people were most likely to provide relevant information in an understandable manner. An understanding of the context in which women's legal problems arise was regarded as being vital for effective communication about those problems.
- 144 Many women said that they look for and value that same understanding in lawyers. As a result, their assessments of "good lawyers" emphasised not just technical legal competency but also lawyers' knowledge of women's everyday lives and their skills in communicating legal information in an understanding and understandable manner. For these communication-based reasons, many women said that, if they could, they would choose a lawyer with whom they could identify because of their culture, sex or sexuality or who could be relied



upon to have some knowledge of the women's circumstances. In that regard, women often said they found it difficult to believe that a young man or woman who had recently embarked on a legal career could understand the human dynamics involved in family-related problems, particularly disputes over children and situations involving family violence.

"We need more Māori women lawyers . . . Someone who can understand where we come from as Māori. Someone who we do not have to explain ourselves to." – *Transcript of hui with Māori women, Rohe 1*

"We have not one Māori male or woman lawyer who we can turn to and who will understand us as Māori first. We badly need more Māori lawyers in our area." – *Transcript of hui with Māori women, Rohe 4*

"Some of the lawyers, as good as they are as lawyers, it's difficult to deal with men. They don't really understand you. You feel really judged by them." – *Transcript of hui with Māori women, Rohe 3*

". . . we don't use the two Māori lawyers [in the area] because they don't identify as Māori and they don't practise in family law, only in company and tax law. That's no use for us." – *Transcript of hui with Māori women, Rohe 8*

"... and for me to talk about the personal things that have happened in my life was really hard. PI women don't talk openly like that to Palagi people. We are too shame." – *Report on Consultation with Pacific Islands Women, 11*

"I think that if there are a lot more Pacific Island lawyers out there perhaps I would feel more comfortable. The difference is between telling secrets to a stranger and telling your secrets to somebody that you might feel comfortable with and I know that I would feel more comfortable with one of my own people/culture." – *Report on Consultation with Pacific Islands Women, 11*

"Ultimately, I would want a PI woman lawyer. Even if it was a PI man you still have patriarchy and so PI women have double jeopardy. Yeah it would be a women I would feel more secure with." – *Report on Consultation with Pacific Islands Women, 25*

"When I wanted to go to court about my kids I wanted to find me a Tongan lawyer but I didn't know where to go. So I asked my minister and he told me where to go but there aren't many." – *Report on Consultation with Pacific Islands Women, 7*

"The lawyer was too pushy. She wouldn't listen to me. I felt scared every time I go up to see her. I would tell myself to be strong and stand up to her but when I got into her office I just let her push me around and talk down to me." – *Report on Consultation with Pacific Islands Women, 16*

"I may not have been to University but I know what I am talking about. I have been around a while and know more about life than that baby lawyer that was standing up in court talking about me as if I wasn't there . . ." – *Report on Consultation with Pacific Islands Women, 15*

"... the other thing that you're always looking for is, ok who is a lesbian friendly lawyer and how the hell do you find that out?" Basically you have to rely on

other people's experience and that's a hell of a hard way to learn." – *Report on Consultation with Lesbians*, 9

"I had a young woman lawyer who didn't really understand. I felt fobbed off and not important. It wasn't her fault. She was too young and didn't have experience of family and life." – *Submission 509 (telephoned)*

"The way I was feeling at the time I felt I wanted a female lawyer because she would be more supportive of me." – *Submission 65*

"Lawyers (and it can be both sexes) don't appreciate the commitment and hard work involved in caring for children, in particular after separation." – *Submission 183*

"A woman wanted the name of a female lawyer as her male lawyer told her to 'grin and bear' verbal abuse." – *Submission 239*

- 145 Women said that having – and exercising – the choice of a "good lawyer" would increase the likelihood of their receiving good-quality legal services, and allay many of their fears about negotiating the unfamiliar corridors of the justice system. However, it was said there is a limited choice of lawyers who women are confident have the knowledge and skills that are vital to effective communication with women clients. Women's impression of the "average lawyer" was of a highly educated, highly paid, city-dwelling person who is most likely to be a Pakeha man – an impression that reinforced the view that they were unlikely to find a "good lawyer" by chance. Yet, information about "good lawyers" was particularly difficult for many women to find.

"I had no help from anyone. I didn't know who was a good lawyer or anything." – *Transcript of hui with Māori women, Rohe 10*

"Where do I go to? The yellow pages tell you nothing except that they are lawyers. The information in the telephone book does not tell us whether the lawyer is Māori or a woman." – *Transcript of hui with Māori women, Rohe 1*

"I don't know how I got my lawyer. I think he or the firm was recommended and there was only one person in that firm and he happened to be male and I went along to him and said, right, how do we work, when can I contact you, how can I contact you? He seemed really reasonable and easily accessible – that's what I wanted, someone I could get to – there wasn't going to be secretaries and other people – and whenever I phoned I was virtually put straight through to him if he was in the office. There was no problem with me accessing him. Later on when it came to settling property I found I ran up against – I think most women come up against it – "Why don't you just settle for this amount because after all he's a farmer and he's going to need his equity to re-establish himself in his farming career" and therefore I was supposed to settle for less than 50 percent. I think it was a male sympathising with the males." – *Submission 65*

"Is there a place where lesbian friendly lawyers put their name forward, so you can find them?" – *Report on Consultation with Lesbians*, 68

“It would be really good if there was a handout. A booklet about going to your lawyer for the first time – saying what your rights are. Educative. It should tell people that they can make, you know, more fully informed choices. The more you know of something, the more informed your choice can be. At the moment, going to a lawyer, you don’t really have much choice. It’s so iffy and you don’t even know if you’re going to a good one. Like trial and error.” – *Report on Consultation with Pacific Islands Women*, 22

“How do we choose a lawyer who will represent us well? We just don’t know who is the right lawyer for us. I rang a lawyer for help and the secretary said she would get him to ring me. He didn’t even bother to contact me.” – *Transcript of hui with Māori women, Rohe 2*

“It was our belief that appropriate information needs to be readily available. For instance one of our participants said that she had some difficulty in finding a good lawyer. Whereas another participant found a lawyer who explained everything to her and was extremely helpful. One of the solutions to the dilemma of who is an appropriate lawyer was to list lawyers in the yellow pages under women and/or Māori. We felt that this would at least begin the process to finding the right person for the job.” – *Submission 365 (community group)*

“Counselling services work at the coal face of human crises and it would be a good idea if they had basic pamphlets available on legal information.” – *Submission 6 on NZLC MP4*

- 146 Many women relayed experiences that confirmed for them that lawyers and judges, both male and female, did not understand their lives or the significance for them of the problems for which they had sought help. Sometimes the experiences related to the women’s economic circumstances.

“I sometimes think maybe the courts don’t care very much about property that is not \$500 000 worth or something like that, but it means a lot. It means a great deal to a lot of women whose total possessions only come to \$30 000 maybe but if they lose those they never have the money to rebuy all those things again, not if they are on the DPB or an unemployment benefit or a very low wage somewhere in part time work. And it matters a lot that these things are not just thought of no moment. They think they are objects and they can be replaced and that’s all there is to it, but it has taken me years. I walked out with two suitcases of clothes and it’s taken me years to get back.” – *Submission 65*

- 147 Sometimes, lawyers’ and judges’ reactions to women’s distress over the situations for which they were seeking legal assistance gave rise to the view that the women’s circumstances were not understood.

“Because one speaks with tears in one’s eyes, anger in one’s voice and pain in one’s words – does this mean that what is being spoken is invalid? There are male lawyers who do not appear to hear what is said by a woman client unless she manages to be cool and ‘rational’. They seem to ‘switch off’ and ignore what she is saying because of the way she is saying it. Therefore she feels herself failed by the very person who is there to be her advocate.” – *Submission 219*

“Women are prevented from accessing information when they are in a distressed state. The paternalistic attitudes of many lawyers and the whole foreign culture of the courts also inhibits their comprehension of legal issues and procedures.” – *Submission 21 on NZLC MP4*

“One male solicitor that I talked to admitted to having told a distressed woman client ‘to stop your crying; it does nothing for me’. Many other male solicitors expressed impatience with ‘emotional’ women clients and generally interpreted emotion as a sign of weakness or stupidity . . .” – *Submission 8 on NZLC MP9 (lawyer)*

- 148 Sometimes it was felt their lawyers had demonstrated how little they understood of their women clients’ lives by not knowing or not passing on information about other services relevant to the women’s problems, such as income assistance and emergency benefits, housing, budgeting, changing children’s schools, counselling – matters which were integral and pressing parts of the circumstances which had caused the women to seek legal help. These criticisms were often expressed in the need for a “one-stop” shop for legal services.
- 149 Sometimes women felt that an inadequate understanding of domestic violence put their very safety at risk.

“After being told I was over-emotional not trying to understand my husband’s needs, not thinking that the children might want to be with their (violent) father, did not need a non-molestation order, that it was not necessary to get an interim custody order (even after the children had to be put in a safe house as they were all on his current passport and he had tried to lift them twice) – all I needed was counselling!! – I became very angry and very desperate. I could not change lawyers even though I was quite frightened and intimidated by him. He was and still is a very well respected and liked lawyer I believe.” – *Submission 124*

“[My lawyer] said things like ‘He’s a bit bitter now but he’ll calm down in a couple of months.’ At this stage he was ringing my mother to say he was going to get me and telling me he’d see me dead in the gutter.” – *Submission 301 (telephoned)*

“Although her lawyer knew about the violence in her marriage he suggested a round table conference with her ex-husband and his lawyer. Her lawyer said it was an opportunity for her to have a bloody good go at him, which she says she didn’t actually want to do. Throughout the conference her ex-husband kicked her under the table and she said she couldn’t concentrate on what the lawyer was saying. Her lawyer frequently told her that she should have left him years ago.” – *Submission 114*

“In one case a woman who had left a violent situation and had been helped to set up in another house with her four children had the problem of the partner taking the children out of town and not returning them after access. The judge, with the agreement of the lawyer on the client’s behalf, ordered the woman to give the husband the address and let him come to the house for access, the woman to be the supervisor. The result was that the husband immediately moved into the house and the wife and children – in the middle of a very cold

spell in July – were thrown out onto the streets. They slept in cars. The same lawyer advised the woman to go to the man when he took the children to another city during access. ‘Go and be nice to him and get the children back’.” – *Submission 257 (community group)*

“The judge tried to order that I alone take the children to my husband’s place for their access, despite the round trip being approximately 160 kms and my husband having a non-molestation order against him and the fact that it took me six years to get out of a violent and destructive marriage. I found the judge’s speech to be very upsetting, like putting your head in a lion’s mouth. My husband had made numerous threats against the children and myself which the judge was well aware of.” – *Submission 182*

- 150 The result, it was said, is that many women feel particularly alienated from the “average lawyer” and so are dubious of their chances of establishing and maintaining an effective working relationship with a lawyer. This sense was strongest when women spoke of needing help with problems involving personal matters likely to be far removed from a lawyer’s own life experiences. Women repeatedly said that the strategies needed to remove the barriers between them and lawyers included lawyers being better educated about women’s lives and better trained to communicate effectively with diverse women.

“The skills that are essential for successful lawyering are listening, empathy and sound advice in a form accessible to your clients.” – *Submission 398*

### **Women need information about the how their dealings with the justice system will impact on their everyday lives**

- 151 Two matters about which women need information because of its relevance to their everyday lives have already been mentioned: how to find a “good lawyer” and how to find other services relevant to the problems about which women seek legal assistance. The difficulties women described in obtaining that information were at least matched by the difficulties they reported in obtaining information about the nature and practical effect of the processes of the justice system. These difficulties related to three broad areas.
- 152 First, the problems about which women sought legal assistance had very often caused substantial upheaval in their everyday lives, disrupting their housing, their income, their children, and even threatening their safety. For this reason, women said they needed to know the answers to such basic questions as: how long will this take? how much will it cost? when will I know I am safe? when will I be able to make plans for where my children will be going to school? It was often said that women felt their whole lives were on hold until their legal matters were settled.
- 153 Second, women wanted to know about the practical effect and the nature of the justice system’s processes in order to be informed participants in it. For example, they wanted to know the answers to such specific questions as: what

is a mediation conference? what is an interim hearing? will my ex-husband be there? where will I be sitting? can I take a friend? what time will it be on? how long will it take? will a decision be reached? and what happens next?

- 154 Third, women wanted to be able to assess the relative benefits and disadvantages of any options the justice system might offer for resolving their legal problems. Unless they were informed of their options, women said they were not only ill prepared for what happened to them, but were also robbed of the chance to consider alternative means of managing their problem. Women said they needed to know such things as: the conditions on which legal services would be provided, how lawyers would deal with them and their cases, how much their lawyer would cost, what and who else would or might be involved at each step along the way, and any other practical effects of processes in which they would be directly involved.

“And also the stress part – Like with this . . . thing I thought it was gonna go through on Thursday and the papers would be served on the Friday. I didn’t ring my lawyer to find out the outcome because I just didn’t realise there could have possibly been a problem. I spent the next week really worried that [my ex-husband] would have the papers and might turn up on my doorstep again. So I was taking extra precautions, locking and shutting the house and walking my child all the way to school . . . and then I get this letter saying it hasn’t gone through and the papers hadn’t been served and we have to do it again. Like there is actually a kind of relationship between what happens in the court and my actual personal life and my own sense of personal safety.” – *Report on Consultation with Lesbians*, 35

“In general I’ve found lawyers have not kept me informed of realities – what to expect, the purpose of meetings – I was just expected to understand. I know lawyers have to do their job, but if I know what is going to happen I can be better prepared and that is good for everyone.” – *Submission 267*

“I remember when for the first time in my life I was buying joint property and the lawyer just crossed out the joint tenancy stuff on all the forms without even telling me what it was about. It wasn’t till later that I realised that the joint tenancy [with automatic rights on death] would have suited me better.” – *Report on Consultation with Lesbians*, 20

“The lawyer always said to me that I was going to prison, going to prison. It was like she had given up even before we started. That was so depressing and I used to wonder what the hell I was doing. The lawyer always growled at me when I asked too many questions but I wanted to understand what I was going through and what was going to happen . . .” – *Report on Consultation with Pacific Islands Women*, 6

“[Women] are uncertain about processes and costs, delays undermine them and they are intimidated by legal jargon. Women feel they have no control over a situation when they don’t understand things. Low self esteem makes it difficult for women to press their case if they are being ‘fobbed off’.” – *Submission 258*

“First mediation I went into I came out of there absolutely horrified and I said to her [the lawyer] ‘How come you didn’t tell me that that was what was going to happen?’” – *Report on Consultation with Pacific Islands Women*, 6

“I thought the only way to get what I wanted was to go to court. My lawyer didn’t tell me straight away that we could try and sort things out with my husband without going through court. I was so worried about having to talk to the judge in front of my husband and his lawyer who is a man. My lawyer did tell me what would happen at the hearing. The first night I knew I couldn’t sleep. In the end we had a meeting with my husband and his lawyer and we sorted things out. If I knew from the start that we could have started sorting things out this way I would not have stressed out so much. It was hard on the kids too because they were still seeing their father through all of this . . .” – *Report on Consultation with Pacific Islands Women*, 22

“The court process often proceeds too fast for the woman and she leaves the court feeling confused and misunderstood.” – *Submission 228*

- 155 By contrast, if women knew these things, they clearly felt their needs were understood, that they were taking an informed role in what was happening and so were being well treated.

“I had a good experience with the first lawyer. I understood what was going on with that lawyer.” – *Report on Consultation with Pacific Islands Women*, 11

“[We choose certain lawyers because] these lawyers are first sympathetic to women and their experiences. Second, these lawyers know the ‘process’ and have no problems explaining the process of the legal system in a way the women can understand.” – *Transcript of hui with Māori women, Rohe 3*

“One woman felt very happy about an instance where she felt her (female) lawyer went to a great deal of effort to ensure that she (the client) remained in control of the process. The lawyer kept up with correspondence, coped well with the client’s children, ensured meetings were short and to the point, and always kept the client informed and legal documents up to date.” – *Submission 331*

“When I wanted a lawyer I rang lesbian line and they gave me the name of a really good woman lawyer who was really on to it and said I could go on legal aid or pay off the bill at \$20 per week. So you know she laid out the options for me.” – *Report on Consultation with Lesbians*, 42

“My lawyers were good to me; probably not considered to be the best lawyers because they weren’t really adversarial and they didn’t play the game. But they supported me and believed in me even though I lost the case.” – *Submission 174*

“The lawyers were great and they explained legal aid to me. They made me understand.” – *Transcript of hui with Māori women, Rohe 3*

“My lawyer was very good, very supportive. We did pursue it. And he was realistic too, he did tell me that we’ve done everything we can do.” – *Submission 65*

“My lawyer is very good at explaining things in my everyday language instead of using those jargon legal terms.” – *Transcript of hui with Māori women, Rohe 10*

“My lawyer was good. He contacted the lesbian mothers’ defence fund and stuff.”  
– *Report on Consultation with Lesbians*, 36

“I came away from there feeling very different – still stretched to the limits of my endurance but knowing I had been given some very practical steps I could take as I began to look at decisions I knew were going to have to be made. Her recommendations were not directional but for the first time I had someone acknowledging the awfulness of the situation I was living in. She asked questions in a way that did not reduce me to an emotional heap and I could begin to see there was still alternatives and hope for a decent future.” – *Submission 233*

- 156 Without exception, women said they needed to know about the processes of the justice system. For the majority of women, the difficulties they had experienced in obtaining this knowledge was the main reason they were concerned about their “access to justice”. Accordingly, their concerns about knowledge of their legal rights and the adequacy of those rights, or about the quality of their lawyers’ technical legal skills, were of secondary importance.
- 157 However, there were two main exceptions to this. First, groups of women who had experienced discrimination on the basis of their ethnicity, sexuality or disability emphasised their need for information about their substantive legal rights. These women were also particularly concerned that some areas of the law affecting their legal rights were unclear and unfair. Second, some women were particularly concerned about the unfairness of the substantive law governing disputes over matrimonial property and the property of de facto partners, and about the processes by which such disputes are resolved.

## CULTURE

- 158 The second main way in which women said their access to justice was impeded related to clashes of culture. Two strands of this theme relate to what was described as the predominantly Pakeha culture of the justice system. It was said that the justice system is insufficiently responsive to:
- Māori cultural values; and
  - the needs of diverse cultural and ethnic groups.
- 159 A third strand of the theme uses the word “culture” in a different sense. It was said that the “male culture” of the justice system is an impediment to women being treated fairly.

### Māori cultural values

- 160 For Māori women, the starting point for assessing barriers to their access to justice was the Treaty of Waitangi. Consistently, Māori women attributed the difficulties they had experienced with the justice system’s rules, processes and personnel to systemic failure to respect Māori cultural values and the Treaty of Waitangi, which protects those values. For them, the culture theme was an umbrella term apt to denote all of the reasons for the obstacles faced by Māori women in obtaining access to justice. *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53) explores this sense of the culture theme.



“The Treaty guarantees three things: protection, partnership and participation. But we are never allowed the participation or the partnership for Māori. You haven’t got protection if you haven’t got participation or partnership.” – *Transcript of hui with Māori women, Rohe 9*

“The legal system has to acknowledge Māori tikanga. If this means a total overhaul of the system then so be it. In the long run the benefits for all concerned would be worth it. As Māori too we need time and the support to build it in a way that would be culturally appropriate for us.” – *Transcript of hui with Māori women, Rohe 4*

“The culture of Pakeha is not sensitive to our cultural ways. If someone would just try to understand our ways.” – *Transcript of hui with Māori women, Rohe 3*

“The law does not wish to understand us Māori people. Because the justice system is predominantly male, that causes our women even more problems in getting help.” – *Transcript of hui with Māori women, Rohe 8.*

“Why can’t we have more Māori in court who we can relate to? The pronunciation of Māori names is disgusting and very offensive to us all. If they can’t give their staff some basic public relations training on cultural sensitivity they should not be there.” – *Transcript of hui with Māori women, Rohe 4*

“[Lawyers] are not even trained to look after Māori clients.” – *Transcript of hui with Māori women, Rohe 5*

“If you want to bring your whanau in you have to ask and get consent. If they want to come and there are quite a few members, the rooms are not big enough. Within the courtroom it is not set up like our marae style.” – *Transcript of hui with Māori women, Rohe 7*

“[The judge] was choice, had a nice way of speaking and clearly understood the whanau present. He looked on the whanau support group and gave us some support. It made my son think because of how [he] talked to him. It was really neat.” – *Transcript of hui with Māori women, Rohe 3*

### **The needs of diverse cultural and ethnic groups**

- 161 Women from a range of minority ethnic groups repeatedly identified barriers of language and cultural values between them and the justice system, and particularly between them and legal service providers. It was plain that for most women from those groups, the clash between their own cultural heritage and the predominantly British heritage of the justice system presented the largest of all the barriers they encountered in their attempts to utilise the system.
- 162 Women said that when the system failed to provide for their most basic needs (such as those already referred to, for information provided in their own languages, or from or through people who speak their languages and understand their lives) they received a clear message that their cultural values were not respected. This was described as being a major deterrent to their use of and faith in the justice system. Māori and Pacific Islands women in particular frequently reported a sense that the system was not there to assist them and could actually hurt them. They also reported having encountered patronising, ill-informed or racist attitudes among justice system personnel.

- 163 It was also made plain that culture influences the reasons for women's interactions with the justice system. For example, Māori women spoke far more than non-Māori about issues arising from crime (including family violence and youth justice), about land and environmental issues, and, in the family law arena, about custody and access by grandparents, adoption, and the care and protection of children. The nature of these interactions was reflected in the demand by Māori women for legal services delivered by Māori who are more likely to have the relevant expertise in these areas.
- 164 Similarly, Pacific Islands women frequently spoke of interacting with the justice system in connection with issues of immigration, crime, youth justice, and care and protection. This was also reflected in Pacific Islands women's calls for legal services delivered by Pacific Islands people.

### The "male culture" of the justice system

- 165 Whatever their ethnic background, women were generally critical of what was referred to as the "male culture" of the justice system, especially of the legal profession and judiciary. They saw this as affecting the quality of services they received from the justice system. Women knew that lawyers and, especially, senior lawyers and judges are mainly men. The message they took from this was that attitudes and practices within the legal profession are not conducive to women lawyers' advancement. This served to reinforce the view that women clients would be disadvantaged in their dealing with lawyers and the justice system in which lawyers play such an important role.

"... well it's difficult enough to get a woman's perspective of the law heard now. Therefore it's even more difficult to get a lesbian or Māori woman's perspective." – *Report on Consultation with Lesbians*, 30

"(a) It is judges and lawyers who make up the legal system. If the system is to change there must be changes to judicial selection. Judicial attitudes, lawyers' training and lawyers' attitudes. (b) Only recently a female barrister complained to me that a High Court judge addressed a group of barristers as 'gentlemen' despite there being two female barristers present. She did not complain because she knew that she would be appearing before him again and he would be difficult towards her. That result would not be in the best interests of her client. So the system prevents change and in fact allows unacceptable conduct to continue." – *Submission 234*

"The legal system is a male world – male lawyers, male judges, not a woman in sight. As a mother I have no weight in the court room. If you've got lots of money and a position then you get the kids [in a custody dispute]." – *Submission 304*

"I felt like that if I acted like a woman in court I would be seen to be unstable and so I had ... to play by their rules otherwise I would be judged to be unstable and hysterical." – *Submission 16*

"It was a totally male orientated court and I felt intimidated a lot by that ... I was not being taken seriously ... the biggest problem ... was that I was Māori, I was female and those two things were against me full stop." – *Submission 164*

“Even if there are women judges the problem is they have still been brought up in a male dominated system.” – *Transcript of hui with Māori women, Rohe 4*

“All the women expressed a desire for more informal choices within the legal process. All the women wanted more women in the system.” – *Submission 33 (community group)*

“It’s like the judges were like ‘good grief, poor man, his wife’s run off with another woman, that’s not cricket’.” – *Report on Consultation with Lesbians, 30*

## CAREGIVING

- 166 The third major way in which women said they experienced barriers to their access to justice related to their caregiving roles. The vast majority of the women who spoke and wrote to the project team did so in terms which showed that those roles were central to their lives. Women’s responsibilities to children – most commonly as mothers, but also as grandmothers and others with responsibility for children’s care – dominated their accounts of why they had become involved with the justice system. Women’s roles as caregivers for adults were also emphasised, especially by women caring for relatives with disabilities, or elderly partners or other relatives.
- 167 It was plain that many women believe that women’s unpaid work in caring for others is increasing and that this must be factored into legal service providers’ views of how services may best be delivered to women and of what legal issues are likely to be of concern to women. Māori and Pacific Islands women, in particular, spoke of the care they provide for older family members and considered that any lack of regard for that fact on the part of legal service providers was explicable by the underlying mismatch between the providers’ and the women’s cultural values.
- 168 The constraints of time and place which women said their caregiving roles put on their ability to receive legal services have already been referred to (see paras 139–140). Women said their caregiving roles affected their access to justice in other ways too. For example, some women were concerned that the practical implications of caregiving were not understood or that insufficient regard was paid to them.

“They don’t understand. You’re left with no house, with children to feed and *absolutely* no money. I can’t afford to buy a pair of shoes for myself or my child. I’m completely socially isolated. Can’t remember the last time I went out . . . And when the mothers suffer, the children suffer . . . The whole process offers no end in sight . . . And when, as a result of this, I suffered a breakdown – it’s capitalised on by his lawyers.” – *Submission 510 (telephoned)*

“My priorities are on my whanau and their needs. This may mean that I don’t get to go to these [service] organisations, and as far as I can tell they certainly don’t come to me.” – *Transcript of hui with Māori women, Rohe 3*

“The law is too linear (individualistic) – women operate in a circle. It is impossible to isolate issues for women as they have a relationship with their families.” – *Meeting with Pacific Islands women in Wellington, March 1995*

“Some judges are twitchy about children in court yet young children are often unable to be left with other people, especially babies breastfeeding. I have never heard a male judge give ‘permission’ to feed or attend to a child when in court – sometimes I think women clients will be anxious about this.” – *Submission 104*

## COST

- 169 The fourth main way in which women said they experienced barriers to their access to the justice system related to the cost of legal services. Indeed, concerns about cost, together with those about communication problems, dominated women’s accounts of the barriers to obtaining legal services.
- 170 Most women were astounded at the cost of lawyers’ services. Throughout the consultation meetings, a constant criticism was that lawyers are priced outside the “women’s market”.

“I was so happy when I went to see my lawyer when she said that I could get the legal aid and not pay anything for a lawyer. For a long time I stayed away from the lawyer because no money but then one day I knew I had to do something so I went. I was going to beg the lawyer to let me pay my bill bit by bit . . .” – *Report on Consultation with Pacific Islands Women, 9*

“The cost puts people off – they think ‘what’s the use of going?’” – *Meeting with Visually Impaired Women, Rotorua, 1996*

“Lawyers cost, what, \$150 per hour? Even if I can find a job that pays \$15 an hour it would take me 10 hours to earn what I pay for one hour from a lawyer. That’s ridiculous.” – *Report on Consultation with Lesbians, 42.*

“Lawyers’ fees are too high. If women can’t afford their services or are not eligible for legal aid then they will just put up with their problems. Where is the justice in the legal system when lawyers’ fees are too much for us to pay? How do we get help?” – *Transcript of hui with Māori women, Rohe 9*

“I went to see the lawyer to write for a motor vehicle dispute. I nearly died. The man said ‘I’m happy to listen to you for a half an hour, but after that it will cost you \$450.’ I wanted an official letter. I’m sure he said he would write a synopsis. I didn’t even know what it meant, but it sounded good. So the cost and the language is a problem. I told the lawyer, ‘Sorry, I can’t afford that money’ . . . I didn’t hear anything else he was saying to me. When I heard those words \$450 I didn’t take anything in after that.” – *Transcript of hui with Māori women, Rohe 4*

“[Cost] is a major problem – boy oh boy is this the real problem. I won’t go and see any lawyer because of the cost.” – *Transcript of hui with Māori women in Rohe 3*

“Costs are astronomical – even phone calls count. I hate to think how much it will cost. I’m being forced into responding.” – *Submission 509 (telephoned)*

- 171 Fear of the cost was plainly a substantial deterrent to women engaging lawyers, except in the most traumatic circumstances when there was no other known option. Despite that, time and again women said they had not been prepared for the actual cost of their lawyers' services. They said they had not been warned of what to expect and bills arrived for amounts they could not afford.
- 172 Many women said their lawyers had not discussed fees with them. Others said their lawyers might have talked about fees but, if so, the women could not recall what they had been told. An explanation commonly given for that possibility was that the women had been too upset to absorb what their lawyers had said about fees.
- 173 Women who said that they had asked about fees frequently reported that the information they received was inaccurate – often to a very substantial extent.

“E asked for an estimate at the beginning of the process and the lawyer said it was difficult to provide an estimate of these cases because the matter was very complicated. E expected a bill of \$1000. However, she has just received a letter from the lawyer saying he spent 48 hours at \$150 an hour on the case. He has said that he is prepared to negotiate his fee.” – *Submission 145 (telephoned)*

“I often asked why this process took so long to finalise. My solicitor told me that my costs would be between \$600/\$2000 initially, but my final account totalled \$25 000 . . . I inquired about what I thought was an excessive amount. I was informed that it was because my former husband had been difficult. I finally took this matter to the Family Courts and was reimbursed \$3785.” – *Submission 227*

- 174 Women voiced a strong sense of outrage that a “justice” system could be so costly for ordinary people. That sense was compounded by their knowledge that the problems for which women so often turn to the justice system are very common (for example, family breakdowns) and very important to resolve. It was frequently observed that the costs of sorting out women’s and children’s future security after family breakdown can ruin that security.
- 175 Even though women often talked of being effectively forced to use lawyers’ services, they plainly did not regard that as a “necessity” when compared with other demands upon their financial resources. Necessities were food, clothing and shelter for themselves and their children, and many women clearly felt that their incomes could barely stretch to cover those, much less the unwanted but unavoidable “luxury” of legal costs.
- 176 Women said that their own views about costliness and value conflicted with those of the justice system in another sense too. They felt that the importance of their possessions was trivialised by lawyers, and judges, whose approach seemed to be based on the mistaken assumption that the women could easily replace essential chattels. Further, women felt that approach denied the intrinsic value of familiar possessions, especially when women and children are unsettled by changed family and household circumstances.

"I was trying to get orders so that I could go back and pick up my furniture, and that really hurt because it was said of my chattels that they were merely chattels that we were fighting over and I suppose to them they were. However, it was my children's beds, it was our fridge, it was everything that I had been collecting since I was 16 years old and I wanted it all back and I got it back in the end but that was off-putting . . . it was as if to them, "Oh you can always start again." Well you can't. Those things are . . . my net that I keep around me . . ." – *Report on Consultation with Pacific Islands Women*, 18.

"I find the Family Court an intimidating cold, impersonal place. The judge we had for an interim hearing was cold and arrogant. She was very scathing and dismissive in her comments. To her the difference of \$6000 in the valuations of a particular asset was a 'mere' sum. To her on her judge's salary it may be, but to me struggling to bring up a child and make ends meet \$6000 is a healthy sum to fight for. It might be enough to pay my legal bill at the end of all this." – *Submission 275*

"You know like judges allowing women to leave the family home because there has been violence and they are not actually considering that those children and that mother have actually got no beds, no blankets, no washing machine, no pots and pans, no income, so they go on to a DPB which you know brings in enough money to pay for their food, but where are they going to get all the children's bedding and bikes and things that are in the family home. It's just a grave lack of perception that a judge doesn't actually realise that a woman who walks away from a marriage with nothing but the clothes she stands up in virtually and children to care for – I mean, how does he think she is going to survive out there?" – *Submission 65*

- 177 Women who had been unprepared, mentally or financially, for the cost of their lawyers' services often said they had felt unsure that the advice they received from their lawyers about how to use the justice system was the most suitable for their circumstances. However, they said they had tended to assume that what they had been advised was the only way, or the best way to protect their position. But once they found out the cost of the course they had adopted it seemed so unfair that they became very concerned that their lawyers had "taken them for a ride". It was a frequent complaint that lawyers were more concerned with making money than with truly considering women clients' circumstances and finding the course of action which best matched those circumstances. It was notable that many women who made this complaint did not talk about the outcomes of their cases as justifying or discrediting the price they had paid for them. Instead, their criticisms were mostly couched in terms of "whatever the outcome, the process by which it was reached was outrageous given my financial circumstances. A just system would not have required me to pay so much".

"I believe it is in the solicitors' financial interest to prolong court cases. I believe both men and women are victims of our current justice system, because . . . we are all at the mercy of these people." – *Submission 43*

"There is really only one winner and that's the solicitor. Everyone else is just stressed out and bitter and twisted by the end of it." – *Submission 504 (telephoned)*

- 178 Other women in that situation blamed the justice system more generally. They said it was open to abuse by parties with economic power over their opponents, and that the main reason they had to pay such high fees was that their opponent (generally their ex-partner) had used stalling and other tactics to drag out the inconvenience to, and raise the costs incurred by, the women. Serious criticisms were voiced about the justice system allowing the costs of legal services to fall disproportionately on women.

“I am not able to apply for legal aid because my income is above the threshold level. The criteria apparently do not allow for any consideration of my fixed outgoings as a consequence of the matrimonial property settlement, or, even more significantly, the massive 3:1 income differential between my ex husband and me which operates to his advantage. He was able to employ the highest-paid family court lawyer to do everything he possibly could to complicate proceedings and greatly push up my costs in the process. My current unsecured legal debt is over \$5000 and at present rates and even assuming no further costs – which on the basis of past experience is unlikely – will take at least another 5 years to repay. My lawyer is highly reluctant to undertake any further work for me because of this debt and is pressing to have it repaid more rapidly.” – *Submission 260*

“To get the law to work effectively for you, you have to be able to afford to pay for the best specialist lawyer. You have to know which ones are good. Unfortunately most of us cannot afford to do this and end up the losers financially and emotionally. You get abused by your spouse and then you get abused by the law.” – *Submission 275*

“My lawyer said ‘You know you’re going to have to try and actually not have any contact with this person anymore because if you keep coming up to court about the same thing, ie, access and custody of the children, they will refuse it to you.’ This was quite annoying to me because I have never sought out the help of lawyers and I’ve not been the instigator of my legal processes. It’s been in answer to or in response to stuff that is coming at me . . . Insensitive to say the least. I mean I do have better things to do. I didn’t want to be going through this all the time . . .” – *Report on Consultation with Pacific Islands Women, 18*

- 179 A further sense of cost that women frequently referred to was the emotional cost of being involved in such expensive processes. Women said that constant worry about affordability takes a high toll on their confidence and sense of self-worth, especially when they are responsible for providing for others, and on the credibility of the justice system.
- 180 In light of those concerns, women regularly asked why there were not more free or low-cost legal services available. Most said they had looked around for alternatives to using lawyers, but that there are too few available and the services that can be obtained do not cover the full range required. Women in areas with law centres and who had used their services praised them; women in other areas called for those services to be available to all who need them. It was frequently said that a nationwide free telephone service dedicated to providing information relevant to legal problems would be invaluable for women, especially rural women. Many times, women at the consultation

meetings asked, “Why can’t lawyers provide a first interview for free?” “Why do lawyers charge by the hour and not for the task?” “Are there any checks on lawyers’ costs?” “Can people complain about their lawyers’ bills?” Many said that they had been or would be afraid or embarrassed to ask their own lawyers about money matters and did not know anyone else they could ask.

“I didn’t know I could ask for a cost review of the \$9000 lawyers’ fees I paid for separating from my husband and getting non-molestation orders and custody of the two children, and that was 2 years ago. Apparently you have got to do a cost review within 6 months, so that knowledge is now of no use.” – *Submission 380 (telephoned)*

- 181 The other set of criticisms women made about the cost of lawyers’ services related to the legal aid schemes. Many, particularly Māori and Pacific Islands women, had only a very general idea about the schemes’ terms. Women who did know about legal aid were critical of the limits on its utility for women seeking to bring or defend civil proceedings, particularly family proceedings. They saw legal aid as the only bridge between low-income people and the cost of lawyers’ services – but as a bridge that was not available to all who needed it. The very low financial eligibility threshold was criticised, as was the general requirement that applicants pay a \$50 initial contribution. This amount was said to be beyond the reach of many of those who are poor enough to qualify for legal aid.

“That \$50 is too much to ask our women and their whanau to pay. Many of them are struggling to cope with their expenses and cannot afford this amount. So in the end they don’t apply for legal aid because of this problem. If that new Act [Domestic Violence Act 1995] is going to let women have the \$50 paid for, why can’t they do this for all the women who need assistance?” – *Transcript of hui with Māori women, Rohe 7*

“Why do we have to pay [\$50] before we get some justice in our lives?” – *Transcript of hui with Māori women, Rohe 9*

“The initial fee of \$50 is still a big problem for many of our women. Why can’t that fee be waived because it’s too much to expect women to pay.” – *Transcript of hui with Māori women, Rohe 11*

“Once you run out of legal aid at about the \$3000 level, which is nothing for a lawyers fee, that’s it. If you have not got your own money, if you’re not independently wealthy, if you haven’t got family, if you haven’t got a house to sell, if you have got nothing and you are dependent on legal aid you may as well kiss your kids goodbye. If you kill somebody you can get legal aid . . . If you just want to fight for your children, forget it. You won’t get it. Once you have been in court once or twice that will be about your limit.” – *Submission 16*

- 182 One message that had reached many of the women who knew about legal aid was that it is a loan not a grant. It seemed to be a prevalent view, however, that this meant that the entire cost of legal aid, or at least the greater part of it, always had to be repaid. Women who had received legal aid and who owned



a share in a house often said that, throughout the process of resolving their problems, they had been extremely worried about the size of the charge they might end up with, and about how they would repay it without selling their family's home and then not having enough money to buy another. Some women who had charges imposed on their houses to secure their repayment of legal aid said they could not shift houses for that reason.

“While some women report that they have found legal aid to be useful to gain access to legal advice on the dissolution of a relationship, many of these women are stunned to find that legal aid is fully recoverable out of the proceeds of any joint property. This can cripple these women's chances of gaining home ownership for themselves and their children after their marriage. Without a deposit or an income which is acceptable to the banking industry they may never qualify for a mortgage. While in principle it appears that women may apply for an exemption to the repayment of legal aid, in practice this discretion is seldom exercised in their favour.” – *Submission 175*

“A woman had walked away from a matrimonial property dispute because of the violence. She had a \$3000 legal bill with the Legal Services Board and they are now attempting to put a charge on the house. It is likely that this will outrage the man and make her more vulnerable to his violence.” – *Submission 240*

- 183 The quality of the services provided by lawyers to legally aided clients was also the subject of frequent comment. There was a widespread belief among women who had received legal aid for criminal or civil matters that the service they received was inferior to that which they would have had if they were “regular paying clients”.
- 184 Another quite commonly held view was that criminal defendants have access to more free legal services than do women who are asserting or defending their own and their children's rights in civil proceedings. More frequently mentioned was the view that rich people can afford the best service from the justice system and that women are not among those people. The expression “one law for the rich, another for the poor” was repeated many times during the consultation meetings.

“You don't have to be a rocket scientist to know that if you've got money you're going to be able to pay for a good lawyer.” – *Report on Consultation with Pacific Islands Women*, 8

## CONTROL

- 185 The final major theme of women's submissions – control – was described as being the result of the other barriers, of communication, caregiving, culture and cost, that women had encountered in seeking access to legal services. Women were concerned that the legal services arena, and the wider justice system, are geared in such a way as to effectively deny many women the ability to act as informed participants in the management and resolution of their problems.

- 186 Most commonly, women saw that their lawyers had assumed too much control in dealing with the women's problems. They felt this to be inappropriate when the lawyers did not display an informed awareness of the women's circumstances. Very often the conclusion women drew from this was that their lawyers were not acting in their best interests but were "playing their own games" with the opposing lawyers in order to reach a "standard" outcome which took too little account of the women's circumstances. Frequently, women asked whether lawyers have any basic duties to their clients, such as protesting or taking action against opposing parties' delaying or other exploitative tactics.

"One woman was told by her older male lawyer during her matrimonial property settlement, 'Don't question what you're going to get, be a good girl'." – *Meeting with rural women, Hamilton, 1995*

"Women spoke of lawyers having been controlling of them as opposed to there being a partnership relationship." – *Submission 275*

"There is a feeling of being cut off and removed from the system while two lawyers make their own solutions, and their clients, who are the people most affected, are left out of the process." – *Submission 146*

"The whole process took two years before it went to a hearing. [My] lawyer kept on saying 'I hear you' and then doing nothing." – *Submission 354*

"[What I want is] the giving over of power within a legal situation – pointing out these are your options and not pushing women into making decisions too soon." – *Report on Consultation with Lesbians, 37*

"Without exception our consultees considered that others, mainly their lawyers, were controlling their access to the legal system. They considered themselves to have had very little input into decisions about their cases and believed they were persuaded on occasions by their counsel to go along with courses of action which they were not happy with and/or did not understand." – *Report on Consultation with Pacific Islands Women, 18*

"A very upsetting process in marriage break-up is the often condescending attitude of the young lawyer – often a woman – who is appointed to cases through legal aid. Many women feel they are treated as simpletons and their comments and requests are often ignored. A common reply to women who relate the behaviour of the male partner is often 'He is such a nice man he wouldn't do that' and the lawyer often becomes one more hurdle for the woman to deal with. While it is understood there must be communication between the lawyers of both parties, many women feel a decision is often reached in the back room and the woman has no input into the outcome. Often the feeling is it is for the expediency of the lawyers concerned and not for the good of the family." – *Submission 257*

"When you are engaged in litigation you feel powerless because someone else is standing in your shoes. The perception that lawyers have their own club is so true. Women lawyers have told me that they feel powerless when instructing others on their own matrimonial matters." – *Submission 234*

“I instructed our lawyer three months ago that I wanted legal action taken against [a person] to get all our records back because they belong to us. What our lawyer did, rather than listen to my instruction, which was written down and signed by the judge, was that he negotiated what he considered a better settlement.” – *Transcript of hui with Māori women, Rohe 2*

“I think if you are going in to see someone about a specific issue, they should be honest about whether they can deal with it and . . . clear about their comfort and experience and knowledge of same sex stuff.” – *Report on Consultation with Lesbians*, 38

- 187 Judges were sometimes implicated in the criticism that those who assume undue control of the problems women take to the justice system do not understand women’s circumstances. A particular concern was the Family Court’s limited power to punish for contempt and inability to stay repeat applications for custody orders.

“It was very frustrating that she knew what she wanted and that in theory she could get it but that in practice the system could not do a lot of things. For example it didn’t cope with the deliberate delays while her ex husband didn’t provide information. She said the whole process was ‘like some game I didn’t understand’.” – *Submission 354 (telephoned)*

“It wasn’t until I’d been going through this whole system for about three years that one of the judges . . . finally said there is no point in me making any orders when [the respondent] will clearly not follow the orders. And I thought, what am I here for? You know this person has absolute control to run amok and here it is documented. Why am I coming backwards and forwards, backwards and forwards asking for the system to do something about this and clearly . . . they weren’t going to make orders. I wondered why this judge was sitting back doing absolutely nothing until finally he puts it in one of these judgments. “There is no point when clearly he is not going to . . . .” – *Submission 65*

## STRATEGIES FOR CHANGE

- 188 The overriding message from New Zealand women’s accounts of the barriers to their access to justice was that the justice system, and particularly those whose role it is to guide women to and through it, is insufficiently aware of and responsive to the facts which both unite women’s life experiences and which make their lives diverse. Time and again, women described being made to feel “out of place” in their interactions with the justice system. As a result, the majority of the women consulted were openly sceptical about the truth of the notion that it deals fairly with all New Zealanders.
- 189 But women did not merely voice varying shades of disappointment, frustration, anger and despair at the situation they described. They identified positive strategies to redress it. Two further messages dominated their suggestions for change. The first reflects women’s concerns about the barriers to interacting with the justice system in ways that are consistent with their everyday lives. It

is the message that community-based services will best meet women's needs for assistance to and through the justice system. The other message reflects women's emphasis upon the diversity of their needs by reason of their identification with diverse social groups. It is the message that a choice of services is needed to meet women's diverse needs. Parts 3 and 4 of this study explore issues relating to community-based services and the diversity of legal services in New Zealand.

- 190 This chapter has summarised the oral and written submissions women made to the Law Commission's project team. Women's experiences are one part of the picture of their access to the justice system. Two other parts of that picture, the social context of New Zealand women's lives, and the institutional context within which legal services are provided to women, are outlined in the following two chapters.
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## 4

# The social context: a statistical overview

### INTRODUCTION

- 191 **T**HE PURPOSE OF THIS CHAPTER is to review key social and economic factors which affect women's lives in New Zealand and which bear on their association with the justice system. All data in this chapter is from Statistics New Zealand's 1996 Census of Population and Dwellings, unless otherwise stated. The information that follows emphasises the connection between personal circumstances and broader social forces as they affect women's ability to obtain access to the justice system. Specifically, it is intended to answer questions such as:
- How many women live in New Zealand, where do they live, and what families and communities do they belong to?
  - Do women and men have different social, disability and economic status which might impact on their needs or priorities?
  - Do women have the same or different levels of education and income as men?
  - What caring roles do women have, and how do these affect women's lives?
  - Are all women's experiences the same, or are there differences for different groups of women?
  - Are women's lives affected by violence and, if so, are they affected in the same or in different ways from men's lives?

### SIZE OF POPULATION

- 192 Over half of New Zealand's 3 618 303 resident population are women and girls. Women on average live longer than men and, by the time they are in their eighties, outnumber men by two to one. However, Māori women have a lower life expectancy than non-Māori women, and Māori men have the lowest life expectancy for any group.

### A multicultural population

- 193 The ethnic diversity of our population is steadily increasing. This fact has a significant bearing on the provision of services to all New Zealanders. In the 1996 Census, those identifying with the major ethnic groups were as follows:

- Pakeha, 72 percent (2 594 685 people);
  - Māori, 14.5 percent (523 374 people);
  - Pacific Islanders,<sup>7</sup> 4.8 percent (173 181 people);
  - Asian,<sup>8</sup> 4.4 percent (160 680 people); and
  - “other”<sup>9</sup> ethnic groups, less than 0.5 percent (14 667 people).
- 194 The age structure of the Pakeha population is different from that of other ethnic groups. There are proportionately fewer Pakeha children and more Pakeha older people than in the rest of the population: 92 percent of those over 60 years are Pakeha, 5 percent are Māori, 2 percent are Pacific Islands and 1 percent are Asian. Demographers predict a rapid increase in the proportion of older people in other ethnic groups over the next few decades. For example, whereas Māori women over 60 years of age accounted for only 5 percent of all Māori women in 1996, in 2031 they are expected to account for 14 percent.
- 195 The age structure of the Māori population is the youngest of all ethnic groups. Thirty-eight percent of all Māori are under the age of 15, and another 19 percent are between the ages of 16 and 24. This means that well over half of all Māori people are under the age of 25, whereas fewer than a third of Pakeha are in that age group.
- 196 Different ages usher in different stages in the life cycle. The larger the proportion of women from a particular ethnic group in the child-bearing and child-rearing age group, the more mothers there will be in that ethnic group. One implication of this is that women from ethnic groups with younger age structures and higher fertility rates are proportionately more likely to find themselves in marriage and other relationship breakdowns involving young children than are women from older populations.

### **The immigrant population**

- 197 Nearly one in five New Zealand residents was born overseas. New Zealand’s immigrant population has grown significantly in the last seven years but the majority of immigrants have lived in New Zealand for more than 16 years. The immigrant population is increasing more than eight times faster than the New Zealand-born population.
- 198 Pakeha and Pacific Islands immigrants are the longest established in New Zealand (90 percent have been in New Zealand for more than five years). By

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<sup>7</sup> The Statistics New Zealand classification system is prioritised. Pacific Islanders includes the following groups: Samoan; Cook Island Māori; Tongan; Niuean; Tokelauan; Fijian (except Fiji Indian/Indo-Fijian) and other Pacific Island groups.

<sup>8</sup> Asian includes the following groups: Filipino; Khmer/Kampuchean/Cambodian; Vietnamese; Other Southeast Asians (for example, Burmese, Indonesian, Lao/Laotian, Malay/Malayan, etc); Chinese (for example, Hong Kong Chinese, Kampuchean Chinese, Malaysian Chinese, Singaporean Chinese, Vietnamese Chinese, Taiwanese Chinese); Indian; Sri Lankan; and Japanese.

<sup>9</sup> “Other” ethnic groups include the Middle Eastern, Latin American/Hispanic and African groups. It should be noted that 4 percent (151 713 people) declined to specify their ethnicity. In the government’s Report to the United Nations Committee on the Elimination of Discrimination Against Women, *Status of Women in New Zealand 1998* (Ministry of Women’s Affairs), it is said that Asians and “other” New Zealand residents, from some 50 ethnic groups, make up approximately 8 percent of the New Zealand population (4).

contrast, about half of the adult immigrants from Asian and “other” ethnic groups have lived in New Zealand for less than five years, and 90 percent have lived in New Zealand for less than 16 years.

- 199 For a recent snapshot of the people arriving in New Zealand, the following figures and trends have been obtained from the New Zealand Immigration Service.
- In the year 1997/98, a total of 31 274 applicants were granted residency in New Zealand; 16 284 were female and 14 734 were male, and 256 unknown.
  - Men, and especially those under the age of 40 years, were more likely to belong to the General Skills category (which depends on factors including qualifications, work experience and age).
  - Women were significantly more likely than men to enter New Zealand because of marriage, especially between the ages of 21 and 40.
  - Women were also more likely than men to be accepted into New Zealand in the category of being a parent of a New Zealander.
  - Of the 1312 applicants in the Humanitarian category (where serious physical or emotional harm can be resolved only by the grant of residency), 710 were female and 587 were male.

### **Ethnicity and English-language ability**

- 200 With English being the predominant language of the New Zealand justice system, the English language ability of adult New Zealanders is highly relevant to their access to the system. English-language skills vary considerably according to ethnicity and the length of time a person has lived here.
- 201 Across all immigrant groups, a higher proportion of women than men do not speak English. Even with time in New Zealand, fewer women than men achieve fluency. The Asian immigrant community provides the most pronounced example of this. For new arrivals (fewer than six years in the country), 24 percent of men and 30 percent of women do not speak English. After between six and 15 years in the country, 17 percent of men and 18 percent of women still do not have fluency in English. After more than 16 years, the percentage of male non-English speakers drops to 8 percent but stays reasonably constant for women at 16 percent.
- 202 Among Pacific Islands people who have lived here for between six and 15 years, 22 percent of the men and 25 percent of the women do not speak English. Among those who have lived here for more than 16 years, some 13 percent of men and women do not speak English.
- 203 The number of New Zealanders who do not have fluency in English is likely to have significant implications for the medium in which legal information may be needed by different New Zealand women and for the range of languages in which information may be needed in order to ensure their access to the justice system.

### **Geographic distribution**

- 204 The size of the town or city in or closest to which people live is relevant to their access to services, including legal services.

- 205 Men and women of the same ethnic group demonstrate very similar patterns of geographic distribution to each other, although women are slightly more likely to favour larger centres than men, who can prefer more rural areas. For example, 17 percent of Pakeha men and 18 percent of Māori men live in rural areas compared with 15 percent of Pakeha women and 16 percent of Māori women. During peak child-rearing years, the comparison between men's and women's location is the most similar of any age group (other than children themselves). This is consistent for all ethnic groups.
- 206 Seventy percent of New Zealanders live in a metropolitan area of more than 100 000 people (Auckland, Wellington or Christchurch), or in a main urban area of between 30 000 and 99 999 people. The remaining 30 percent of New Zealanders live in secondary urban centres (10 000–29 999 inhabitants), minor urban areas (1000–9 999 inhabitants) or rural areas (fewer than 1000 inhabitants).

### **Ethnicity**

- 207 Ethnicity can influence geographic distribution. For example, Pacific Islands and Asian people are considerably more likely to live in a large urban centre than either Pakeha or Māori.
- Auckland, Wellington or Christchurch are home to nearly four out of five Pacific Islanders (78 percent) and an even higher proportion of Asians (81 percent).
  - Less than a half of Pakeha (46 percent) and only a third of all Māori (35 percent) live in one of these metropolitan centres.
  - 30 percent of Māori and 24 percent of Pakeha live in rural areas of fewer than 1000 people, but only 4 percent of Pacific Islanders and 5 percent of Asians live rurally.

### **Age**

- 208 Age also has an influence on where people live. Those aged between 15 and 24 are more likely than any other age group to live in a city. Auckland, Wellington or Christchurch are home to 53 percent of Pakeha women, 50 percent of Pakeha men, 40 percent of Māori women and 38 percent of Māori men of this age. Age is not such a distinguishing characteristic for Pacific Islanders and Asians, as they are so strongly metropolis dwelling and the numbers in other types of towns are very small at every stage of their life cycle. One of the largest variations based on gender, age and ethnic group is seen in older Pakeha and Māori women. After the age of 45, Pakeha women start to drift from the large cities and rural areas to main, secondary and minor urban sized areas. The opposite occurs for Māori women, who increasingly move to rural areas in the later years of their life.

### **Lawyers' geographic distribution**

- 209 Information on the geographic distribution of lawyers throughout New Zealand is not directly comparable to data on the distribution of the population generally, as the geographic boundaries of law societies are different from those used in the Census. However, such information as there is shows that lawyers'



geographic distribution is strongly weighted in favour of large urban areas. This fact indicates that women in rural areas are likely to experience barriers to accessing lawyers' services.

### Telephones and cars

- 210 Other factors may impact on access to services, such as whether there is a telephone in the household or ownership of a private motor vehicle. The 1996 Census shows that 5 percent of New Zealand households do not have a telephone. This proportion increases for households in more rural areas. Nine percent of households in minor urban areas (1000–9 999 inhabitants), and 7 percent of rural dwelling households reported not having a telephone. Another 4 percent did not specify whether they had one.
- 211 Similarly, 11 percent of households in New Zealand do not have a car, and another 41 percent have only one vehicle. These proportions vary according to the type of centre in which a household is located. For example, 12 percent of households in the three main centres compared with 14 percent in minor urban areas have no car. In rural areas, 6 percent of households do not have a motor vehicle. This information indicates that some women in rural areas and small towns, due to their lack of proximity to legal advisers and their inability to easily contact them, may have particular difficulty in obtaining access to legal services.

### DISABILITY

- 212 One in five New Zealanders has some form of disability (namely, a long-term limitation in activity resulting from a medical condition or health problem).<sup>10</sup> More women than men have disabilities, and the nature of their disabilities is different from men's. For example, women have higher rates of physical and psychiatric/psychological disability than men. Conversely, men have higher rates of intellectual and sensory disability than women. These factors are likely to impact on the types of services women and men need.
- 213 There are also variations in the incidence of disabilities among ethnic groups. Māori have higher rates of psychiatric or psychological disability compared to Pakeha, while Pakeha have the highest rates of disability overall. While Pakeha make up 72 percent of the total population, 81 percent of the adult population with disabilities are Pakeha – a fact which may reflect the older age structure of the Pakeha population.
- 214 Participation in the workforce of people with disabilities varies according to gender and ethnicity but is consistently below the national average. Men with disabilities are more likely to be in the workforce than women with disabilities: about half of all men with disabilities (compared to 66 percent of all men) are

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<sup>10</sup> The 1996 Household Disability Survey. Respondents to the survey were selected from the 1996 Census forms. A sample of 20 848 was selected and a response rate of 86 percent was achieved. After data editing, 17 548 responses remain in the dataset. Of these, 4100 people had a disability. Both adults and children were included in the survey. The data collected is the most comprehensive that has ever been available about New Zealanders with disabilities. A functional concept of disability was used in the survey and the definition adopted is the World Health Organisation (WHO) definition, which is the recommended international standard for data collection on disability.

in the workforce, as are one third of women with disabilities (compared to 51 percent of all women). Unemployment rates for women with disabilities are also higher than for men with disabilities. Māori with disabilities are twice as likely to be unemployed as are Pakeha with disabilities.

- 215 Accordingly, income levels for people with disabilities are lower than for those without disabilities. For example, of all New Zealanders who specified their income in the 1996 Census, 25 percent received a personal income of \$30 000 or more, but only 15 percent of people with disabilities have that level of personal income. Income levels also vary with disability type. Those with intellectual and psychiatric disabilities have lower levels of income than do those with sensory disabilities. This information suggests that physical access to and the cost of legal services may be a more significant barrier for women with disabilities than for other groups of women.

## INCOME

- 216 There are three broad types of income: personal, family or household. Women and men have different levels and sources of personal income, as do those from different ethnic groups.

### Personal Income

*The median income for all New Zealand women is \$12 600*  
*The median income for all New Zealand men is \$22 000*

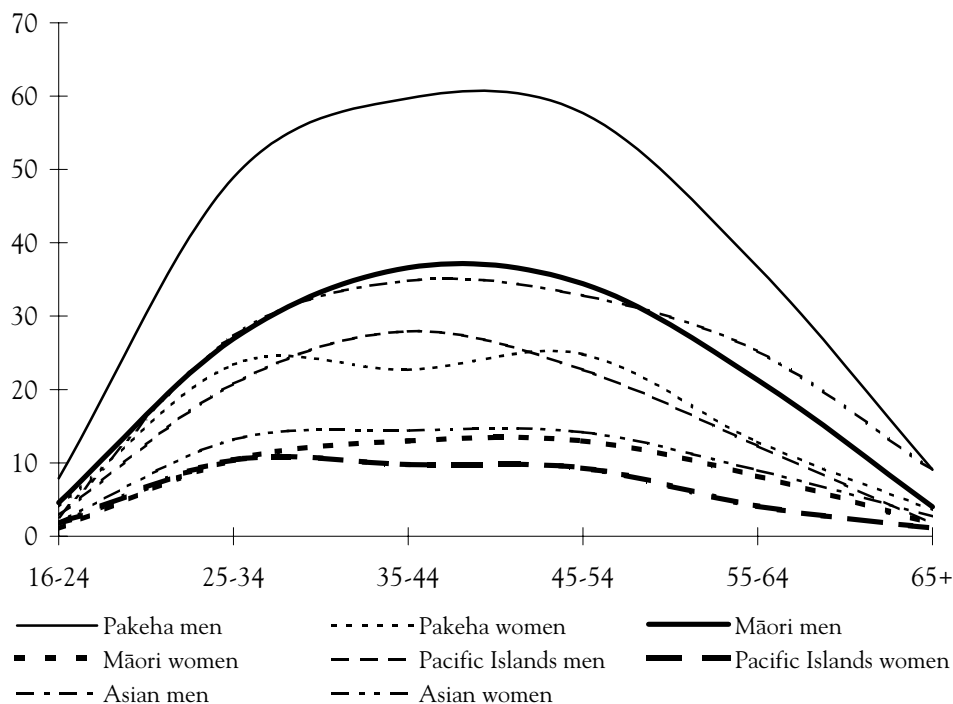
- 217 Personal income is distinct from family income and household income. Personal income provides the individual with an important measure of independence and security. Those who have low or no personal income may be reliant on others for financial support and therefore be at risk of economic hardship when there are changes in the circumstances of those upon whom they rely.
- 218 The response rate to the 1996 Census question about adult personal income was lower than for other questions: 249 897 people over the age of 16 years did not answer the question, for reasons which are assumed to be connected to the private nature of the information.
- 219 The following analysis focuses only on the 2 352 720 adults who did specify their personal income in the Census, and shows very clear disparities between the personal incomes of New Zealand women and men. In particular:
- the median income<sup>11</sup> for all New Zealand women is \$12 600;
  - the median income for all New Zealand men is \$22 000;
  - 37 percent of New Zealand's women receive personal incomes of less than \$10 000 a year;
  - 24 percent of New Zealand's men receive personal incomes of less than \$10 000 a year;
  - 70 percent of women (890 547 women) receive personal incomes of less than \$20 000 a year;
  - 45 percent of men (545 031 men) receive personal incomes of less than \$20 000 a year;
  - 86 percent of women (1 095 723 women) receive personal incomes of less than \$30 000 a year;

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<sup>11</sup> The median income is the income earned by the middle person in the group.

- 65 percent of men (786 000 men) receive personal incomes of less than \$30 000 a year;
  - 3 percent of women receive personal incomes of more than \$50 000 a year;
  - 12 percent of men receive personal incomes of more than \$50 000 a year.
- 220 The disparities are even more stark when those statistics are disaggregated for the four major ethnic groups of men and women identified separately in the Census (Pakeha, Māori, Pacific Islands and Asian). Of those groups, Māori women have the lowest personal incomes and Pakeha men the highest. The following figures are the proportions of each group with personal incomes of less than \$20 000 a year:
- 81 percent of Māori women and 56 percent of Māori men;
  - 77 percent of Asian women and 62 percent of Asian men;
  - 75 percent of Pacific Islands women and 59 percent of Pacific Islands men; and
  - 68 percent of Pakeha women and 42 percent of Pakeha men.
- 221 Pakeha men are over-represented in the high income bands. The following graph demonstrates that, in every ethnic group and age, more men than women have a personal income of over \$30 000. The greatest similarity across the eight gender and ethnic groups is that those who are least likely to be earning over \$30 000 are our youngest (16–24 years) and oldest (over 65 years) citizens.

#### PERCENTAGE EARNING OVER \$30,000 A YEAR



- 222 Pakeha men between the ages of 25 and 54 are the most likely to earn over \$30 000 per annum in personal income. The proportions of women from every ethnic group who earn over \$30 000 stay relatively low in the same age bands.
- 223 The low level of New Zealand women's incomes accounts for women's concerns about the cost of legal services and the relative priority that can be given to purchasing legal services when compared to other day-to-day costs. In addition,

low levels of personal income suggest that women are more likely than men to be dependent on others for financial security. This in turn suggests that women may experience greater economic difficulty when there are changes in the economic circumstances of those on whom they depend: for example, upon the breakdown of a marriage or de facto relationship. This is supported by research that shows that, upon marriage or relationship breakdown, women typically experience a far more marked decline in their standard of living than do their male ex-partners, especially when there are dependent children and, as is usual, their mothers are their primary caregivers. (See Funder et al 1993, Lee 1990, and Maxwell, Robertson and Vincent 1990)

## SOURCES OF INCOME

- 224 Personal income can be derived in four main ways: wages and salary, self employment, interest and dividends, and state income support payments. The source of a person's income is strongly associated with its amount. The following information on sources of income shows that women's incomes are significantly lower than men's across all ethnic groups. This suggests that women are more likely than men to experience barriers associated with the cost of legal services.

### **The self-employed**

- 225 Self-employment can be linked to high personal income levels. In the less than \$20 000 personal income band, 16 percent of men and 10 percent of women derive some income from self-employment. In the over \$50 000 income band, 46 percent of men and 48 percent of women derive income from self-employment. Of all the gender and ethnic groups, Pakeha men are the most likely to be self-employed. The proportions of the various groups who derive some personal income from self-employment are:
- 26 percent of Pakeha men and 14 percent of Pakeha women;
  - 20 percent of Asian men and 11 percent of Asian women;
  - 18 percent of men from other ethnic backgrounds and 11 percent of women;
  - 12 percent of Māori men and 7 percent of Māori women;
  - 8 percent of Pacific Islands men and 4 percent of Pacific Islands women.

### **Income Support Payments**

- 226 There are many different types of income support payments, including those related to unemployment, sickness, superannuation and caregiving (the Domestic Purposes Benefit).

### *Domestic Purposes Benefit*

- 227 The largest difference between New Zealand men's and women's sources of income relates to their reliance upon the Domestic Purposes Benefit (DPB). Women are significantly more likely than men to receive income from this benefit, and most recipients of the DPB have low income levels. Over 80 percent of the people (84 075 out of the 103 245) who reported receiving at least some of their personal income from the DPB had received less than \$20 000 in the 12 months preceding the 1996 Census. Of all those who received under \$20 000 that year from all income sources, 9 percent of the women and 1 percent of the men received income from the DPB. Breaking down that group

of women (with incomes under \$20 000) by their ethnicity, 23 percent of the Māori women, 15 percent of the Pacific Islands women, 6 percent of the Pakeha women, 5 percent of the “other” ethnic women and 2 percent of the Asian women received income from this benefit.

### *Unemployment Benefit*

- 228 Those who receive income from the unemployment benefit also tend to be in lowincome brackets. Again, there are significant differences by gender and ethnicity among those who received at least part of their income from the unemployment benefit in the preceding 12 months. In the lowest personal income bracket (under \$20 000 a year), the following proportions were recorded:
- 35 percent of Māori men and 19 percent of Māori women received income from the unemployment benefit; as did
  - 28 percent of Pacific Islands men and 18 percent of Pacific Islands women;
  - 18 percent of Asian men and 13 percent of Asian women; and
  - 14 percent of Pakeha men and 7 percent of Pakeha women.

### *Interest and investment income*

- 229 Men are only slightly more likely than women to receive income from interest or other investments. While the exact amount of investment income received cannot be determined from the Census, it is evident from the personal income data that there must be significant variations in the amounts of interest and investment income received by people in each of the population sub-groups. The disparity between men’s and women’s provision for retirement (for which investment and interest income is one measure) has been well publicised in New Zealand in recent years by, among others, the Office of the Retirement Commissioner and the Ministry of Women’s Affairs.

### *ACC payments*

- 230 Approximately 3 percent of New Zealand’s adults receive at least part of their income from Accident Compensation Corporation (ACC) payments. Men are nearly twice as likely as women to receive income from that source. This is accounted for by the fact that the ACC scheme compensates people who suffer accidental injuries (not illnesses) which adversely affect their earnings. Because fewer women than men are in the workforce, women are less likely to be entitled to ACC payments for the effects of accidental workplace injuries.

## WORKFORCE STATUS

### *Unpaid work*

- 231 Work is an ambiguous term for many women, as historically it has been defined by reference to work undertaken for monetary gain. That definition has little relevance to those who carry out unpaid work in the home. Currently, statistics regarding unpaid work are insufficient to support any significant analysis. The state’s increased reliance on the unpaid sector in areas such as the care of the sick and of people with disabilities has led to a growing demand for information

on unpaid activities. The paucity of data will be remedied by the availability at the end of 1999 of the results of a time-use survey being conducted by Statistics New Zealand for the Ministry of Women's Affairs.

### *Paid work*

*34 percent of working age women are employed full-time in paid work*

*59 percent of working age men are employed full-time in paid work*

- 232 The gender and ethnic composition of the New Zealand workforce (16 years or over) reveals that those two factors are very influential in a person's paid work prospects. Those with the highest rate of participation in the workforce are Pakeha men. Those with the lowest rate of participation in the workforce are women from the "other" ethnic groups. In fact, all groups of women have lower workforce participation rates than men.
- 233 Men also have far higher rates of participation in the full-time workforce than do women. In 1996:
- 59 percent of New Zealand's working age men were employed full-time;
  - 34 percent of New Zealand's working age women were employed full-time;
  - 7 percent of working age men were employed part-time;
  - 17 percent of working age women were employed part-time.
- 234 For a person to be unemployed, she or he must be both available for, and actively seeking, work. At the last Census, unemployment rates were the same for both men and women, at 5 percent, but the low Pakeha unemployment levels mask the high rates for other ethnic groups. For Māori and Pacific Islands men and women, the unemployment rate was at least twice that: Māori men, 12 percent; Māori women, 11 percent; Pacific Islands men, 11 percent; and Pacific Islands women, 10 percent.
- 235 People who are not employed and neither available for work nor actively seeking it are classified as not being in the workforce. In 1996, 25 percent of working-age men and 41 percent of working-age women were not in the workforce.
- 236 The availability of adequate childcare services is relevant here. The Household Labour Force Surveys show that approximately 15 percent of women available for work are not seeking it because they cannot find suitable childcare.
- 237 This information suggests that women may find it more difficult than men to meet the costs of legal services, and that paid and unpaid work commitments may affect women's ability to obtain access to legal services.

## GENDER, OCCUPATION AND INCOME

*Women employed in full-time work earn 80 percent of the earnings  
of men employed in full-time work*

- 238 Pay rates for different jobs are determined by a variety of factors, including the level of skill, training and experience that is required. But in a 1993 report, Statistics New Zealand observed that full-time employed women have a lower median income than full-time employed men, irrespective of the industry or occupation group in which they are employed or their level of education. (*All About Women in New Zealand*, 117)

- 239 On the basis of the 1991 Census data, the difference between full-time working men's and women's median incomes was nearly \$6000 (\$27 322 for men and \$21 596 for women). (*All About Women in New Zealand*, 114) At that time then, full-time employed women were receiving less than 80 percent of the earnings of full-time employed men, and differences in educational qualifications could not account for the disparity. Research in other countries has identified three broad factors that contribute to the gender pay gap: productivity differences, occupational segregation and discrimination. (Dixon, 1996)
- 240 The following analysis of the 1996 Census results divides occupations into nine broad types: legislators/administrators/managers, professionals, technicians, clerks, service and sales workers, agriculture and fishery workers, trades workers, plant and machine operators and assemblers, and elementary occupations. The proportions and numbers of workers in each occupational group have been itemised.
- 241 There is one caveat: the percentages and numbers given here do not include the nearly 28 000 women and 35 500 or more men who did not specify their occupation in the 1996 Census. Māori and Pacific Islands people were over-represented in this group, accounting for nearly one quarter of those who did not specify their occupation.

### **Male-dominated occupations**

- 242 In the nine occupational groups, men dominate as trades workers, plant and machine workers, legislators/administrators/managers (called administrators here), and agriculture and fishery workers. In fact:
- 16 percent of all employed men work as trades workers, compared with 1 percent of all employed women (approximately 138 500 men and 9500 women);
  - 12 percent of all employed men work as plant and machine workers, compared to 4 percent of all employed women (approximately 105 500 men and some 28 500 women);
  - 14 percent of all employed men work as administrators, compared with 9 percent of all employed women (approximately 120 500 men and 67 000 women); and
  - 12 percent of all employed men work as agriculture and fishery workers, compared to 7 percent of all employed women (approximately 101 000 men and 47 000 women).

### **Female-dominated occupations**

- 243 Women are more concentrated than men in fewer occupational groups. Nearly 60 percent of the female workforce are employed in just three groups, as clerks, service and sales workers, and professionals (which includes all forms of teaching, nursing and other healthcare work). The proportions and numbers of women and men in those groups is as follows:
- 24 percent of all employed women work as clerks, compared to 5 percent of all employed men (approximately 170 000 women and 43 000 men);
  - 20 percent of all employed women work as service and sales workers, compared to 9 percent of all employed men (approximately 140 000 women and 77 000 men); and

- 15 percent of all employed women work as professionals compared to 10 percent of all employed men (approximately 104 000 women and 87 000 men).

## **Ethnicity and occupational groups**

*Māori and Pacific Islands people dominate in elementary,  
plant and machine work*

- 244 Some equally notable trends are evident when the ethnicity of New Zealanders involved in the various occupational groups is considered. In particular, while only 7 percent of the entire male workforce (or some 65 000 men) and 6 percent of the female workforce (or some 40 000 women) are employed in elementary occupations, Māori and Pacific Islanders are so over-represented in those occupations that they make up a quarter of all elementary workers. The same is true of plant and machine work, in which 12 percent of all employed men and 4 percent of all employed women are engaged. A quarter of those employees are Māori or Pacific Islanders.
- 245 At the time of the 1991 Census, higher proportions of all workers, and especially Māori and Pacific Islanders, worked in elementary and plant and machine occupations than were doing so in 1996. The decline, which is due in part to the decrease in local manufacturing operations, seems to be matched by an increase in the proportions of Māori and Pacific Islands people who are now engaged in sales and service work.
- 246 The over-representation of Māori and Pacific Islands workers in elementary and plant and machine work is matched by their under-representation in the three occupational groups, legislators/administrators/managers, professionals and technicians. Although 35 percent of the entire male workforce is involved in one of those three occupations, the proportion of the Māori male workforce is just half of that (19 percent). For the Pacific Islands male workforce, the proportion is even lower (13 percent). And although 35 percent of the entire female workforce is involved in one of those three occupations, only 27 percent of the Māori female workforce, and 18 percent of Pacific Islands female workforce, are so engaged. Pakeha men dominate as legislators/ administrators/ managers: one in seven employed Pakeha men are in that group, compared with one in 30 employed Pacific Islands women.

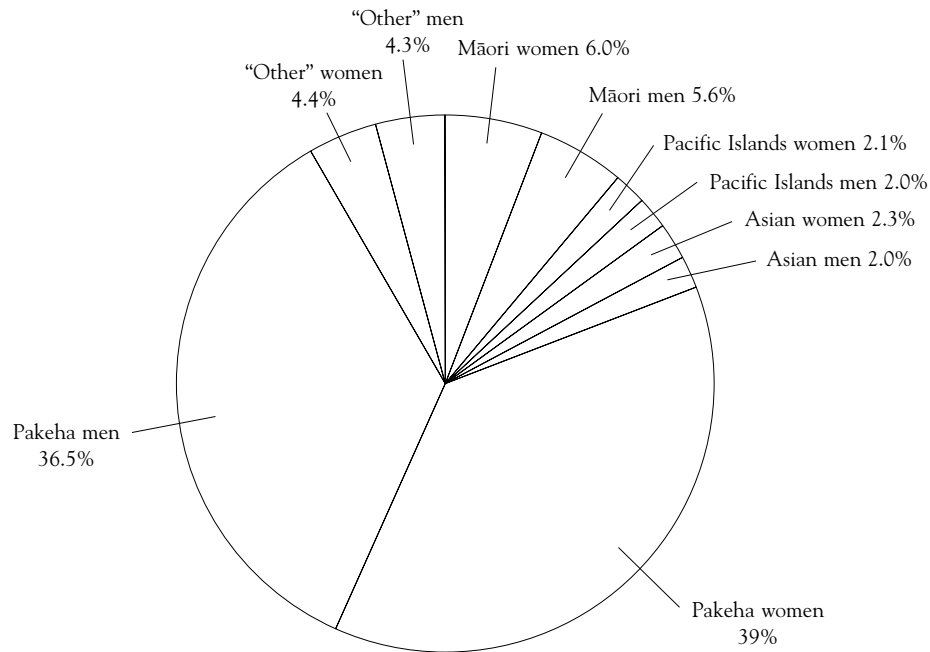
## **Gender and ethnicity of legislators, administrators and managers**

*The majority of legislators, administrators and managers  
are Pakeha men*

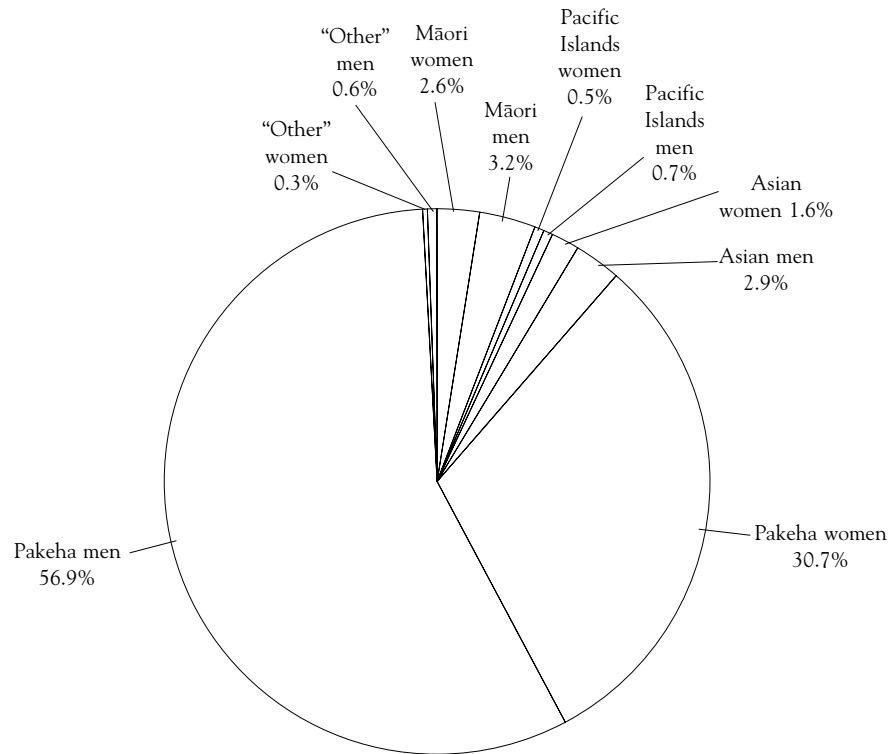
- 247 The occupational group which contains many of those in influential public and private sector positions is that of legislators/administrators/managers ("administrators"). Approximately 188 000 New Zealanders work as administrators but the gender and ethnic composition of this group is very different from that of the New Zealand population as a whole. The following graphs show the disparity between the composition of the general population and the administrators.



# COMPOSITION OF ADULT POPULATION



# COMPOSITION OF ADMINISTRATORS, LEGISLATORS AND MANAGERS



- 248 Accordingly, women, Māori and those from other non-Pakeha ethnic groups are not well represented as legislators, administrators and managers.

### **Educational qualifications**

*6 percent of New Zealand women and 9 percent of men  
have a tertiary qualification of some kind*

- 249 There is a strong correlation between educational qualifications and employment status. The Census results make it clear that the higher a person's educational qualifications are, the more likely it is that she or he will be gainfully employed and the less likely it is that she or he will be unemployed.
- 250 Historically, New Zealand women have had fewer opportunities than men to gain formal qualifications. This has been particularly true for non-Pakeha women. In recent years, the differences between women's and men's educational achievements have lessened considerably, but large disparities on the basis of ethnicity still remain. The effect of these disparities can be seen in the preceding section on personal income and participation in paid work. However, there are indications that educational qualifications statistics are changing.
- 251 Of people aged 16 years or more and still studying, women outnumber men: 13 percent of women (183 735 women) compared with 11 percent of men (145 272 men). Of the ethnic groups, Pakeha are the least likely to be currently studying, a fact which may be associated with the older age structure of the Pakeha population. Some 11 percent of Pakeha are studying, compared with 14 percent of Māori and 14 percent of Pacific Islanders. Asians are significantly more likely than any other group to be currently involved in education, with 30 percent of Asian men and 27 percent of Asian women studying at the time of the Census.
- 252 Rates of employment are highest for women and men with tertiary qualifications. While 51 percent of all New Zealand women and 66 percent of men are employed full-time or part-time, 78 percent of women with tertiary qualifications and 85 percent of men with tertiary qualifications are employed. By contrast (and excluding those who are still studying), unemployment rates are highest among those with no qualifications. Of those without qualifications, only 35 percent of the women and 57 percent of the men are employed.
- 253 In relation to the highest (tertiary) qualification level, 6 percent of New Zealand women and 9 percent of men have a tertiary qualification of some kind. By ethnicity, 30 percent of the "other" ethnic groups population have a tertiary qualification. Asians are the next most highly represented, with 24 percent of Asian men and 18 percent of Asian women having a tertiary qualification. This compares with 11 percent of Pakeha men and 8 percent of Pakeha women, 3 percent of Māori men and women, and 2 percent of Pacific Islands men and women who have a tertiary qualification.

### **No formal qualifications**

*32 percent of women and 30 percent of men  
have no formal qualifications*

- 254 Across the total adult population (16 years and over), 32 percent of women and 30 percent of men have no formal qualifications, which means they do

not have any school qualification, such as School Certificate, or any higher qualification. By ethnicity, 46 percent of all New Zealand's Māori and Pacific Islands adults are in this group, compared with some 30 percent of Pakeha, 20 percent of Asian adults and 19 percent of adults from the "other" ethnic groups. Age is also a relevant factor: 24 percent of those without a qualification are in the over-65 age group. The younger age structures of all non-Pakeha ethnic groups, and the fact that older people have less need for formal qualifications for employment purposes, provide important contextual information for the proportions of Māori and Pacific Islands people without formal qualifications.

### **School and vocational qualifications**

- 255 For all ethnic groups, a higher proportion of women than men have a school qualification as their highest. About 40 percent of New Zealand's Pakeha, Māori, Pacific Islands, Asian and "other" ethnic groups are in this category. For vocational qualifications (eg, trades), men have a slight predominance over women, but differences between ethnic groups are more marked. Some 21 percent of Pakeha, 12 percent of Māori, 13 percent of "other" ethnic groups, 10 percent of Asians and 8 percent of Pacific Islands people have a vocational qualification as their highest.
- 256 The implication of this information across all groups is that there may be particular barriers for some people wishing to obtain legal information or legal services, particularly if information and services are made available on the basis of assumptions about educational attainment.

## **FAMILY RELATIONSHIPS AND HOUSEHOLDS**

- 257 An understanding of the families and households in which women live is essential for understanding how changes in these might affect women's interactions with the justice system.
- 258 There are 915 111 families in New Zealand. Families are classified as being
- two parents with children (dependent or adult);
  - couples without children, or
  - one parent with children (dependent or adult).

### **Two-parent families**

*Just over 75 percent of New Zealand's dependent children  
live in two-parent families*

- 259 Across all ethnic groups, the most common type of family consists of two parents with children. These account for nearly 45 percent of all New Zealand families, down from 53 percent of families 10 years ago. Now just over three-quarters of New Zealand's dependent children (707 568) live in two-parent families.
- 260 The following are the percentages of dependent children by ethnic group who live with two parents:
- 86 percent of Asian children;
  - 82 percent of Pakeha children;
  - 80 percent of children from "other" ethnic backgrounds;

- 71 percent of Pacific Islands children;
  - 59 percent of Māori children.
- 261 One of the most notable changes in two-parent families since the previous Census is the decline of marriage. Since 1991, there has been an increase of over 50 percent in the number of two-parent families in which the parents are in a de facto relationship.
- 262 Ethnicity has an influence on whether parents in a two-parent family will be married or in a de facto relationship. Asian women in two-parent families are far more likely than any other group of women to be married: 96 percent with one child are married; 98 percent with two or more children are married. Māori women in two-parent families are the least likely to be married: 63 percent with one child are married; 72 percent with more than one child are married.
- 263 Same-sex couples with children account for a very small proportion of two-parent families. About 1300 same-sex couple families include children, with female couple families far more likely than male couple families to have children.

### **Couples without children**

- 264 The next most common family type is that of couples without children. This accounts for 37 percent of families, compared with 33 percent 10 years ago. In 1991, 23 percent of Pakeha women lived in a couple-only household. This increased to 30 percent in only five years. For Māori women the increase has been from 8 percent to 12 percent. Couple-only households include pre-parent couples, those whose children have left home and couples who do not have children.

### **One-parent families**

*86 percent of dependent children who live in one-parent families  
live with their mother*

- 265 One-parent families account for 18 percent of New Zealand's families, compared with 14 percent in 1986. Of all New Zealand's families with children, 28 percent are one-parent families. Just under a quarter of New Zealand's dependent children (or 220 275 children) live with one parent. A particularly notable feature of one-parent families is that in the great majority of them (83 percent), the parent is a woman. Māori are more likely than any other ethnic group to live in one-parent families: four out of 10 Māori children live in one-parent families. By contrast, three out of 10 Pacific Islands children, and fewer than two out of 10 Pakeha and Asian children, live in one-parent families.
- 266 In 1996, just under two-thirds of sole parents had been married and just over a third (35 percent) had never been married. In the five years since the previous Census, there has been an increase of 7 percent in the proportion of sole parents who have never been married. Some of this increase will be the result of the breakdown of de facto relationships in which some sole parents were living previously.
- 267 Only 13 percent of sole-parent mothers are under the age of 25 years. The largest number of sole-parent mothers (44 percent) are between the ages of 25 and 39 years, and 43 percent are over the age of 40 years.

## Marital status

- 268 Twenty-five years ago, at the time of the 1971 Census, 65 percent of all New Zealand's women were married. In 1996, just 46 percent of all the women in New Zealand were married. Included in that 46 percent are the 7 percent of women in second or subsequent marriages. Ethnicity again influences marriage rates, as is demonstrated by these figures:
- 55 percent of Asian women are married;
  - 48 percent of Pakeha women are married;
  - 40 percent of Pacific Islands women are married;
  - 30 percent of Māori women are married.
- 269 A further 4 percent of women are divorced and not remarried or living in a de facto relationship, and 3 percent are separated from their husbands and not living in de facto relationships. Accordingly, it can be deduced that one in every nine New Zealand women has been through a marriage dissolution, and that one in every 33 women has been through a marital breakdown but not yet obtained a dissolution. Department for Courts records show that in the year to June 30 1998, there were 10 036 applications filed in the Family Court for dissolution of marriages.
- 270 Alongside the decline in marriage rates, the incidence of de facto relationships has increased, but unevenly according to ethnic group. In 1996, 9 percent of all women in private dwellings lived in a de facto relationship with a man. However, 15 percent of all Māori women were living in a de facto relationship with a man, compared with 9 percent of Pakeha women, 8 percent of Pacific Islands women and 4 percent of Asian women.
- 271 A small proportion of New Zealanders live in same-sex relationships. The 1996 Census recorded 6510 people in same-sex couples, making up 0.4 percent of all couples. Statistics New Zealand has noted that this figure is likely to be an understatement, because of inconsistencies in the way people responded to the question asked. There were more female couples (55.7 percent) than male couples (44.3 percent). On those figures, 0.2 percent of adult women live in a lesbian relationship. Again, there are variations among ethnic groups in the incidence of same-sex relationships. For example, Māori women are three times more likely to live in a same-sex relationship than are Asian women.
- 272 The different age structures of the ethnic populations account for some of the differences in women's marital status. For example, Pakeha women, who make up by far the largest proportion of older women, are more than twice as likely as Māori and Pacific Islands women, and three times more likely than Asian women, to be widowed. However, among women with dependent children, Māori and Pacific Islands women are twice as likely as Pakeha women to be widowed.
- 273 It has been noted that marriage rates are higher among Asian and Pakeha women than Pacific Islands and Māori women. However, divorce rates do not follow the same pattern. Two percent of all Asian women are divorced but not living in a relationship with a man, as are 5 percent of all Pakeha women, 3 percent of Pacific Islands women and 4 percent of Māori women. It is notable that these proportions are almost identical among women who have dependent children and those who do not.
- 274 Across all ethnic groups, women with dependent children have far higher rates of separation than other women: 2 percent of Asian women with dependent

children are separated from their husbands, as are 5 percent of Pakeha women, 5 percent of Pacific Islands women and 6 percent of Māori women.

- 275 One conclusion that may be drawn from these figures is that Māori women, who are the least likely to be married, have disproportionately high rates of divorce and separation. Another conclusion, which may be drawn by comparing the divorce rates with the rates of separation for women with dependent children, is that Pacific Islands and Māori women are less likely than either Asian or Pakeha women to obtain dissolutions of their failed marriages. The reasons for this are unclear, but the disparity suggests that Māori and Pacific Islands women may face particular barriers in obtaining legal services related to marriage breakdown.

## Households

- 276 At the time of the 1996 Census, there were 1 276 332 private households in New Zealand, an increase of 8.4 percent since 1991. A household is a private dwelling containing either:
- one person living alone;
  - one family (two parents with children, a couple only, or one parent with children);
  - two or more families (of any of the above three types of family); or
  - a multi-person (non-family) group.
- 277 The average size of a New Zealand household is 2.7 people. Over half of all households contain only one or two people. Households containing one family are by far the most common type (69 percent of households). Of the major ethnic groups, Pakeha are the most likely to live in one family households: 82 percent of Pakeha live in one-family households.
- 278 The next most common type of household consists of one person living alone (20 percent of households). Of the ethnic groups, Pakeha are most likely to live in one-person households: 9 percent of Pakeha live alone. Māori are the next most likely group to live alone: 4 percent of Māori live alone.
- 279 Households made up of two or more families account for 3 percent of all private households. Pacific Islanders are the most likely to live in two-family households: 18 percent of the Pacific Islands population lives in two-family households. They are also more likely to live in households with three or more families: 4 percent of Pacific Islanders live in such households. This means that more Pacific Islanders live in households of three or more families than live in one-person households.
- 280 There has been an increase in multi-family households across all ethnic groups since the 1991 Census. In 1991, 2 percent of Pakeha women lived in a multi-family household. This increased to 3 percent in 1996. The increase for Māori women has been greater, from 10 percent in 1991 to 13 percent in 1996. The largest increase is for Pacific Islands women: from 17 percent in 1991 to nearly 25 percent in 1996.
- 281 There has also been an increase in the number of women living with others who are not family. Multi-person (non-family) households now make up 5 percent of all households. Overall, 12 percent of New Zealand women now live in a multi-family household or in one in which there is a family living with others. The proportions of women from the different ethnic groups living

in these shared households vary significantly: 7 percent of Pakeha women, 26 percent of Māori women, 27 percent of Asian women and 42 percent of Pacific Islands women live in shared households.

- 282 There has been speculation about the reasons for sharing accommodation. Although there are cultural precedents for it, the significant increase in shared living over the last five years points to economic pressure being the major factor. In the 1993 report *All About Women in New Zealand*, Statistics New Zealand observed that the 1991 Census results revealed that single-parent families were more inclined than two-parent families to share accommodation and that they probably did so for economic reasons. At that time, almost one in three single-parent households headed by women with dependent children shared their accommodation with others. By contrast, only one in 12 mothers in two-parent families with dependent children shared accommodation. In 1996, more than one in two women in single-parent households lived with others and one in seven mothers in two-parent couples lived with others.<sup>12</sup>

## FAMILY INCOME

- 283 Two-parent families have far greater access to income from earnings than either couple-only families or, most notably, one-parent families. In fact, in nearly one-third (31.2 percent) of two-parent families both parents are employed full-time. In 1996 only one in five two-parent families had the father as sole breadwinner. Ten years earlier almost one-third of families had a father working full-time and a non-workforce mother.
- 284 In general, the larger share of couples' household income of between \$20 000 and \$40 000 is earned by men. This is true whether the couple is married or unmarried. For example, among both married and de facto couples with a household income of between \$20 000 and \$40 000, some 45 percent of the men earned over \$20 000 whereas only 11 percent of the women earned that amount. In both types of couple, approximately half the women earned less than \$10 000 whereas about 13 percent of the men earned that amount.
- 285 In 7 percent of two-parent families, neither parent is in the workforce. But half (50 percent) of all sole parents are not in the workforce. There has been a notable change in the work status of sole parents since 1991, when more (57 percent) were not in the workforce. The increased participation of sole parents in the workforce is largely the result of their entry to part-time work. Since 1991, the proportion of sole parents working part-time has increased from 9 percent to 13 percent.

### Family income level

*One-parent families have a median annual income of \$16 900*

*Two-parent families have a median annual income of \$50 200*

- 286 There are very clear connections between family type and family income level, which is the combined income received by all people aged 15 and over in a

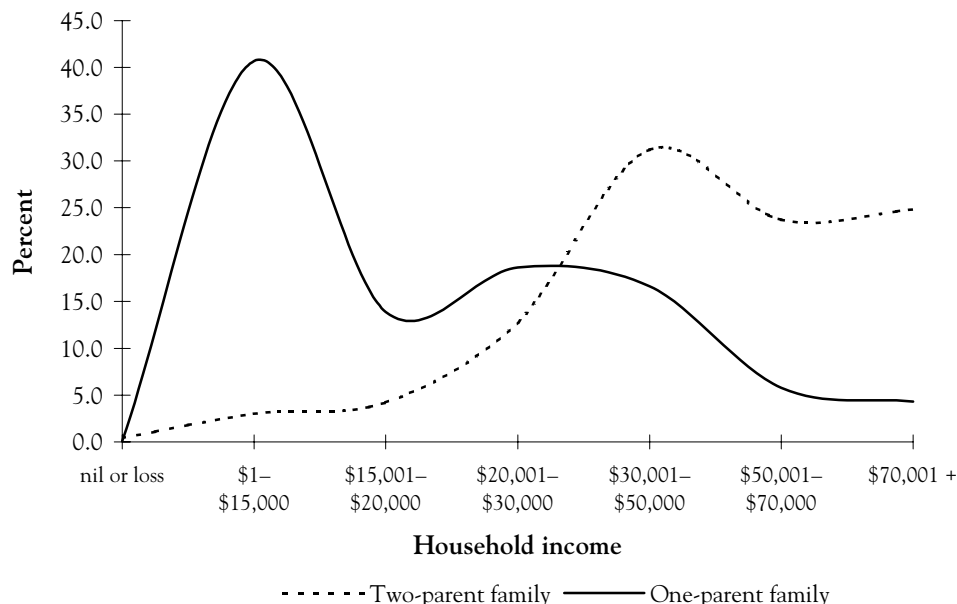
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<sup>12</sup> This includes women who live in any of the following: one-family household couple plus children plus others; one-family household one parent plus children plus others; two-family household, at least one with two parents; two-family household both with one parent; two-family household not further classifiable; three-or-more-family households with or without others.

family unit. Of the three family types, one-parent families have by far the lowest median income: \$16 900. The median income for couple-only families is more than twice that amount: \$37 700. And the median income of two-parent families is almost three times that of one-parent families: \$50 200.

- 287 The dramatic differences in income between one- and two-parent families are illustrated in greater depth by the following graph. From this it can be seen that of the households which consist of one-parent families:
- over half (55 percent) have an income under \$20 001;
  - three quarters (73 percent) have an income under \$30 001; and
  - 90 percent have an income under \$50 001.
- 288 By contrast, of the households made up of two-parent families:
- only 8 percent have an income under \$20 001;
  - 20 percent have an income under \$30 001; and
  - just over half (52 percent) have an income under \$50 001.

#### INCOME BY FAMILY TYPE 1996



- 289 As with all the nationwide figures noted to this point, a disaggregation by ethnicity reveals disparities between Pakeha and non-Pakeha. Using the ethnicity of the mother as the basis for disaggregation, it is clear that two-parent families which have an income over \$50 000 and in which the mother is Pakeha are the most highly represented in that high income group of two-parent families. Over half (52 percent) of Pakeha-mother two-parent families have an annual income of more than \$50 001, compared with 39 percent of two-parent families with a Pacific Islands mother, 37 percent of two-parent families with a Māori mother and 35 percent of two-parent families with an Asian mother.
- 290 However, family or household income is not necessarily a reliable indicator of access to money by those living in the household. Recent research has found that New Zealand women in all ethnic groups studied prioritised their children's needs over their own, that women's need to save for retirement did not have priority and that women who contribute unpaid work rather than money to



household resources can be in a weak position when deciding whose needs are to be met from these resources. In Pakeha families, it has been found the more a woman contributes to a household income, the more likely she is to have some say in household financial decisions. However, men exert various forms of direct and indirect control over money which inhibit women from spending it on themselves in areas such as health care. (*Briefing to the Incoming Government*, Ministry of Women's Affairs, 1996, 46; Taiapa, 1994; Pasikale and George, 1995; Fleming and Easting, 1994)

## VIOLENCE AGAINST WOMEN

*In the year to 30 June 1998, 91 percent of the 7195 applications for protection orders were made by women;  
91.5 percent of the applications were made against male respondents*

- 291 Recent New Zealand surveys confirm overseas research which indicates that the incidence of violence against women, especially in the home, is astonishingly high. The Statistics New Zealand *New Zealand Now: Crime Tables* reveal that during 1995 there were 16 001 incidents of domestic dispute reported and 9573 male assaults females reported. Of the total reported sexual attacks, 1155 related to sexual violation. Of these, 59.9 percent (692) occurred in the home. (*New Zealand Now: Crime Tables* 1996, 14, 17) In 1996 there were 2116 convictions for a violent sex offence (rape, unlawful sexual connection, attempted sexual violation or indecent assault). In 1997 there were 1565 convictions for those offences. (Ministry of Justice, 1998, 13)
- 292 The *New Zealand National Survey of Crime Victims* 1996, the first comprehensive survey of this type, was published during 1997. It found that the sexual victimisation of women is considerably higher than of men. Overall, 16 percent of men stated that they had experienced an act of sexual violence whereas 26 percent of women had experienced such an act. Within that overall result, 11.6 percent of women reported that someone had had, or had attempted sexual intercourse with them against their will, compared with only 1.5 percent of men. The study found that the rate of partner abuse reported by women is two to three times higher than that reported by men. It also tested levels of worry about being a victim. Over half (50.4 percent) of women compared with less than a third (30.9 percent) of men were fairly or very worried about being assaulted by a stranger. Further, 21.7 percent of women were fairly or very worried about being assaulted by someone they knew, compared with 12.5 percent of men. (Young et al, 1997, 38, 41, 118)
- 293 With regard to non-sexual assaults, the survey found that there were no statistically significant gender differences in the overall risk of being a victim, although women and men experienced different types of violence. Men had much higher incidence (number of assaults) and prevalence (proportion of the group assaulted) rates for assaults by strangers and casual acquaintances than did women. Conversely, women were much more likely than men to be assaulted by those they knew well. (Young et al, 1997, 32–33)
- 294 The *Women's Safety Survey* was also published in 1997. This survey, conducted as part of the *National Survey of Crime Victims*, explored violence against 500 women by their male partners. Among the survey's findings are that:

- 24 percent of the women with current partners and 73 percent of the women with recent partners had experienced at least one act of physical or sexual abuse by their partner;
  - 2 percent of the women with current partners and 22 percent of the women with recent partners had experienced 10 or more acts of physical or sexual abuse by their partner;
  - 1 percent of the women with current partners and 8 percent of the women with recent partners had been treated in or admitted to hospital as a result of their partner's violence; the comparable figures for Māori women were 2 percent and 19 percent;
  - 3 percent of women with current partners and 24 percent of the women with recent partners had been afraid that their partner might kill them; the comparable figures for Māori women were 5 percent and 44 percent. (Morris, A, 1997, 28, 48)
- 295 In the year to 30 June 1997, there were 7911 applications for protection orders under the Domestic Violence Act 1995, of which 91 percent were made against men respondents and 8 percent against women. (The sex of the other 1 percent of respondents is unknown.) In the year to 30 June 1998 there were 7195 applications for protection orders, of which 91.5 percent were against men respondents and 8 percent against women. Women were 91 percent of the applicants for protection order.
- 296 Crime statistics are one measure of the incidence of violence against women. The economic cost of family violence in New Zealand is another measure. In 1994, the government commissioned research which estimated the annual cost to the country of family violence for the 1993/94 year at between \$1.187 billion and \$5.302 billion. (Snively, 1994)
- 297 Men's own attitudes to violence against women also provide a useful measure of the social context for violence against women. *Hitting Home: Men Speak About Abuse of Women Partners* (research commissioned by the then Department of Justice) was released in 1995. Of the 2000 men surveyed as part of the nationally representative survey:
- 21 percent reported at least one physically abusive act towards their partner in the past year, and 35 percent at least one such act during their lifetime;
  - 70 percent said domestic violence is a major problem;
  - 87 percent knew that hitting a woman is a crime (10 percent did not know that a man hitting a woman is a crime);
  - 67 percent had personal knowledge of men hitting women – either they knew a perpetrator or victim of physical abuse, or they had witnessed physical abuse;
  - 25 percent said that physical abuse of women partners is “okay in some circumstances”;
  - 58 percent said that psychological abuse of women partners is “okay in some circumstances”. (Leibrich, Paulin and Ransom, 1995, 16–17)

## CONCLUSION

- 298 The Census and other data cited in this chapter allows a number of important conclusions to be drawn about how social and economic factors relate to women's abilities to obtain access to the justice system. Before summarising

the issues highlighted by the data, it needs to be noted that it indicates that women are differentially disadvantaged and that there are some men whose life circumstances place them in a much more disadvantaged position than that of some women. Nonetheless, the general point holds true – that there are few women with high incomes, and that in relation to the indices of access to income, employment and disability, women are worse off than men, and Māori women are the most disadvantaged. In summary:

- The different social, economic and disability status of men and women in New Zealand is likely to impact on their needs and priorities for legal services.
- Men and women have different levels of education and income, and these differences are likely to impact on the types of services they need, including legal services, and their respective abilities to pay for them.
- Different groups of women have different educational qualifications, income levels, and household and family compositions, and these differences suggest there may be differing legal services needs among these groups.
- Women, Māori and those from non-Pakeha ethnic groups are not well represented in the occupational group (legislators, administrators and managers) to which many of those in influential public and private sector positions, including those in the justice sector, belong.
- New Zealand's increasingly diverse population includes women from all ethnic groups and with differing English-language abilities who are likely to have specific legal services and legal information needs.
- Women have different caring roles from men, and those roles are likely to affect women's ability to undertake paid work and to obtain access to legal services.
- Women are likely to have significant needs for legal services associated with marriage breakdown, and Māori and Pacific Islands women may face particular barriers in having their needs met.
- Women's lives are affected by violence, but in different ways from men's, and those differences are likely to affect the legal services needs of women.
- New Zealand women mainly live in urban centres, although there are differences in the geographic distribution of groups of women by ethnicity and age which suggest legal services are needed in a diverse range of places.
- Rural women may face particular barriers in obtaining access to legal services.

299 This statistical information supports the likelihood that women's experiences with and needs of the justice system will be different from men's (just as in general the life experiences of men and women are different), and that different groups of New Zealand women will have different needs.

300 This chapter has outlined key facts of the social context for New Zealand women's lives. The next chapter outlines the facts about one part of the institutional context for the structure and delivery of legal services in New Zealand.

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## 5

# The institutional context: legal services in New Zealand

### INTRODUCTION

301 THIS CHAPTER PROVIDES a descriptive overview of the providers of legal services in New Zealand and the services they provide. In particular, it outlines:

- the legal information services provided by community groups, state agencies and the legal profession;
- the legal advice services provided by lawyers and community groups;
- the legal representation services provided by lawyers in private practice;
- the cost of lawyers' services; and
- the basic features and current use of the civil legal aid scheme.

This information, together with women's own descriptions of the barriers to their access to legal services (chapter 3), and the social factors which are part of the context for their experiences (chapter 4), provide the basis for the subsequent chapters' analysis and recommendations.

### THE LEGAL SERVICES "PYRAMID"

302 The provision of legal services in New Zealand can be depicted as a pyramid. At the base of the pyramid is a large number of state sector, private sector and not-for-profit sector agencies and organisations which provide *legal information* to the public or to sectors of the public. Legal information may be defined as general information about the law, legal services and legal processes.

303 At the middle level of the pyramid is a smaller number of providers of *legal advice*; that is, law-related information which explains how the law and legal processes apply to a person's particular situation. Legal advice may be provided either by qualified lawyers or by people who are sometimes referred to as "paralegals" – people whose training and experience in particular areas to which the law is relevant equips them to provide legal information. Lawyers in private practice are certainly the most numerous providers of legal advice, but some community organisations (including community law centres, citizens' advice bureaux and women's refuges) also play vital roles, either through the voluntary work of private lawyers and law students, through their own staff, or a combination of both means.

304 At the top of the pyramid are the providers of *legal representation* services; that is, advice to and advocacy on behalf of another person in a proceeding before

a court or tribunal in which the person is a party. Here, virtually the only providers are qualified lawyers.<sup>13</sup> The vast majority of lawyers who provide representation services to members of the public are in private practice, working in law firms or as barristers sole.

- 305 Each part of the pyramid is looked at in this chapter. The role of lawyers in private practice is considered at the top level of the pyramid (in connection with the provision of legal representation services) because women generally said that private lawyers are not among the first people they would go to for legal information and legal advice (as defined in paras 303–304 above). Relevant to that point is the research conducted during the International Year of the Family (1994) which found that most people prefer to get information from community-based services. In particular, it found that:
- 7 percent of people felt least comfortable dealing with community organisations;
  - 26 percent of people felt least comfortable dealing with professional, business or other service organisations; and
  - 67 percent of people felt least comfortable dealing with government organisations. (International Year of the Family Committee 1994, 11)

## LEGAL INFORMATION – THE BASE OF THE PYRAMID

- 306 *Women's Access to Legal Information* (NZLC MP4, 33–41) described the range of legal information services available in New Zealand. In general terms, the hundreds of organisations that play some part in serving the needs of the public for legal information can be grouped into three categories:
- generalist providers;
  - specialist providers; and
  - targeted providers.

Each category is outlined in turn.

### **Generalist providers: generalist community groups**

- 307 Making up the category of generalist providers are community groups offering general services to the public which are neither specifically focused on people's legal needs nor on people's needs in relation to a specific issue (such as family violence). Usually, generalist groups act as distribution points for information produced by others. Many also provide referrals to other service providers. The following paragraphs give a broad outline (rather than a definitive list) of the various kinds of nationally organised generalist groups, and list some of the locally organised groups.

#### *(a) Nationally organised groups*

- 308 There is a wide range of nationally organised generalist groups which provide community services relevant to such matters as health, housing, education, welfare and employment. Although the groups do not have a specific focus on legal needs, women who are connected to or know of these groups may well turn to them when faced with problems which have a legal dimension. That

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<sup>13</sup> There are some tribunals or courts which permit appearances by non-lawyers (such as employment advocates in the Employment Court) and some tribunals from which lawyers are specifically excluded (such as the Disputes Tribunal).

this occurs was evidenced by the attendance at the consultation meetings of representatives of many such groups and by their accounts of situations in which their women clients or members had experienced difficulties obtaining access to legal services.

- 309 The nationally organised groups may be categorised as follows:
- in a category of its own is the one *generalist community information service* – New Zealand Association of Citizens Advice Bureaux (CAB);
  - there is a range of *women's groups* (either for all or for particular groups of women), including Māori Women's Welfare League, National Council of Women, Pacifica, Women's Division Federated Farmers, and YWCA;
  - there are *groups which cater to women and men in communities identified by their particular needs*, such as Age Concern, Disabled Persons Assembly, REAP, IHC and Royal New Zealand Foundation for the Blind;
  - there are *groups with a church or religious base*, including Anglican Social Services, Baha'i Faith, Catholic Social Services, Office for the Advancement of Women, Presbyterian Support Services and Salvation Army; and
  - there are *groups which provide general family-based services*, including Barnardos New Zealand and Relationship Services.
- 310 Without detracting from the role of the other generalist community groups which provide legal information, it was clear that the women consulted in this study were most familiar with the information services of the CAB. For that reason, its services are described here.

#### NEW ZEALAND ASSOCIATION OF CITIZENS ADVICE BUREAUX

- 311 There are 91 citizens advice bureaux throughout the country, staffed by some 2750 volunteers and 60 paid staff, most of them part-time. The bureaux deal with over half a million client inquiries a year, 73 percent of which are made over the telephone. In 1997, CAB launched an 0800 national telephone service (which links a caller to the nearest bureau) which, between September 1997 and August 1998, received more than 36 000 calls. A significant majority (70 percent) of bureau clients are women. CAB data collated by Colmar Brunton Research shows that Māori, Pacific Islanders and Asians are well represented among bureaux users. (NZACAB 1997, 2–4; NZACAB 1998, 5–10)
- 312 The generalist nature of the CAB information services is reflected in the categories of inquiry bureaux receive. They include budgeting, hobbies, sports and leisure, health, entertainment, welfare services, practical and emergency help, and a wide range of law-related issues. Of the top 20 categories of inquiry recorded by the CAB in its 1998 annual report, at least half have some clear legal dimension. The CAB has also noted the increase in time-consuming and complex law-related inquiries, particularly in the areas of family, employment, tenancy and consumer law. (NZACAB 1997, 3; NZACAB 1998, 20)
- 313 Describing its clients' reliance on the existence of more specialised providers, the CAB 1997 annual report states:
- The information disseminated last year to bureaux from 49 government and statutory agencies and on behalf of 25 community agencies, assists our bureau workers to provide initial information for clients on an enormous range of subjects. As a generalist information service, we rely, however, on the availability of specialist agencies to provide more in-depth information and advice for our clients. (3)
- 314 About 50 of the 91 citizens advice bureaux play an active role in the middle level of the legal services pyramid by providing to members of the public free,

weekly or monthly legal advice sessions of a few hours. Those who attend the sessions will each receive between 15 and 20 minutes of initial legal advice from local lawyers who have volunteered to be on the bureaux' rosters. If further advice is needed, the lawyers can provide referrals. In addition, bureau workers who are asked for referrals will generally rely on the private lawyers in their roster "pool" either to take the clients or to provide referrals to other lawyers.

- 315 Not all bureaux have close links with local private lawyers. For example, at a meeting with bureau workers in one major provincial centre, it was said that the information on which they were making referrals was too general to meet clients' needs for lawyers who would work well with people from a minority ethnic group or with women who were in abusive relationships.

(b) *Local groups*

- 316 Examples of the wide range of generalist community groups established in response to local needs throughout New Zealand include community centres, the Family Advocacy and Information Resource Centre (FAIR), Māori women's resource centres, Pacific Islands people's resource centres, parent support groups, refugee and migrant services, welfare advocacy groups, and women's centres.

### **Generalist community groups and legal information**

- 317 *Women's Access to Legal Information* collated and analysed the tangible information resources (pamphlets, videos, booklets, books and information sheets) that are publicly available on three topics about which women commonly said they need information: custody and access, domestic violence and civil legal aid. That paper also recorded the producers and distributors of the considerable number of information resources that were found. It was apparent that generalist community groups act primarily as distributors of whatever legal information they can obtain. Even when such groups produce their own information resources to meet their clients' needs (for example, the information sheets produced by CAB and FAIR), it is likely to be a compilation of, or derived from, other legal information resources. (See NZLC MP4, 3–23)
- 318 Submissions made in response to the paper showed that some generalist community groups experience difficulties in obtaining legal information resources. A number of the groups, particularly local groups, said that they have to take the initiative in locating and acquiring information, and that if they do not know who and where the producers are (or know someone else who can tell them), then they cannot obtain it. It was evident that many groups rely on one another, and particularly on the CAB and community law centres, to find out about existing or new information resources.
- 319 There is a catalogue of legal information resources, *Rarangi Rauemi*, which is produced and updated by the Legal Services Board. It serves as a valuable resource for groups which both know of it and have the time and resources to request information from the various sources listed there. It was interesting, however, that the consultation paper, *Women's Access to Legal Information*, served as an information resource for some generalist community groups. Several who responded to it said that they had not previously known of the existence of some of the resources listed there.

## Specialist providers

- 320 Specialist providers are those who offer the public (or certain sectors of it) information about a particular type of problem or from a base of specialist knowledge. A range of community groups, state sector agencies and private sector providers make up this category.

## *Community groups*

- 321 Specialist community information services include those offered by:
- the National Collective of Independent Women's Refuges as well as by refuges not affiliated to the collective;
  - the 24 local collectives around New Zealand which are affiliated to the National Collective of Rape Crisis and Related Groups of Aotearoa – Whanau Ahuru Mowai (which provide crisis counselling, long-term counselling, support, education and training for victims and perpetrators of rape and sexual abuse);
  - the 67 Victim Support Groups (which offer 24-hour, 7-day-a-week support to victims of crime, accident and emergency, largely through the work of 1500 volunteers); and
  - some employment-related groups, such as working women's resource centres and people's resource centres.
- 322 Apart from their role as distributors of legal information produced by others, many of these groups have a role in producing information about their own specialist services. This information may be distributed by others (particularly community groups and state agencies) to whom women might go. Of the groups listed above, women at the consultation meetings were most familiar with the services provided by women's refuges. Again, without detracting from the services of other specialist community service providers, the services provided by women's refuges are described here.

## WOMEN'S REFUGES

- 323 Staffed by 159 paid and 478 unpaid workers, the National Collective of Independent Women's Refuges Incorporated (NCIWR) has 53 affiliated or associate refuges. In addition, there are a few refuges which are not affiliated to the National Collective. Refuge services are aimed at meeting all the needs of women and their children which arise from the effects of violence, including 24-hour crisis support, emergency shelter, housing, counselling, community education programmes, income support, and legal protection services. Refuges work with women in the community as well as with those who use safe house emergency accommodation. (NCIWR 1998, 16)
- 324 Most of the National Collective's 52 affiliated safe houses around New Zealand are available to any women and children who need emergency shelter. Some are for specific groups of women and their children, including nine safe houses for Māori women, two for Pacific Islands women and one for Asian women. The one safe house in New Zealand for women with disabilities is not affiliated to the National Collective. Māori women are disproportionately more likely to use refuge services than are non-Māori women. Of all the admissions to safe houses in 1998, 44 percent of the women and 51 percent of the children were Māori. (Communication with NCIWR, December 1998)



- 325 In the year ended 30 June 1998:
- the Refuge 24 hour Crisis-line received 295 692 telephone calls;
  - 3060 women and 4779 children used the safe houses of National Collective refuges;
  - 115 877 safe house beds were filled; and
  - 3897 women and 5244 children used community services provided by National Collective refuges. (NCIWR 1998, 13, 17)
- 326 Typically, refuges have very good links with lawyers in their communities who can meet the needs of their clients. As well, refuge advocates (paid and unpaid) are trained to inform women of their legal rights and to provide support throughout the process of obtaining legal protection. (Communication with NCIWR, December 1998)

### *State sector agencies*

- 327 At an overarching level, the state has general responsibility to provide legal information to the public. State obligations are discharged in varying ways by government departments, ministries and Crown-owned entities – through their policy and service-delivery roles and, increasingly, through the provision of government funding to community-based service providers. In *Women's Access to Legal Information*, an outline was provided of the work of state sector agencies, including the New Zealand Community Funding Agency, the Community Organisation Grants Scheme, the New Zealand Lottery Grants Board, the Department for Courts, the Ministry of Justice and other government agencies. (NZLC MP4, 33–36)
- 328 For present purposes, to illustrate the disparate information services offered directly to members of the public by state agencies, an outline is provided of the information activities of some of the agencies which have service delivery roles likely to be of particular relevance to women. (The agencies provided the descriptions of their activities which are presented in the following paragraphs.) It will be recalled from the discussion in chapter 3 that women did not generally identify state agencies as being places they would approach for legal information relevant to problems in their lives. It was notable, however, that Māori women spoke of Te Puni Kokiri (the Ministry of Māori Development), and Pacific Islands women spoke of the Ministry of Pacific Island Affairs, as the places in government they would most likely approach for information on a variety of topics.

### COURTS

- 329 The Department for Courts has communication advisers for each of its business units – Courts, Collections, Māori Land Court, Waitangi Tribunal, and Corporate. Each has responsibility for developing communications with its stakeholders. This is done in a variety of ways. One of the primary means is the supply of written information on a wide range of topics, distributed through the courts and local agencies such as citizens advice bureaux. At an operational level, legal information pamphlets are often held in stands at the courts or are provided on request by court staff. Many of the department's printed information resources about the Family Court, domestic violence and legal aid are available in the English, Māori, Samoan and Tongan languages. The department also works with other agencies and organisations to maximise educational and information resources wherever possible.

- 330 Some courts have information staff or officers who provide general information to customers. There are 21 victim advisors working in 14 District and High Court centres to provide victims of offences with information about the justice system, the progress of their cases, how victims can participate in the court process, and other relevant services. At 24 of the 25 permanent Family Courts around the country, there is a Family Court co-ordinator whose role includes arranging counselling for Family Court customers and providing general information about the court. Co-ordinators are also responsible for responding to requests for information about court matters and for referring customers on to other organisations or services where necessary, including community law centres and Domestic Violence Act programmes. As well, they can provide clients with a list of lawyers specialising in family law. Co-ordinators also provide more general community education by organising and delivering talks about the court to community groups.

#### POLICE

- 331 The New Zealand Police tend to provide general legal information and education rather than specific advice. For example, they have a website; provide ongoing education campaigns such as Safer Communities Together and youth education services; and participate in the television programme Crime Scene. When members of the public request advice on a particular problem, the police provide pamphlets produced by other government agencies, and refer the person on to other agencies. Much of the information produced by the police, often in conjunction with others, is targeted at particular areas of crime. The Family Violence Project, for example, which is overseen by a co-ordinator, includes a public awareness campaign about family violence.

#### CHILDREN AND YOUNG PERSONS SERVICE

- 332 As a result of recent changes in the Department of Social Welfare, the Children and Young Persons Service (CYPS) is now merged in the new Children, Young Persons and Their Families Agency. Before the changes, CYPS provided information and referred people on to other agencies on a case-by-case basis. Mostly, information was provided by CYPS social workers in the course of their contact with the Service's clients. In addition, CYPS provided general information about its services through posters, pamphlets and videos. It also ran broader public awareness campaigns in areas related to its work: for example, the campaign encouraging parents not to hit their children. It is expected that the new Agency will provide a similar information service.

#### TE PUNI KOKIRI

- 333 Te Puni Kokiri (the Ministry of Māori Development) responds to requests for information from members of the public on a case-by-case basis. It publishes regular newsletters and papers which provide information on current issues, some of which relate to the law.

#### MINISTRY OF PACIFIC ISLAND AFFAIRS

- 334 The Ministry of Pacific Island Affairs publishes a newsletter five times a year and provides information to members of the public as required. It has established a database of contacts, including Pacific Islands community groups and lawyers, so that callers may be referred to them.

#### OTHER INFORMATION SOURCES

- 335 Of the other state sector agencies, the Ministry of Consumer Affairs, which ran a toll-free Consumer Advice Service until 1997, now provides consumer educational information targeting low-income Māori and Pacific Islands' consumers, and provides resources to citizens advice bureaux, Budget Advisory Services and community law centres to support their provision of consumer advice to the general public. The Industrial Relations Service within the Department of Labour warrants mention for its 0800 telephone information service which received over 170 000 calls in the year to 30 June 1998. Where there is a complaint that minimum employment conditions have been breached, labour inspectors may investigate the matter.
- 336 Finally, the public education role of some Crown-owned entities, especially the Human Rights Commission, must be noted. The Commission provides information on human rights issues, and can provide education and training resources and other materials in schools, workplaces or community groups. One of its recent initiatives has been the development and delivery of training in human rights law to groups of people with disabilities so that they can act as resource people in their communities. In addition, the Commission is authorised to investigate complaints of discrimination or other breaches of human rights legislation.

#### *Private sector organisations*

- 337 Women rarely mentioned private sector people or organisations as being among the places they had gone to, or would go to first, for legal information. A very small number of women said that they had contacted, or knew that they could contact, a district law society to get a referral to a lawyer. Community groups were more likely to have used a law society to obtain legal information; particularly the New Zealand Law Society's 14 Law Awareness pamphlets, which were well known among nationally organised community groups. Not all groups were aware of the law societies' other information resources, however. For example, three nationally organised generalist community providers said in their submissions in response to *Women's Access to Legal Advice and Representation* that they did not know that the Wellington and Auckland District Law Societies produce directories of legal services providers.

#### **Targeted providers**

- 338 The third category of legal information providers are those which specifically target their services to meeting legal information needs. Community law centres, which provide free legal services to the public, are the only groups in this category. Most of the law centres provide not only legal information (as defined in para 302), but also legal advice (as defined in para 303). Accordingly, they have roles to play in both of the lower levels of the legal services "pyramid". Far less commonly, law centres provide legal representation services.

#### *Community law centres*

- 339 In February 1992, when the Legal Services Act 1991 took effect, there were 11 community law centres in New Zealand, nine of which received funding from the Legal Services Board in its first year of operation. Now there are 19 law

centres funded by the board. Each centre is focused on the needs of its own community and so provides, within the limits of its budget and its access to unpaid assistance from local lawyers and other volunteers, a range of legal services targeted at those needs. Most centres have an exclusively local focus, but two have a national focus as well – on the legal needs of young New Zealanders and of Māori respectively.

- 340 With five law centres in the greater Auckland area, three in the Wellington area, and two each in Christchurch and Dunedin, the remaining seven centres are thinly spread throughout the country. They are to be found in Blenheim, Hamilton, Hastings, Invercargill, Masterton, Rotorua and Wanganui. For the year ended June 30 1998, the Legal Services Board allocated \$3.575m from the Special Fund (see further, chapter 6, paras 407–408) to fund the core activities of the 19 community law centres. The law centre budget for the 1998/99 year is \$4.5m. It is likely that up to four new centres will be established before 30 June 1999. (Legal Services Board Annual Report 1998, 11, 16)
- 341 All of New Zealand's community law centres are situated in urban areas. Typically, their premises are located near the centre of town and are decorated and appointed to be as welcoming as possible to the client groups in the communities they serve. In addition to the legal information and further services provided by the centres' own staff, the great majority of law centres have very good links with local lawyers and, primarily, provide legal advice to members of the public through a roster system by which lawyers (and law students) come to the centre at appointed times each week to provide free, initial, 15 to 20-minute advice sessions. The centres' networks with local lawyers enable them to refer clients on for legal services that they cannot themselves provide because of their operating conditions or staff resources.
- 342 Although generalisations about the work of law centres are difficult to make because each law centre exists to serve its own community's unmet legal needs, all have a strong focus on providing legal information to their communities. They also foster links with other community service providers so that appropriate referrals can be made. Their different levels of staff and financial resources, as well as their different stages of development since establishment, mean that there are substantial variations in the level of services provided.
- 343 Most centres have both a direct role (through work with individual clients) and an indirect role (through education and training) in meeting legal information needs in their communities. Some centres are particularly active in paralegal training; that is, training other community workers to provide legal information to their own clients.<sup>14</sup> Some have significant "outreach" capacity: travelling or offering an 0800 telephone service to people outside the immediate area. Some have a specific focus on Māori communities. Most have strong links with other community-based and state agency providers of social services.
- 344 Some law centres employ only paralegal staff, but most also employ at least one lawyer to provide legal advice and further services to clients. The New Zealand Law Society database shows that, late in 1998, there were 27 lawyers

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<sup>14</sup> For example, the Wellington South Community Law Centre is providing paralegal training and a back-up reference manual for leaders in the various ethnic communities in Wellington, so that they may be resource people for their communities. Topics covered include legal aid, the New Zealand legal system, traffic, domestic violence and employment.

employed by community law centres around the country. Some of those lawyers, along with the centres' paralegal staff, provide advocacy or support services in a limited range of legal proceedings, particularly tribunal proceedings. Three of the 19 law centres have operating conditions, approved by the local district law society, which enable them to undertake certain types of legal aid work for their clients. Only one centre, in Mangere, where there are no local lawyers, provides a comprehensive range of legal services to members of its community.

- 345 There is a variety of reasons why community law centres have not been established in more areas of New Zealand. One reason is that the thin geographic spread of the population in some parts of the country does not necessarily make the law centre, with its permanent premises and office hours (plus weekend and evening sessions), the most appropriate model for meeting people's needs for legal services. In recognition of this, in 1998 the Legal Services Board established a nine-month pilot project in Te Tai Tokerau by which six trained outreach community workers (paralegals) are rostered to attend at various community premises, including marae, throughout the Far North on a weekly (or in some cases monthly) basis. Local lawyers are rostered to receive 0800 telephone calls from these workers and their clients, and are also available to travel, as required, to meet with clients and provide one hour's legal advice free of charge. The lawyers are paid at legal aid rates, and other fixed fees are set for responding to 0800 calls and for travel. The outreach workers are paid a fixed hourly rate of \$25. In October 1998, a similar project got underway in Nelson.

## LEGAL ADVICE – THE MIDDLE LEVEL OF THE PYRAMID

- 346 Although lawyers in private practice are by far the most numerous providers of legal advice in New Zealand, their profile and the nature of their services are considered in the next section, in connection with legal representation services, where their predominance is even greater. Here, the focus is on those who provide legal advice to the public on other than commercial terms or the terms of the legal aid schemes.
- 347 The two main providers of legal advice outside the private lawyers' market are citizens advice bureaux and community law centres. As has already been outlined, the bureaux' advice sessions depend on the volunteer services of local lawyers. The law centres' advice sessions, conducted by volunteer lawyers and law students, are supplemented, to varying degrees, by the centres' own legal and paralegal staff.
- 348 In some parts of the country, private lawyers are using different methods of providing free legal advice on a regular basis to members of the public. For example, in response to local demand, especially from Pacific Islands women, an Otahuhu firm of women lawyers allocates one lawyer for half a day each week to provide free advice at the firm. Also in Auckland, a medium-sized firm provides a free on-campus service to students and staff of Auckland University. For two hours each afternoon during term time, a solicitor is available to give 20-minute consultations, and students receive a 15 percent discount on further services. In Lower Hutt, a local firm provides free family law advice for two hours each Wednesday. Also in Lower Hutt, two women lawyers provide free advice at the local women's centre on one Saturday morning each month.

- 349 In the wider Hutt Valley area, a recent initiative of the Hutt City Council's Community Services Division has seen the publication of a 20 page *Directory of Legal Advice Services in the Hutt Valley* (1998), the costs of which were partly funded by the Legal Services Board. That directory reveals that 17 local firms provide free telephone legal advice.
- 350 In addition, some law firms provide new clients with a free or discounted first appointment, although this practice seems to be extremely variable and little publicised. For example, of the more than 11 pages of entries in the 1998 Wellington Yellow Pages for "Lawyers" and "Barristers and Solicitors", only five law firms mention that the first interview will be provided free or at low cost (\$10). In the late 1970s and early 1980s, the New Zealand Law Society instigated, and publicised, a LawHelp scheme under which participating law firms provided a new client's first appointment for free or for \$10. In the questionnaire circulated by the project team to lawyers around the country, it was asked whether they participated in LawHelp. Fifty of the 203 lawyers who responded said that they did, and a further eight lawyers said they provided free or discounted first interviews but did not identify that as a LawHelp service. Some lawyers who completed the questionnaire said that they did not know what LawHelp was. Others who said that they did offer the service commented that it was not well used. Only one said the firm advertised its free first appointment service. Most said that clients learned about it from local community law centre or citizens advice bureau workers.
- 351 Further, law societies run occasional public relations and educational campaigns (for example, the New Zealand Law Society's Law Week in 1992, the Wellington District Law Society's Mediation Week in 1996, the Auckland District Law Society's Mediation Month in 1998) in which some members of the public will be able to obtain free legal advice.
- 352 All the services mentioned above can be advertised to potential clients, even if some are not well publicised. What cannot be advertised, because it is a matter for individual law firms', and lawyers', discretion, is that lawyers will and do provide free or discounted services to particular clients or in particular circumstances. The extent of this practice is difficult to gauge. Lawyers' answers to the project's questionnaire indicate that many provide some free services, especially when giving general information or "one-off" advice on the telephone or to a person who does not return for further help. They also indicate that some lawyers may not charge for all the time they spend on clients' matters, especially when the work is for legal aid clients or others who are not well off, or requires research on unfamiliar areas of law.

## LEGAL REPRESENTATION – THE TOP LEVEL OF THE PYRAMID

### **Lawyers in private practice**

- 353 The most comprehensive range of legal services offered to New Zealanders are those provided by lawyers in private practice, who are paid either by their clients directly or through criminal or civil legal aid. Their services range from advice to legal representation and a wide range of transactional services (of which property leasing and conveyancing are common examples).

- 354 The Law Practitioners Act 1982 (s 56) provides that, in order to act as a barrister or solicitor, a person must be qualified to be, and be, admitted as a barrister and solicitor of the High Court and hold a current practising certificate issued by a district law society. The result of this regulatory scheme is that there are many circumstances in which members of the public who wish to invoke the justice system's processes must obtain the services of a qualified lawyer. For example, only a qualified lawyer can represent a party in proceedings in most courts, including the Family Court.

### *The cost of lawyers' services*

- 355 There is no single definitive source for the cost of all lawyers' services in New Zealand. However, an indication of lawyers' costs can be gleaned from the *Profession Report 1998* (Management Research Centre, 1998). Based on responses from 165 self-selected respondents to a Practice Survey, that report shows that the median rate charged in 1998 for principals' time was \$196 an hour, and for employed solicitors' time \$137 an hour. These rates included an allowance for business expenses like salaries, wages and other overheads.
- 356 As noted in chapter 4, the 1996 Census shows that 58 percent of New Zealanders (including 70 percent of New Zealand women and 45 percent of men) have personal incomes of less than \$20 000 a year. An annual income of \$20 000 provides a gross weekly income of \$385 – an amount which would buy two hours of a principal's time.
- 357 The main response to the high cost of access to civil justice is the state-funded legal aid scheme, which pays all or part of the costs (lawyers' fees and associated costs) incurred in civil proceedings by low-income earners who are eligible for aid. That scheme is outlined at paras 387–395. The responses to the cost barrier that are made by community-based legal service providers, individual members of the legal profession and law firms have already been outlined.

### *Lawyers' services: a profile of providers*

- 358 As outlined in chapter 3, the women consulted in this study saw lawyers as an elite group of people who are highly educated, highly paid, mainly male, overwhelmingly Pakeha and largely city-dwelling. The following statistical information confirms that general image.

#### LAWYERS ARE HIGHLY EDUCATED

- 359 Compared to the population at large, lawyers are highly educated. Only 8.6 percent of New Zealand men and 5.9 percent of women have a tertiary qualification of any kind, and every New Zealand lawyer is in that group. Further, law is a specialised discipline, with some status attached to it. About 1 in 200 New Zealand adults (0.5 percent) has completed a law degree, and this includes all those who are now retired or who have never worked as lawyers. (Statistics NZ, 1996 Census of Population and Dwellings)

#### HIGHLY PAID

- 360 Lawyers, generally, are a well-paid group. The New Zealand Law Society *Poll of Lawyers* shows that, in 1996, newly employed lawyers (with up to two years' work experience) received an average income of \$31 000. At that point in his

or her legal career then, the average lawyer, who is likely to be about 25 years old, is already in the top 30 percent of New Zealand income earners. The average income of an employed lawyer with between six and 10 years experience was \$56 200. For principals, those with up to five years' experience had an average income of \$46 000. Thereafter, principals' average incomes exceeded \$100 000, peaking at an average of \$147 900 for principals with between 16 and 20 years' experience. (*Poll of Lawyers*, 184)

#### MAINLY MALE

- 361 New Zealand Law Society figures as at August 1998 show that just under one-third of the 7757 lawyers with current practising certificates are women. However, women make up a slightly smaller proportion (29.5 percent) of lawyers working in law firms and a smaller proportion again (27 percent) of those working as barristers sole. This is because women lawyers are over-represented in government and other employment arenas outside private legal practice. In terms of numbers, there are:
- 5693 lawyers working in law firms (1681 women and 4012 men);
  - 746 barristers sole (200 women and 546 men); and
  - 1318 lawyers in "other" occupations (667 women and 651 men).

#### OVERWHELMINGLY PAKEHA

- 362 At the time the New Zealand Law Society last sought information about the ethnicity of members, there were 7585 lawyers with current practising certificates. Of those, 1128 (15 percent) declined to provide information about their ethnicity. Of the remaining group of 6457 lawyers:
- 5608 (87 percent) identified themselves as Pakeha;
  - 199 (3 percent) identified as "other European";
  - 119 (1.8 percent) identified as Māori ;
  - 46 (0.7 percent) identified as Pacific Islanders;
  - 194 (3 percent) identified as Asian;
  - 291 (4.5 percent) identified themselves in some other way, mostly in terms which indicate some mixture of ethnic origins.

#### CITY-DWELLING

- 363 New Zealand Law Society figures, and those from the 1996 Census, show that the average lawyer to population ratio for the whole country is very close to 1:500. There are, however, substantial disparities in the ratios in different parts of the country. The Census shows that, of the 74 territorial districts in New Zealand, only eight have lawyer-to-population ratios which are more favourable than the national average of 1:500. All eight are cities: Wellington City, Auckland City, North Shore City, Hamilton City, Lower Hutt City, Christchurch City, Dunedin City and Invercargill City. With one lawyer for every 119 residents, Wellington City has the highest proportion of lawyers in the population. Next is Auckland City, with one lawyer for every 188 residents. These figures are not truly comparable, however, as a higher proportion of lawyers in Wellington than elsewhere are working in government rather than private practice.
- 364 At the other end of the scale, there are 42 territorial districts in New Zealand which have, at most, one lawyer for every 1000 residents. Thirteen of those districts have, at most, one lawyer for every 2000 residents. The eight districts



with the lowest proportion of lawyers in their populations are the Districts of Waimate, Hauraki, Wairoa, Southland, Kawerau, Hurunui, Mackenzie and Chatham Islands.<sup>15</sup>

*Lawyers' service: public views and lawyers' views*

- 365 In 1996, the New Zealand Law Society commissioned three polls (of lawyers, the public, and law firms) which asked for responses to a list of statements about lawyers' values, skills, knowledge and other matters relevant to the quality of the services they provide. The public poll, of 500 randomly chosen adults (255 women and 245 men) throughout the country, was conducted by telephone in English. The polls of lawyers and law firms were conducted by written questionnaire. The profile of the 670 lawyers who responded to the Poll of Lawyers, in terms of their employment status and their sex, provides a reasonable match with the profile of the profession as a whole. The responses from the 208 firms which responded to the Poll of Law Firms were weighted to achieve a match with the profile of the 1285 various sized firms nation-wide. (*Poll Summary*, 73–81)
- 366 The poll results were released in 1997. Overall, they showed that lawyers were more pessimistic about the public's view of the legal profession generally than was justified. They also showed that the members of the public who had ever consulted lawyers, (376 of the 500 people polled (75 percent)), consistently rated their own lawyers' performance more highly than all 500 rated the performance of the legal profession generally. (*Poll Summary*, 13–20)
- 367 The polls reveal, however, that in a number of important matters relating to the accessibility and quality of the legal profession's services, public confidence is not high. For example, some of the matters which only 35 percent to 55 percent of the public made responses favourable to the profession related to lawyers:
- explaining things well enough (55 percent);
  - being concerned about meeting the community's needs for legal services (54 percent);
  - giving good value for money (41 percent);
  - always being as knowledgeable as they should be (38 percent); and
  - taking a long time to do things (36 percent). (*Poll of the Public*, 13)
- 368 The matter on which the public gave the least favourable response related to the cost of lawyers' services. Only 8 percent of the public thought that lawyers are not expensive to use. (*Poll of the Public*, 13)
- 369 The polls also show that lawyers' own views of the quality of service provided by the profession (as opposed to their estimation of the public's view of the profession's service quality) are, in some respects, particularly negative. For example, 50 percent or fewer lawyers gave responses favourable to the legal profession with regard to lawyers:
- being approachable (50 percent);
  - being proactive on their clients' behalf (42 percent);

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<sup>15</sup> The Census figures for lawyers per population are randomly rounded to multiples of three with the result that although the last four districts mentioned are recorded as having no lawyers at all in their population, each may have up to three lawyers.

- explaining things well enough (36 percent);
  - being concerned about meeting the community's needs for legal services (34 percent);
  - putting clients off to someone more junior and less experienced (31 percent);
  - taking a long time to do things (28 percent);
  - keeping their clients well informed on legal matters of importance or interest (25 percent);
  - being expensive to use (18 percent);
  - always being as knowledgeable as they should be (9 percent). (*Poll of Lawyers*, 62–63)
- 370 Lawyers had a more favourable view of the profession than did members of the public on six matters, namely that lawyers:
- are professional (8 percent of lawyers agreed, 87 percent of the public agreed);
  - are interested in getting a good result for their client (90 percent of lawyers agreed, 83 percent of the public agreed);
  - can be trusted with your money (75 percent of lawyers agreed, 48 percent of the public agreed);
  - compete vigorously with one another (66 percent of lawyers agreed, 45 percent of the public agreed);
  - give good value for money (61 percent of lawyers agreed, 41 percent of the public agreed);
  - are expensive to use (18 percent of lawyers disagreed, 8 percent of the public disagreed). (*Poll of Lawyers*, 61, 63)
- 371 Further, while members of the public who had consulted lawyers had much more favourable views of their own lawyers than the entire group had of the profession generally, they were least satisfied with their own lawyers (as were members of the public generally, in relation to the profession as a whole) in relation to:
- the cost of the lawyers' services (only 43 percent thought their own lawyer was not expensive to use while 74 percent thought their lawyer gave good value for money);
  - the time their lawyers took to do things (75 percent thought their lawyer did not take a long time to do things); and
  - the sufficiency of their lawyers' explanations of things the clients wanted to know (79 percent were satisfied that their lawyers had explained things to them well enough). (*Poll of the Public*, 81)
- 372 Another section of the *Poll of the Public* asked if there had ever been a time when any of the 500 respondents thought they could have used a lawyer's help but did not obtain it. Just under a third of the group (32 percent), or 160 people, said there had been such a time. When they were asked why they had not obtained a lawyer's help, 56 percent said that that one reason was their perception of the cost of doing so. Women were considerably more likely than men to identify this as a reason for not having obtained a lawyer's help, with 66 percent of the women in the group, compared to 49 percent of the men, mentioning the cost of lawyers' services as a reason. The next most commonly mentioned factor, which 26 percent of the respondents identified, was that they had preferred or managed to sort their situations out themselves. (*Poll of the Public*, 61–63)

### *Lawyers' services: specialist providers – family lawyers*

- 373 Women's main concerns about their access to justice arose in connection with family problems and, less commonly, criminal matters in which they or, more usually, male family members were involved. (In 1997, women made up 15.9 percent of all defendants in criminal proceedings in New Zealand. (Ministry of Justice, *Conviction and Sentencing of Offenders in New Zealand: 1988 to 1997*)) Not all lawyers provide advice and representation services relevant to family and criminal matters. This reduces the pool of lawyers available to assist people who are involved in these kinds of proceedings. Also, not all family and criminal lawyers are willing to undertake legal aid work, which further limits the pool of lawyers available to legally aided clients.
- 374 The recent establishment of the Family Law Section of the New Zealand Law Society has provided the opportunity to collect some information about lawyers who do family law work. The Society's records show that, as at May 1997, when 6300 lawyers responded to a request for information about their areas of practice, nearly 40 percent (or 2586 lawyers: 1682 men and 927 women) said that they did some family law work. The majority of those lawyers (1584 lawyers: 1226 men and 361 women) said they spent between 1 percent and 25 percent of their time on family law work. The other 1002 lawyers (456 men and 566 women) spent more than 25 percent of their time on family work. Accordingly, the figures indicate that, proportionate to their numbers in the legal profession, women are over-represented among lawyers who do family work and, particularly, among lawyers who spend at least one quarter of their time on family work.
- 375 An indication of the workload of New Zealand's family lawyers can be gleaned from the number of new applications made to the Family Court each year. In the year to 30 June 1998, the number of applications filed in each of the categories recorded by the court was as follows:

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TABLE 1: Family Court Applications 1997/98

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substantive applications (custody and access)	19 906
care and protection (Children, Young Persons, and Their Families Act)	1 591
protection orders (Domestic Violence Act)	7 242
dissolutions of marriage	10 036
Total	38 775

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Annual Report: Department for Courts for year ended 30 June 1998, 71

A further 3779 applications were filed under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

### **Civil legal aid: basic features of the scheme**

- 376 The civil legal aid scheme operates at the top level of the legal services pyramid. The remaining sections of this chapter summarise the basic features of the civil legal aid scheme, outline the proceedings for which it is used, profile civil legal aid lawyers, and profile those who use it.

### *A judicare model*

- 377 New Zealand's legal aid schemes are known as "judicare" schemes. They create a partnership between the state and the legal profession. The state's role is to fund the lawyers' and other costs of the proceedings that are pursued or defended by citizens who are eligible for aid. The legal profession's role is to provide, at a discounted price, the legal services that those people need. In civil proceedings, eligibility is determined according to criteria relating to applicants' financial situation, the type of proceedings in which they are involved and the merits of their being involved in those proceedings.
- 378 The judicare model of delivering legal aid was described in the Department of Justice's 1981 research and discussion paper on access to the law as "but a small extension of the existing services provided by private practice". (*Access to the Law*, 1981, 157) The paper was critical of the capacity of the judicare model to respond to the range of barriers which low-income New Zealanders may face in attempting to obtain legal services, especially the barriers posed by poor knowledge of the justice system. More graphically, a 1995 Canadian report states:
- Under the judicare model, private lawyers who handle a few legal aid cases along with their better-paying ones stay in their offices in the business section of town and passively wait for legal aid clients to come to them. (National Council of Welfare, 1995, 29)
- 379 In other jurisdictions comparable to our own – for example, in Australia and Canada – the judicare method of delivering legal aid services is supplemented by another method of delivery: the "staff model", under which lawyers employed directly by the legal aid scheme provide legally aided services to the public. New Zealand makes no use of this method of delivery. Another supplementary method of delivering legal aid services is the "community clinic model", which uses staff lawyers who work for independent neighbourhood law offices (or community law centres) run by boards made up of legal professionals and members of the community. In New Zealand, some use is made of this last model, with three of the 19 community law centres being able, under their conditions of operation, to provide a limited range of legally-aided services to their clients.

### *Demand-driven expenditure*

- 380 The criteria which govern eligibility for civil legal aid (see chapter 7, paras 479–487) are such that there is no ceiling on the state's responsibility to pay for the lawyers' services and other services provided under the scheme. Instead, the annual amount for which the state is liable depends on a complex mix of factors which drive the demand for legal aid, including New Zealanders' income levels and their ability and propensity to litigate. Of particular importance in the mix is the condition of the justice system and of the law which is applied there, and the impact of this upon low-income people's need or ability to resort to the courts and tribunals for proceedings in which aid is available. For example, before 1981, it was a requirement of the Department of Social Welfare that a person wishing to establish entitlement to a domestic purposes benefit bring maintenance proceedings against the other parent, even if the parents were not in dispute. In the first five months' operation of the liable parent contribution scheme, which largely replaced the need for litigation with an

administrative procedure, the number of applications for legal aid in “domestic proceedings” fell by 37 percent and the total number of applications fell by 17 percent. Two years later, the liable parent scheme was credited with causing a major part of the 15 percent decline in the total number of applications for civil legal aid between 1982 and 1983. (*Access to the Law, Final Report*, 1983, 47)

- 381 As a result of the demand-driven nature of legal aid expenditure, the state guarantees to fund its costs whatever they may be, although naturally it needs to predict and budget for them, and be satisfied that the money is well spent. The Justice and Law Reform Committee of Parliament provided a helpful explanation of, and comment upon, this feature of legal aid in its 1996/97 Financial Review of the Legal Services Board:

Entitlement to civil and criminal legal aid is guaranteed under sections 4 and 19 of the Legal Services Act 1991. The Board is in a relatively unusual situation in that if an application for aid meets the criteria of the Legal Services Act, the district subcommittee is obliged to grant the aid. Given that aid is demand-driven, the Board has only a limited ability to control actual expenditure. The Act prohibits the Board from interfering with or restricting eligibility and grant decisions made by Registrars and subcommittees.

...

We note that expenditure on legal aid could be seen as “inevitable expenditure” in order to provide quality access to representation and knowledge which empowers people who would otherwise not receive them. (1996/97 Review, 3)

- 382 In the year to 30 June 1998, the total expenditure on civil legal aid was \$40.32m. That amount excludes the Legal Services Board’s liability for grants made but not invoiced before 30 June 1998. (Communication with Legal Services Board, February, 1999)

### *Recovery of costs*

- 383 Another general feature of the civil legal aid scheme is that aid is made available on the terms that recipients who can repay some or all of the costs of the proceedings which are brought or defended on legal aid will be required to do so. Although the Legal Aid Act 1969 contained contribution and recovery mechanisms, it was widely publicised both before and after the Legal Services Act 1991 came into force that a more rigorous approach to recovery from aid recipients would be pursued under the new Act. Such publicity, perhaps coupled with the 1991 Act’s more extensive means of recovering costs, has led to the current civil legal aid scheme being widely known as one which makes aid available as “a loan not a grant”. In fact, recoveries from civil legal aid recipients accounted for 9 percent of the total annual costs of the civil scheme in the 1997/98 year. (Recoveries made on criminal legal aid that year accounted for some 0.33 percent of its costs.)

### *No aid for advice*

- 384 It is widely accepted among legal services providers that early advice can provide the “stitch in time” which will prevent some problems from escalating to the point where further intervention becomes inevitable. In light of women’s economic circumstances (see chapter 4), the availability of free or low-cost services is of particular relevance. However, civil legal aid is not available for legal advice which is unconnected with court or tribunal proceedings. Instead,

it is available to people who meet financial and other criteria (see chapter 7) to sponsor the cost of representation provided by qualified lawyers. Representation by a solicitor and, if necessary, a barrister (counsel) is defined to include:

all assistance usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. (Legal Services Act 1991, s 20)

- 385 Legal advice appears to have been excluded from the civil legal aid scheme in the original 1969 Legal Aid Act for fear of the costs that might otherwise accrue to the state. The Legal Services Act 1991 established the means to fill part of the gap in the civil legal aid scheme's coverage of legal advice. It did this by providing for community law centres, law-related public education, and research and pilot schemes related to legal services to be funded out of the New Zealand Law Society's Special Fund, which is made up of the interest paid by banks on monies held in solicitors' trust fund accounts. (See further chapter 6, paras 407 and 408)

### Civil legal aid lawyers

- 386 New Zealanders who are eligible for civil legal aid must find their own lawyers who are willing to act on legal aid. There is no obligation on lawyers to undertake civil legal aid work. The Ethics Committee of the New Zealand Law Society has advised lawyers that, if three conditions are met, they should apply for legal aid for any client who may be eligible for it. The conditions are:
- if the lawyers are prepared to work on legal aid rates;
  - if the job is within their competence; and
  - if they have the time to do the work. (*LawTalk* 483, 18 August 1997, 8)

The result is that lawyers who are not prepared to work on legal aid rates are not obliged to accept clients who may be eligible for legal aid.

- 387 In the year to 30 June 1998, 26 113 grants of civil legal aid were made – an increase of 2000 on the previous year.<sup>16</sup> Recent data from the Legal Services Board shows that some 1400 lawyers around New Zealand act for clients on legal aid. It is not known what proportion of those lawyers do civil legal aid work.
- 388 Further information about legal aid lawyers is provided by the 1997 New Zealand Law Society polls. The *Poll of Lawyers* shows that 29 percent of the 670 lawyers polled spent time on civil legal aid work each week. The average amount of time each of them spent was eight hours per week. (*Poll of Lawyers*, 34) The *Poll of Law Firms* shows further that of the 208 law firms polled:
- 28 percent would take any civil legal aid cases that came their way;
  - 4 percent (mainly large firms of 11 or more partners and sole practitioners) would not do any civil legal aid work at all; and
  - over half of the firms did not have a policy on the matter. (33)
- That poll also indicates that approximately 18 percent of law firms' income from civil legal work is covered by legal aid. (30)

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<sup>16</sup> The Report of the Legal Services Board for the year ended 30 June 1998 suggests a lower number of applications were granted. The board advises that 26 113 is the correct number of civil legal aid applications granted during the 1997/98 year.

- 389 The Legal Services Board's 1997 research, *Legal Aid Remuneration: Practitioners' Views* (Maxwell, Shepherd and Morris), enlarges the available information about the number and profile of legal aid lawyers in New Zealand. It found that, on average, there were 1.2 legal aid lawyers in each of the 510 New Zealand law firms randomly selected from the Legal Services Board's "national vendor list" – the list the board keeps of all firms that have provided legal aid services. It found further that of the 439 lawyers surveyed in that research (82 percent of whom practised in civil matters):
- 63 percent were men;
  - 37 percent were women;
  - 89 percent were Pakeha, with 3 percent Māori, 3 percent Pacific Islanders and 5 percent "other" ethnicities;
  - the median age was 40 years, with 21 percent between the ages of 20 and 29 years;
  - 58 percent of the junior and intermediate level lawyers were women (compared with 42 percent of the men) and 28 percent of the senior lawyers were women (compared with 72 percent of the men).<sup>17</sup> (Maxwell, Shepherd and Morris 1997, 13, 15, 64)

## Civil legal aid: use of the scheme

### *Rising number of grants*

- 390 Every year since the Legal Services Act came into force, there has been an increase in the number of grants made. Table 2 shows the number and average size of civil legal aid grants made in the last five years. As can be seen, until 1997, when there was also a substantial increase in the number of grants, the average amount of the grants was remarkably consistent.

TABLE 2: Number and Average Amount of Civil Legal Aid Grants 1994–1998

	1994	1995	1996	1997	1998
Applications granted	18 234	19 294	19 619	23 920	26 113
Average remuneration	\$1663	\$1523	\$1590	\$1732	\$1935

Source: Legal Services Board Annual Reports and updated 1998 records

### *Family and mental health proceedings dominate*

- 391 Research conducted for the Legal Services Board (on a sample of 2316 completed civil legal aid files opened in 1994 and 1995) shows that 86 percent of the proceedings were heard in the Family or District Courts, 12 percent in tribunals and 2 percent in the High Court. (AC Nielsen MRL, 48) Table 3 shows the types of proceedings for which aid was used and the percentage of the total sample represented by each type of proceeding.

<sup>17</sup> At that time, a junior lawyer was one with up to two years' litigation experience, an intermediate lawyer was one with between two and five full years' litigation experience and a senior lawyer was one with at least five full years' litigation experience.

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TABLE 3: Proportion and Types of Civil Proceedings Brought or Defended on Legal Aid

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<b>Family</b>	
Custody and access	30 percent
Domestic Protection Act	7 percent
Guardianship/Paternity/Adoption	6 percent
Matrimonial property	3 percent
Children, Young Persons, and Their Families Act	1 percent
Combination	31 percent
Other family matters	1 percent
<b>Other Civil</b>	
Mental health	12 percent
Immigration	2 percent
Employment	1 percent
Combination	1 percent
Other civil matter <sup>18</sup>	4 percent
Not specified	1 percent

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(AC Nielsen, MRL, 48)

- 392 While table 3 shows that family proceedings were 79 percent of the total 1994/95 research sample, there has been an increase in the number of legal aid grants for protection orders since the Domestic Violence Act 1995 came into force. Currently, 85 percent of civil legal aid expenditure is for Family Court work. (*LawTalk* 501, 6 July 1998, 7)
- 393 There is no data from which to determine the proportion of all family proceedings in which one party or both parties are legally aided. To assist in this matter the Legal Services Board, with the agreement of the Principal Family Court Judge, recently conducted a study of 1777 randomly selected proceedings filed in the four Family Courts in the Wellington region between 1 June 1997 and 31 May 1998. The study shows that recipients of legal aid were involved in the following proportions of proceedings in each Family Court:
- Porirua 57 percent (286 files from 502 involved one or more legally aided parties);
  - Upper Hutt 48 percent (103 files from 214);
  - Lower Hutt 44 percent (224 files from 508);
  - Wellington 26 percent<sup>19</sup> (142 files from 553).
- (Letter from CM Research (NZ) Ltd to Legal Services Board, 24 February 1999)

Although the study could not distinguish between cases in which one party is legally aided and those in which both parties are legally aided, the Legal Services Board considers that proceedings for protection orders are notable for the likelihood that both applicant and defendant will be in receipt of legal aid.

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<sup>18</sup> Other civil matters include administrative (including judicial review) proceedings, and matters relating to ACC, social security and insurance.

<sup>19</sup> This includes 51 mental health files, of which 26 (51 percent) involved a legally aided party.



### *Recipients of aid*

- 394 The 1994/95 research shows that women were 70 percent of legal aid recipients. The main group of recipients were “unemployed” women with dependants (78 percent of the women and 52 percent of the total). The research notes, however, that recipients define their own employment status when completing their applications for aid and that many who described themselves as unemployed were in receipt of a social welfare benefit. (AC Nielsen MRL, 3)
- 395 Of all the women aid recipients, 85 percent had dependants and, as noted, 78 percent of those women were “unemployed”. More than half (54 percent) of the men also had dependants and 45 percent of those men were “unemployed”. The great majority (91 percent) of recipients with dependants had at least one child under four years of age. On average, recipients had two dependants each. Most often, dependants lived with the aid recipients. Consistent with the high proportion of legally aided proceedings arising out of family breakdowns, 84 percent of recipients were either not married or not living with a partner. (AC Nielsen MRL, 4–5)

### CONCLUSION

- 396 This chapter has described, in general terms, the providers of legal services in New Zealand and the services they provide. In particular, it has considered the “legal services pyramid” of legal information services (by the community, state and private sectors), of legal advice services (by lawyers and community groups), and of legal representation services (by lawyers in private practice). This includes a profile of the cost of private lawyers, and the basic features and current use of the civil legal aid scheme.
- 397 Against the backdrop of this overview, as well as women’s own descriptions of the barriers to their access to the justice system (chapter 3) and an outline of the social factors which provide part of the context for their experiences (chapter 4), the following chapter considers the legislative framework provided by the Legal Services Act 1991 under which legal information, law-related education and community-based legal services are delivered. Aspects of the civil legal aid scheme are examined in more detail in chapter 7, and the delivery of legal services by lawyers in private practice is canvassed in chapters 8 to 11.
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## INTRODUCTION TO PART 3

CHAPTERS 6 AND 7 look in detail at two areas of the legal services landscape which were emphasised by women in their submissions: community-based legal services and civil legal aid. From this examination, a range of systemic defects which impede New Zealand women's access to the justice system is identified.

In chapter 6, seven defects are identified in the operation of the legislative scheme which regulates the provision of legal services outside the private lawyers' market. These are:

- the continuing fragmentation and lack of co-ordination in legal services provision;
- the lack of long-term security in funding for community based legal services;
- inadequate resourcing of the Legal Services Board and district legal services committees;
- inadequate systems to identify gaps in the legal services available to communities of interest;
- a lack of flexibility in the power of the board and district committees to respond to unmet legal needs;
- inadequate provision for ongoing monitoring of legal services needs in communities; and
- a conflict in legislative provisions which unnecessarily inhibits the ability of community law centres to respond to unmet legal needs.

In chapter 7, a further 10 defects are identified in the operation of the legislative scheme which regulates the grant of civil legal aid to low-income New Zealanders. These are:

- the erosion of eligibility for civil legal aid;
- in light of that erosion, the difficulties posed for aid recipients by the recovery mechanisms of the scheme;
- inadequate public awareness of the civil legal aid scheme;
- New Zealanders' uneven access to legal aid lawyers;
- the complexity of the application process;
- some lawyers' failure to advise on eligibility for legal aid;
- the unavailability of legal aid for advice unconnected with litigation;
- inequity in the operation of the capital test;
- the limited control of the quality of legal aid lawyers' services; and
- the scope for inconsistent administration of the civil legal aid scheme.

It is concluded that both legislative and administrative reforms are needed to remedy these defects. Using the principles and process identified in chapter 1

as being essential to guide all efforts to promote the just treatment of women by the justice system, four key remedial strategies are identified:

- co-ordination of the legal information services available outside the private lawyers' market and the services funded by the civil legal aid scheme, with an emphasis on a user-focused approach to service needs;
- changes which ensure equitable outcomes for women and men in the operation and application of the civil legal aid scheme, and in the provision of legal services outside the private lawyers' market;
- the development of new and diverse measures to meet the diverse needs of New Zealand women for legal services; and
- transparency both in the processes of the Legal Services Board and district legal services committees and in the means by which legal aid lawyers are accountable for the standard and quality of their services.

A series of specific recommendations is made in each chapter to remedy the defects identified. Inevitably, their implementation depends on adequate and secure funding of community-based legal services and of the civil legal aid scheme.

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## 6

### Choice – between community-based and private lawyers' services

Anyone . . . who needs legal services should have access to them, regardless of financial, communication, or physical barriers. To deny access to legal services is to deny at the outset access to the law. To deny access to the law is to deny justice, and to deny justice to some, is to threaten the integrity of all.  
(Justice Rosalie Abella, 1983)

#### INTRODUCTION

- 398 **M**UCH OF WHAT WOMEN said about the barriers to their access to legal information, advice and representation services highlights the limited accessibility of many of the services. The reasons for this include inadequate information about the existence and nature of services, the uneven geographic distribution of services, the limited supply of certain types of services, and the cost of private lawyers' services.
- 399 The Legal Services Act 1991 established a framework to redress the imbalance in New Zealanders' access to legal services. It provided processes by which to identify and to meet legal needs in communities – by means of legal information, law-related education and the establishment of community-based legal services. The result ought to have been both an improvement in the range of information on which New Zealanders can make choices about their use of the justice system and a diversification of the legal services available.
- 400 There are, however, a number of inter-related issues concerning the Act and its administration which impact on its effectiveness in meeting the diverse needs of women identified by this study. In this chapter those issues are discussed and ways of increasing choice and flexibility in legal services delivery are explored. The ideal is to achieve a seamless market for legal services, with maximum choice and points of entry, a full range of available services, and a diversity of providers – from generalists (such as citizens advice bureaux), to specialists (such as women's refuges), to targeted providers (such as community law centres and private lawyers) – each of whom acknowledges the validity of the others' contribution. At the conclusion of this chapter a package of changes is recommended to improve the capacity of the Legal Services Act to achieve its objective of meeting legal needs in communities.

## THE LEGAL SERVICES ACT 1991

### Background

- 401 The fragmented nature of legal services in New Zealand was recognised in the late 1970s, when the first community law centre and the duty solicitor scheme had been established and legal advice was being provided by voluntary advisers at citizens advice bureaux. The 1978 report of the Royal Commission on the Courts (the Beattie Report), in commenting on the legal aid scheme, noted the view of the New Zealand Law Society that the various schemes, with the possible exception of free legal advice bureaux run by district law societies, should be brought together under one legal aid system. (Beattie et al 1978, 289)
- 402 Following the Beattie Report, the Working Party on Access to the Law was established to review government-assisted and community-based legal services in New Zealand. The Working Party's two reports, published in 1982 and 1983 respectively, established the framework for the integrated approach which was eventually reflected in the Legal Services Act 1991. The development of the legislation was also influenced, although to a lesser extent, by the report of a ministerial advisory committee, *Te Whainga i Te Tika: In Search of Justice*, which was published in 1986.

### Legal Services Board

- 403 The Legal Services Act 1991 addressed the fragmentation of legal services in New Zealand by bringing the civil and criminal legal aid schemes under a single umbrella, and providing both an institutional structure and a source of funding for the provision of legal services outside the private lawyers' market. The focal point of the structure is the Legal Services Board. Among its responsibilities, it must:
- assist in establishing community law centres, and fund them;
  - advise on the provision of legal information and law-related education<sup>20</sup> to the public, and fund it;
  - sponsor and initiate research on the provision of legal services in New Zealand; and
  - sponsor and evaluate pilot schemes for providing legal services to the public. (s 95(1)(e)–(h) Legal Services Act 1991)

### District legal services committees

- 404 The main bodies which the Legal Services Board “assists” and “advises” in relation to community law centres and law-related education are the 19 district legal services committees around the country. The committees have complementary functions to those of the board and so are responsible, for example, for:
- identifying unmet needs for legal services in their districts;
  - establishing and monitoring community law centres; and
  - allocating funding for local legal information and law-related education initiatives. (s115)

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<sup>20</sup> The board states that the different use of the terms “legal information” and “law-related education” in the Legal Services Act makes no practical difference to its workings. See NZLC MP4, paras 33 to 36.

## Membership

- 405 Both the board and the district committees have members appointed by the Minister of Justice on the nomination of:
- district law societies;
  - the Ministers of Consumer Affairs and Women's Affairs; and
  - the Minister of Māori Affairs.

One member of the board is appointed to represent the interests of community law centres. In each district with one or more community law centres, one member of the district committee is appointed to represent its, or their, interests. (ss 98 and 117)

## Vision

- 406 The board's vision is to ensure that by the year 2001:
- Every New Zealander will be able to know where and how to get legal services by accessing information services provided by, or funded by, the Legal Services Board. (*Statement of Intent for the period 1 July 1998 to 30 June 2001*, 1)

Among the board's aims are:

- to provide quality, cost-effective access to legal representation and to knowledge which empowers people; and
- to assess needs and match those needs to appropriate legal services. (*Statement of Intent*, 2)

## Funding

- 407 The administrative costs of the Legal Services Board and the district committees are met by the taxpayer, by appropriation through Vote: Justice. Their legal information and law-related education initiatives, and the board's research and pilot schemes, are funded from interest accumulated on funds held in solicitors' trust accounts. Half of that interest must be paid by banks into the Law Society Special Fund set up under the Law Practitioners Act 1982. The other half is retained by banks in lieu of banking charges and fees. (Law Practitioners Act, ss 91L(5) and 91M(1))
- 408 The Legal Services Board has first claim on the money in the Special Fund, for the funding of community law centres. Any remainder is divided equally between the board (for law-related education, pilot schemes and research purposes) and the New Zealand Law Foundation, an independent trust established by the New Zealand Law Society. (Law Practitioners Act, s 91F; Legal Services Act, s 95(1)(e)) The board itself funds law-related education on a national basis. It also allocates funds to district legal services committees for use in their districts. The committees may in turn allocate funds for legal information or law-related education to community organisations, including law centres (in addition to the centres' core funding allocated by the board).

## Community law centres

- 409 The Legal Services Act recognises the role of community law centres which, although community organisations in their own right, may be established by district legal services committees with the consent of, and by means of funding from, the board. (s 115(c) and (e)(ii); s 154) The functions of law centres are

described as including:

- the provision of legal advice and legal information to the public or any section of the public;
- the promotion of law-related education for the public or any section of the public; and
- such other functions as each community law centre considers necessary to ensure that the needs of the public for legal services are met. (s 155(a)–(d))

### Partnership with the community

410 The Ministry of Justice, in its submission on the consultation paper *Women's Access to Legal Information* (NZLC MP4), emphasised the need for community initiatives and responsibility concerning the provision of legal information. History shows the way in which communities have responded to legal information needs – for example, through the growth of the citizens advice bureaux and other generalist and specialist providers (see chapter 5). But of equal significance is the way in which public institutions interact with communities by providing funding and other assistance.

411 It was always envisaged that the work of the Legal Services Board in relation to legal services matters (including law-related education and legal information, as well as the establishment and funding of community law centres) would be undertaken in partnership with the community. In discussing the need for community law centres, the 1981 discussion paper *Access to the Law* stated:

The basic notion behind community law services is to cater for the legal needs of citizens which are not otherwise being adequately dealt with, either in terms of quantity or quality . . . . It is most important to recognise that “unmet legal need” is a variable concept that must be defined in a local context and by the local community. (*Access to the Law* 1981, 187)

412 This approach was confirmed in the two reports of the Working Party on Access to the Law in 1982 and 1983, which proposed the formation of a Legal Services Board whose functions would include that of general oversight of community-based legal services in New Zealand. (*Final Report, Working Party on Access to the Law*, 1983, 5–6)<sup>21</sup> The proposal was consistent with the emerging theory of community law centres as organisations designed to complement the traditional model of legal aid administered by the legal profession. (See, for example, Zemans, 1996) As explained by one commentator in 1992:

Community law centres are operated for a community, by a community, to bring about change in or benefit to a community . . . . They are responsible to and provide their services for a specific community . . . . Ideally the establishment of community legal services arises from the initiative of the community itself and on-going community control is paramount. (Becroft, 1992)

413 Although the Long Title to the Legal Services Act is silent in respect of these issues, Part V of the Act recognises this philosophy and the partnership approach. It requires each district legal services committee regularly to assess the need for legal services in its district with a view to establishing community law centres. It also requires consultation with the community in the area to be served “to ensure that the establishment of that community law centre is in accordance with the wishes of that community (so far as they can be

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<sup>21</sup> See also *In Search of Justice: Te Whainga i Te Tika*, (Report of the Advisory Committee on Legal Services), 1986, 5–6, 79.

ascertained)". (s 154(2)) Further, as has been noted, s 155, while prescribing the range of functions of community law centres, recognises the autonomy of a centre to perform "such other functions as each community law centre considers necessary to ensure that the needs of the public that it serves for legal services are met". (s 155(d))

- 414 This type of model is well suited to the delivery of legal services, including legal information and law-related education, to and for the various communities to which New Zealand women belong. It is consistent with the emphasis placed by recent governments on active participation by individuals, families and communities in New Zealand's economic, social and cultural development. (See, for example, SRA 5, Strategic Result Areas for the Public Sector 1997–2000, June 1997) It recognises the appropriateness of government agencies, as well as local government, providing funding and, in some cases, services to communities for the meeting of legal information and education needs. The Legal Services Board itself has said:

The provision of legal services from within the community is an evolutionary process which the Board believes will develop in strength and experience through time. (*Review of the Legal Services Act 1991 (pursuant to s 112 of the Legal Services Act)*, Legal Services Board, 1995, 6)

### **The role of the legal profession**

- 415 The legal profession has long assumed a responsibility for ensuring that legal services and information are available to the public. This is reflected in the current functions of the New Zealand Law Society, and the 14 district law societies, to:
- "publish or arrange for the publication" of pamphlets and other material for the benefit of the public; and
  - establish, fund or operate community law centres. (Law Practitioners Act 1982, ss 5(2)(b) and 6)
- 416 The societies' activities in these areas have been substantial over the years. They played a major part in the establishment, funding and operation of community law centres in Auckland and Wellington during the 1970s and 1980s. The societies' role has diminished since the Legal Services Act was passed, but hundreds of their members provide voluntary services to community law centres by, for example, participating in free legal advice sessions, responding to telephone inquiries from law centre staff and serving on the centres' management committees. In addition, the Auckland District Law Society levies each of its members \$50 a year to support the work of law centres in the area.
- 417 Other initiatives by the legal profession, such as the New Zealand Law Society's Law Awareness pamphlet series, the publication of legal services directories by the Auckland and Wellington District Law Societies, and occasional ventures such as Law Week and Mediation Week, continue to have a large impact. The Law in Schools programme has been run by the New Zealand Law Society for 10 years now, with great success. To further the aims of the new social studies curriculum, the society, with funding assistance from the Legal Services Board, has recently produced a *Living with the Law* kit to be used in the teaching of third and fourth form students. It has also produced a kit for form one and two students and, with the Commercial Education Teachers Association, a "Legal Studies Curriculum" for senior school students.



- 418 Much of the work which goes into these initiatives is voluntary on the part of the law societies' members. It is a form of community participation and should be recognised as such. It seems likely, and is certainly to be hoped, that members of the profession will continue to devote time and expertise to activities which support the objective of making appropriate legal services available in the community.
- 419 The New Zealand Law Foundation has already been mentioned. It is empowered by the Law Practitioners Act to use money from the Law Society Special Fund for its activities. The Law Foundation's role overlaps with that of the Legal Services Board and includes the provision of legal education to members of the public. The foundation also funds law libraries, the Council of Legal Education, and legal research. (See further NZLC MP4, paras 57 to 59)

## THE ISSUES

- 420 Inevitably, the potential of the new regime established by the 1991 Act, embracing both legal aid and other legal services, depends on the extent to which those two major components can be integrated to best meet the contemporary needs of New Zealanders. The goodwill and effort of all groups and agencies involved in providing legal services in the community and under the legal aid scheme deserve warm recognition, as does the daily contribution of the many individuals who give their time – for reduced or no financial reward – in creating information and resource materials, giving advice, assisting people in times of need, and actively administering criminal and civil legal aid. A survey of overseas literature confirms the forward-looking nature of the 1991 reforms. The creation of a single umbrella for legal aid and other forms of legal service (including information, education and community provision) is still awaited in other jurisdictions. (See, for example, Cousins 1996; Blankenburg 1996)
- 421 In 1991, the fledgling state of some legal services other than legal aid made it plain that time would be needed for them to develop to a point where they could be relied upon to play their part in any overall plan to reduce unmet legal needs. This study has provided a useful test for the reforms and, together with the formal reviews carried out by the Legal Services Board itself, has stepped up the pace of the evolution. But complacency is dangerous. From what has been learned in the study – including from discussions with the Legal Services Board, the New Zealand Law Society, community law centres and others – seven systemic defects have been identified, some of them interlinked, which hinder the meeting of legal needs in the community. Under the terms of reference, these are capable of being addressed by the adoption of appropriate strategies or specific law reforms. The defects are:
- continuing fragmentation and lack of co-ordination in legal services provision;
  - the lack of secure long-term funding for community-based legal services;
  - inadequate resourcing of the Legal Services Board (in respect of its co-ordinating and oversight role) and the district legal services committees (including defects in the process of appointing members);
  - inadequate systems to identify gaps in legal services for communities of interest as opposed to geographical communities;
  - a lack of flexibility in the power of the board and district committees to respond to unmet legal needs;

- inadequate provision for the ongoing monitoring of legal services needs in a community; and
- conflict between s 6 of the Law Practitioners Act and ss 154 and 155 of the Legal Services Act, which creates an unnecessary barrier to the ability of community law centres to respond to unmet legal needs.

## Fragmentation

- 422 The consultation paper *Women's Access to Legal Information* (NZLC MP4) emphasised the importance of liaison and co-ordination between those who fund, produce and distribute legal information. It noted criticism by many women of the tendency of government agencies, because of the way they are structured, to separate problems into legal, financial, health and other categories. This fragmentation does not necessarily reflect the way in which women experience problems which require assistance.
- 423 This criticism is by no means new. Nor is it limited to the comparatively small area of legal information and law-related education. It is a reflection of the different funding sources in that area, as well as the nature of the government's own infrastructure. There is now widespread recognition of the inefficiencies fragmentation can cause, particularly in the social services area. The "strengthening families" project of recent governments is a current example of an attempt to cross "sectoral" boundaries and provide a co-ordinated approach to the delivery of social services to families in need.
- 424 There are similar problems in respect of the provision of legal services at community level. The discussion in chapter 5 noted the wide diversity of community groups which, to one degree or another, intermingle the provision of legal information with other services. The Legal Services Act network reaches those groups in only a very limited way, and the resulting inefficiencies contribute to the problems women encounter in obtaining legal information. There is a need to integrate the work of citizens advice bureaux, and specialist groups such as women's refuges with the work of the agencies under the Legal Services Board umbrella. Currently, these community groups have no structured or formal input to the work of the board or the district committees.
- 425 There is also a need for better co-ordination of the legal information initiatives of the various state, private and not-for-profit sector agencies which are variously involved as funders, producers and distributors of information. The National Association of Citizens Advice Bureaux has advised, for example, that the bureaux, which have a major role in the distribution of legal information but which suffer from a lack of secure funding, can be left to pick up the demand which results from:
- information and awareness campaigns being mounted by other agencies without sufficient thought for recipients' follow-up information needs (in particular the need for face-to-face help); and
  - the reduction or withdrawal of information services by other agencies, including some government agencies.<sup>22</sup>

<sup>22</sup> In its 1997 Annual Report, the Association attributed the 20 percent increase in consumer work to the phasing out and closure of the Ministry of Consumer Affairs' 0800 telephone line and predicted that, in the 1998 year, there would be an extra 40 000 consumer calls, which would double the bureaux' consumer workload over two years. ("Informing New Zealand", 1997, 3) The 1998 Annual Report records that between September 1997 and August 1998 the CAB 0800 service answered over 36 000 calls. (7)

- 426 In a draft issues paper prepared in June 1997, the CAB proposed a co-ordinated approach to developing a “community information infrastructure”. This would require attention by central and local government agencies as well as community organisations. This view was echoed in a number of submissions on the legal information consultation paper.

### Security of funding

- 427 Funding is a related issue. The Legal Services Board is by no means the only funder of legal information and advisory services. The CAB, for example, receives no core funding from the Legal Services Board. Such central government funds as it receives come from the Department of Social Welfare and from funds administered by the Department of Internal Affairs. Individual bureaux receive varying amounts of financial support each year from local government and other sponsors.
- 428 Adequacy of funds is also a problem for other community organisations which distribute information and give advice. Community law centres around the country made the following comments in submissions to this study:

“[We should be doing] outreach work in the wider community, [but cannot] due to lack of manpower and transport.” – *Submission 502*

“[We should be providing] mediation in disputes . . . training for other community workers . . . assistance with law reform.” – *Submission 501*

“[We should be providing] employment tribunal representation [and representation in] domestic protection proceedings.” – *Submission 500*

“[We should be providing] a mobile service.” – *Submission 499*

“[We should be providing] a specialist family law evening.” – *Submission 253*

“[We should be providing] more education and more hands on support with disadvantaged groups.” – *Submission 497*

“There will never be enough money to meet the unmet legal needs of our community.” – *Submission 498*

- 429 There is a particular concern about the longer-term viability of the Law Society Special Fund, which is, under the Legal Services Act, the existing source of funding for community law centres, legal information and law-related education, pilot schemes and research. The Fund has performed adequately to date, but a study commissioned by the board in 1996 indicated that, in the longer term, even moderately conservative community law centre development, combined with likely fluctuations in interest rates, could rapidly render it inadequate even to fund law centres, which are the first priority for its application. (NZIER 1996) That would leave nothing for the New Zealand Law Foundation or the law-related education and other functions of the board and its district committees.
- 430 The board has taken a conservative approach to the use of Special Fund money and has, as a result, accumulated a large reserve fund: \$12.36 million as at 31 October 1998. In past years, the interest on the reserve fund has sponsored the

law-related education and other “second priority” functions of the board. Since this study began, the board has increased its activities in relation to community law centre development, law-related education, pilot projects and research. The recent sharp decline in interest rates means that the monthly amounts now being paid from the Special Fund to the board have diminished to such an extent that its reserve fund, not merely the interest on it, is very likely to be needed this year to sponsor the “second priority” initiatives for which the board has statutory responsibility. If that situation continues, it could well produce, in the next few years, the result forecast by the New Zealand Institute of Economic Research.

- 431 There is a more fundamental question still about the long-term security of the Special Fund. Prompted by concern over the Conveyancers Bill (which will allow conveyancing to be done by non-lawyers), the New Zealand Law Society has recently proposed to the Minister of Justice that the Fidelity Fund (for losses caused by solicitors’ defalcations) should have first call on the Special Fund, in the sum of some \$2 million annually. This reflects the view expressed in a 1997 report on the purposes, functions and structure of law societies in New Zealand. It was stated there that the distribution of interest on trust accounts to the Legal Services Board and the Law Foundation for the meeting of “social objectives” is an expropriation for which there is no justification, no matter how worthy those objectives are. (*E-DEC Final Report*, 12) Inevitably, the Law Society’s proposal would demote all of the purposes now served by the Special Fund: community law centres, law-related education, pilot schemes and research (under s 95(1)(e) of the Legal Services Act), and the Law Foundation (under s 91F of the Law Practitioners Act). In light of the existing pressures on the Fund, the proposal represents an added threat to the security of funding for community-based legal services in New Zealand.
- 432 The government has not yet taken a position on the matter. Meanwhile, it is plain that security of funding for the purposes listed in s 95(1)(e) of the Legal Services Act, including community law centres and law-related education, is essential. Should the Special Fund be so depleted that it cannot meet communities’ proven needs for legal services, other sources of funding will be required.

### **Resources and appointment procedures**

- 433 Giving effect to the Legal Services Act requires a strategic, planned approach to meeting the ideal of equal access to the justice system. The roles of the Legal Services Board as the co-ordinating and funding body, and the district committees in the identification and meeting of needs, are critically important. Sufficient resources and appropriately qualified personnel are essential.
- 434 Staff resources have been a problem for the board for some time. It has a staff ceiling of 10 to attend to not only its functions under s 95(1)(e) of the Act but also those in respect of the civil and criminal legal aid schemes, the duty solicitor schemes, and the ongoing review of the Act itself under s 112. In fact, the board has rarely employed 10 staff. In February 1999 it had six employees, three of whom were fully involved with financial matters relating to the legal aid schemes. Most of the board’s effort and resources since its establishment have been devoted to the modernisation of legal aid. It has acknowledged that its broader legal services functions have of necessity suffered. Recently, in order

to remain within its state-funded administrative budget and yet maintain the development of legal services other than legal aid, the board has employed suitably skilled workers on contract so that they may be paid from the reserve fund accumulated from the annual allocations made from the Special Fund.

- 435 Resources are also a problem for district legal services committees, whose part-time members operate with very limited administrative support. Moreover, some of the committees have had to cope with delays in the appointment of members who are there to represent community interests (especially those appointed to represent the interests of community law centres, or on the nominations of the Ministers of Consumer Affairs, Women's Affairs and Māori Affairs). The project team surveyed district committees about the extent to which delays in appointment had caused problems. Many committees reported delays, and five said that the delays had impacted on their operation. Communications with the Legal Services Board in February 1999 indicate that many committees are short of members, to the point where some are having difficulty obtaining a quorum at meetings, and that some of the vacancies are up to a year old.
- 436 The appointment process itself has also come under criticism. Appointments to the district committees are handled administratively by officials of the Ministry of Justice. The process of nominating people to represent the interests of women, consumers and Māori is dealt with by officials of the relevant ministries. It is widely acknowledged to lack transparency; there is no formal process for consulting interested people or organisations, or for establishing a pool of candidates. This has been criticised both by the board itself in its 1995 Annual report and s 112 Review, and by the Justice and Law Reform Select Committee in its 1995/96 review of the performance and operations of the Board.
- 437 As one district committee commented in the course of this study, a formal, publicly transparent appointment structure which targeted appropriate community organisations would assist the effective functioning of committees, speed up the process, and make such appointments more deliberate and focused on identifying community needs. This would also facilitate the appointment to committees of people with links to other key community groups in a district – for example, the citizens advice bureaux. It appears that nominating agencies are aware of the need to enhance the representation of relevant community interests on district committees, and there are now more non-lawyers on committees than there were in the past. There has also been an increase recently in the number of non-lawyers and women who are presiding officers of district committees. However, the recent changes are no substitute for formal, publicly transparent appointment processes. These could be developed and implemented without the need for legislative change.

### **Communities of interest**

- 438 District committees have the role of assessing the legal needs of their communities. It has long been recognised that a “community” need not be defined solely in geographical terms. The term “community of interest” provides the wider understanding. Community law centres already exist in New Zealand to serve such groups: for example, Nga Kaiwhakamarama I Nga Ture (the New Zealand Māori Legal Service, based in Wellington but with a national as well as a local focus) and Youth Law (based in Auckland).

- 439 Many groups of women consulted in this study could be described as forming communities of interest: in particular, Māori women, Pacific Islands women, disabled women, and lesbians. All have particular needs in respect of legal services, aspects of which appear from chapter 3 and in the quotes presented throughout this study. In some respects, of course, their needs do not exist only because they are women. Language and cultural barriers, and physical and geographic barriers, for example, exist for both men and women. The compounding effects of gender distinctions may be more or less influential in different circumstances.
- 440 The assessment of community legal needs under the Legal Services Act assumes communities of a geographical nature, or at least that people who are part of a wider community of interest will be present in sufficient numbers in each district to enable their needs to be identified adequately. However, there is no basis to either assumption. The Act has no mechanism for the wider interests to be met. It is perhaps significant that both the Māori Legal Service and Youth Law existed before 1991. Since that time, no community law centre has been formed specifically to represent a wider community of interest.
- 441 The need is particularly acute in respect of Pacific Islanders, especially (but not only) in Auckland. The consultation with Pacific Islands women revealed substantial unmet need, to the extent that one Otahuhu law firm provides free legal advice to clients for a half day each week. There may be a case for a Pacific Islands law centre to be established within the Auckland Legal Services District, or on a wider or national basis. It seems inappropriate, however, that one district legal services committee (for example, that in Auckland) should be required to assess the needs of a community which reaches beyond the boundaries of its district. There is no reason in principle why the Legal Services Board should not exercise that role, although cost and practical difficulty would inevitably arise.

### **Inflexibility of response**

- 442 As noted in para 413, the Act is premised on the establishment of community law centres as a means of meeting legal needs identified by district legal services committees under s 154. Nine law centres in existence before 1991 were, in effect, deemed by the board to have been re-established in terms of the Act. Ten more centres have been established since. In the result, not every district has a law centre and, in the districts without one, the Act's requirement of a two yearly needs assessment has not always been met. Further, there has been some variation in the quality of the needs assessments undertaken. In response, the Legal Services Board is now providing additional assistance to district committees in the needs assessment process. However, a district which already has at least one law centre may find the board reluctant to agree to the establishment and funding of a further centre in that district until it is assured that districts without law centres are adequately serviced or well advanced towards developing services to meet legal needs.
- 443 Communications with the board make plain that it believes community law centres are now well-established as a useful and viable means of delivering cost-effective and low cost services. Its latest annual report confirms that:
- The board is satisfied with the quality of service being offered by law centres which represents, with few exceptions, very fair value for the money invested in them. (Legal Services Board Annual Report 1998, 16)

- 444 Law centres are a visible focus for the provision of legal information, education and advice services at community level. Many operate as something of a hub for other community groups (such as women's refuges) which have contacts with the legal system. It is not uncommon for law centres to engage in their own outreach work – for example, by providing legal advice sessions in prisons, schools and centres for the elderly. Law centres provide the closest example of the “one-stop-shop” model for community legal services that was warmly endorsed by many women who attended the consultation meetings. It may be noted too that a recent report on law centres, written by an Auckland barrister after a three-week inquiry commissioned by the Minister of Justice, concludes that of the 12 centres visited, “the great majority . . . are both effective and efficient in delivering to their clients and sections of the public access to justice”. (Knight, June 1998, 1)
- 445 That report expressed some criticism of what it described as the “cause-driven” rather than “needs-driven” nature of the activities pursued by some centres under s 155(d) of the Act. That is the provision which recognises the autonomy of each centre to perform “such other functions as [it] considers necessary to ensure that the needs of the public for legal services are met”. However, a degree of autonomy in the centres' functions can be regarded as a vital asset in a justice system which, by its nature, might otherwise overlook issues or problems of particular concern to the most vulnerable New Zealanders. Law centres are uniquely placed both to detect features of the law or its administration which impact adversely on their communities and to take action designed to stimulate change – for example, by making submissions to relevant authorities, or by recommending or taking a test case in which the centre's accumulated knowledge of a problem can be built into the arguments put before the court. That latter function is of particular importance when alternative means of promoting public-interest litigation are not well developed in the justice system.
- 446 In that regard, it is notable that about a third of Australian law centres are specialist centres which focus on such areas as women's employment, tenants' protection, immigration and domestic violence. In addition, there is a public-interest advocacy centre which acts as a “clearing-house” for test cases brought to its attention. The specialist centres' in-depth knowledge both of particular legal issues and the “communities” most affected by them, is sought to be shared with the more generalist (geographically based) centres. In addition, their knowledge is recognised as valuable for promoting compliance with human rights standards by means of test cases on issues which are otherwise unlikely to be brought to the attention of appellate courts. (See further Legal Action Group, 1992, chapter 10)
- 447 It was observed in chapter 3 earlier that the legal issues of particular concern to groups of New Zealand women are not uniform. Māori women, for example, emphasised their need for quality legal services in connection with Māori land and environmental issues; Pacific Islands women emphasised their need for quality services in connection with immigration problems; lesbians emphasised their need for quality services in connection with gaps in the law relating to same-sex partners, including property settlements and family matters. These examples serve to highlight that efforts to address the needs of minority groups may lead to their being labelled unfairly as “cause-driven”, especially when the need for law reform may underlie the need for services.

448 The concerns about law centres which this study highlights derive, first, from the evidence that some are not as visible as they might be among people within their target client groups. Second, community law centres are predominantly creatures of large urban centres, and this limits their accessibility. Third, despite the availability of funding from the Legal Services Board, many law centres struggle to meet the demand for services. Because of their limited resources, they find it difficult to recruit suitably qualified and experienced staff.

449 It is unrealistic to expect community law centres to meet all the needs of a community (geographical or otherwise) for legal services. The fact that they do not is evidenced by the example given in para 441 above concerning Pacific Islands clients. In rural areas or in small communities, different approaches are needed. In chapter 5, two recent initiatives of the Legal Services Board were mentioned:

- the establishment of the pilot project in the Northland area, Te Taitokerau Community Legal Service, which uses lawyers and community outreach workers but without a “law centre” base as such; and
- the establishment of a similar pilot project in Nelson.

Other recent initiatives include:

- work-in-progress towards two more pilot projects, in Gisborne and the Bay of Plenty;
- the approval of a pilot community legal education project in Taranaki; and
- the proposal that the board and the New Zealand Law Society jointly develop an 0800 telephone service intended eventually to run on a national basis.

450 None of these initiatives appears to qualify for funding from the community law centres fund under s 95 of the Act. The board has power under s 95(1)(f) to establish pilot projects for the provision of legal services (the Taitokerau, Nelson and Taranaki projects being examples), but has no power to provide funding beyond the conclusion of the pilot unless the services can be described, within s 95(1)(e), as a community law centre or a law-related education project. The Taranaki project, being confined to law-related education, will (if successful) qualify for future funding from the board, subject to the prior claims of community law centres and the competing claims of other education projects, pilot schemes and research. The Taitokerau and Nelson projects are not best described as law-related education projects, for they also deliver legal advice – which is a function of a community law centre. (s 155(a)) But their style of operation may strain that provision’s concept of a community law centre: s 155 seems to envisage a permanent “bricks and mortar” centre which provides the range of legal services needed by its community. That would preclude any permanent 0800 telephone service from being categorised as a law centre. Yet, if such a service provided legal advice, it would not be readily described as a law-related education project either.

451 There is no reason why the Act should require the district legal services committee to establish a community law centre to address unmet legal needs under s 154. This is in no sense a criticism of law centres, but rather a recognition that the diversity of need requires diversity of response. The projects in Te Taitokerau and Nelson are examples of responses designed to respond to local needs. Other examples can be imagined which have far less resemblance to community law centres. A district committee may identify in a community an unmet legal need in respect of social welfare law, because clients are unable



to afford to pay a local firm for advice, even though it has the relevant expertise. Alternatively, the barrier may be one of language, and practitioners with the ability to speak the language in question may be in demand for legal advice on a range of matters by clients who cannot afford to pay for it. Subject to quality assurance, it ought to be possible in either circumstance to channel funds to the firm which is capable of meeting the need. Relevant here is the fact that franchising arrangements (which depend on quality standards being met) have been used with some success in the provision of legal services in other jurisdictions. In England and Wales, such arrangements will be the norm in future, to secure the provision of the full range of legal services that is funded by the state. (*Modernising Justice*, 1998)

- 452 The Legal Services Act allows a desirable degree of flexibility in law-related education projects in that it does not limit the organisations or individuals who can be funded by the board to provide that kind of legal service. A law firm, a law centre or any other organisation can be funded for the purpose. The position should be no different in respect of any other kinds of legal service. But it is not only the Act's requirements for establishing and funding community law centres out of Special Fund money which inhibit innovative responses to unmet legal needs in New Zealand. Flexibility of response is also curtailed by the fact that legal aid money, provided by government, can only be used to fund services that are within the ambit of the current legal aid schemes. Those schemes rely on private lawyers and do not provide aid for legal advice in civil matters. Further, it is doubtful whether a pilot project, using Special Fund money, which relied on private practitioners to provide legal representation (as opposed to advice) in novel ways would be consistent with the Act's *judicare* legal aid scheme. Such a pilot project could not be made permanent anyway. The result is that a web of factors inhibit the flexible provision of legal representation services under the Act.
- 453 Sufficient funding is critical to the achievement of any proposal to amend the Legal Services Act to allow greater flexibility of response to legal needs. The threats to the continued viability of the Special Fund are such that the priority claims of community law centres (to which \$4.5 million have been allocated for the 1999 year) are already diminishing the amounts which the board considers it prudent to make available for law-related education, research and pilot projects. To add to the categories of legal services which may be funded from that source will inevitably increase the pressure on it.
- 454 It is not proposed that the funding priority status which community law centres currently enjoy under the Legal Services Act should be removed. Nor would it be desirable to broaden greatly the range of organisations capable of receiving funding from the source that is available to law centres. On the basis that sufficient funding will be made available to meet the extra demands, the need for greater flexibility could be achieved by amending the Act to provide that, subject to community law centres continuing to have first call on the funds, funding will also be available to:
- first, citizens advice bureaux (on a general basis which would enhance their capability in respect of legal services); and
  - secondly, community organisations and practitioners who can satisfy the Legal Services Board and the relevant district committee of their ability to address an unmet need for a specialist form of legal services.

The funding of the latter (specialist) organisations would be in addition to any one-off grants for law-related education purposes.

## Ongoing monitoring

- 455 The next issue also relates to s 154 of the Act. Subsection (1) provides:  
It shall be a function of every Committee to establish within its district such number of community law centres as it considers necessary to ensure that the needs of that district for legal services are met.
- 456 Subsection (2) sets out the process for assessing legal needs, referred to in para 442. But subs (4) requires further reviews of legal services needs when there is no community law centre in existence in the *district*. The establishment of one law centre in a district therefore satisfies the Act's requirements for review of that district's legal needs. This applies even in large districts and in those with law centres which pre-dated the Act and which were, in effect, deemed to be established under it without a needs assessment under s 154(2) having been conducted.
- 457 The desired flexibility of response to the changing and developing legal needs of a district, and of communities within it, demands that the needs of the district be the subject of periodic review, irrespective of the services which already exist there.

## Section 6 of the Law Practitioners Act 1982

- 458 Community law centres must obtain law society approval under s 6 of the Law Practitioners Act 1982 if they intend to provide legal advice and representation services. This is because only solicitors with practising certificates may "act as a solicitor". Approval is given by way of exemptions from the provisions of the Act which create offences for unqualified people who act as solicitors. The need for an exemption generally arises when a law centre wishes to employ a solicitor, whether or not that person is qualified to practise on her or his own account.
- 459 When granting the application, the district law society must satisfy itself that:
- (a) the legal work which the law centre intends to do is not being adequately undertaken by practitioners in the ordinary course of their practice (whether because of uneconomic nature of the work or the unavailability of willing practitioners); and
  - (b) an exemption from sections 64, 66 or 67(1) of the Act is needed to enable the centre, or its staff, to undertake the work. (New Zealand Law Society Guidelines, *Community Law Centres: Exemptions under section 6 of the Law Practitioners Act* (1995) 4)
- 460 It is inappropriate that, there having been an assessment of legal needs in a community and a decision under the Legal Services Act to establish a community law centre, there should be a further barrier in the form of the requirement for the law centre to seek approval from the New Zealand Law Society or a district society (in practice, the latter) to engage in the particular types of work. This study has been unable to establish why s 6 and its companion provision s 55(8)(b) were not repealed or at least amended at the time the Legal Services Act was passed – as had been recommended by a majority of the Access to the Law Working Party. (*Final Report*, 1983, 44) Some have suggested that the section was impliedly repealed by ss 154 and 155 of the latter Act, particularly in light of each law centre's power under s 155 to perform "such functions as it considers necessary" to ensure that the legal services needs of the public are met. Whatever the case, the provision is in serious conflict with the policy of the Legal Services Act, and the latter Act should prevail as a

matter of principle. With its mix of non-lawyer and lawyer members (the latter being appointed on the nomination of the district law society), and its specific function of assessing community needs for legal services, the district legal services committee is in a better position than the district law society to assess whether particular legal work is (using the language of s 6) being “adequately undertaken” by local practitioners.

- 461 Section 6 does, however, serve two objectives which are worthy of recognition. The first is the need for appropriate professional standards to be observed in the provision of legal services. Such matters should remain within the jurisdiction of the district society, particularly in respect of services provided by those who would, if they were practising in the mainstream profession, have to work for a specified period of time (generally three years) under supervision before being entitled to practise on their own account.
- 462 Secondly, although s 6 has been criticised as being anti-competitive, it may equally prevent law centres (using funds provided through the Legal Services Board) from providing free or subsidised services in competition with local law firms (whose only option is to charge fees to their clients). It is accepted that this is a real issue for the profession. But it is important to realise that the barriers to the use of mainstream legal services are not only those of cost. Communication, culture and caregiving barriers are equally capable of denying New Zealanders the benefit of those services. The funds provided to law centres should be able to be used for the purpose of meeting any legal needs in the community which are not being met by existing services, irrespective of the barrier. The answer to this problem lies in helping district legal services committees to identify those barriers effectively, and on an ongoing basis. Law centres themselves, with their community links, are also well placed to identify and respond to unmet needs. Subject to adequate provision to ensure the maintenance of professional standards in law centres, it is considered that s 6 of the Law Practitioners Act ought to be repealed.

## CONCLUSION

- 463 It is clear that the existing range of legal services available to many communities does not meet the legal needs of women. More diverse providers can help meet the need. Law firms have their contribution to make in particular areas and for particular groups, and there is no reason in principle why they should not be adequately funded to do so where legal aid is not available and their prospective clientele cannot otherwise afford to pay. Likewise, the range of vehicles available to the Legal Services Board and its committees to respond to different needs ought not to be constrained by institutional requirements.
- 464 The role of the Legal Services Board and the district committees is of critical importance. Both have been required to come to grips with a wide range of new functions, with limited resources and insufficient personnel, at a time when the legal aid system is under substantial pressure and its administration in need of overhaul. (See further chapter 7) Despite the successes to date in respect of the provision of legal information and education, and community law centre establishment, it is widely agreed that more resources, and an improved process of appointing members to district committees, are essential if the board and district committees are to lead and at the same time be part of a strategic approach.

- 465 The Legal Services Board has the facility to proceed with care, using its powers to establish pilot schemes and take other experimental measures. With an assurance of ongoing funding, and with responsible management, the Legal Services Act has the potential to make real progress towards reducing the barriers to access to justice for New Zealand women. It is considered that the following strategies are needed to address the defects identified:
- co-ordination of legal services outside the private lawyers' market;
  - changes which focus on ensuring equitable outcomes for women in the provision of legal services outside the private lawyers' market;
  - the development of new and diverse measures to meet the diverse needs of New Zealand women for legal services; and
  - transparency in the processes of both the Legal Services Board and district legal services committees.
- 466 Accordingly, a package of reforms is recommended here, some legislative and some administrative, which would, if adopted, result in substantial improvements to the ease with which the Legal Services Board and district legal services committees can respond to existing and future legal services needs in particular communities in New Zealand.

## RECOMMENDATIONS

It is **recommended** that:

- the government review the funding provision for community-based legal services (including but not limited to those under Part VIA of the Law Practitioners Act and s 95 of the Legal Services Act), to ensure that a long-term funding base is available for meeting all community legal needs;
- the Legal Services Act be amended to create a further category for the funding of community legal services, in addition to those listed in s 95(1) of the Act (for community law centres, law-related education, research and pilot schemes);
- the Legal Services Board's administration budget be reviewed, having regard to its strategic, research and oversight roles in respect of legal services;
- a new procedure be adopted for appointing non-lawyer members of district legal services committees, to enable consultation with, and nominations to be made by, interested people and groups in each legal services district;
- the Legal Services Act be amended to enable the Legal Services Board to review the legal needs of communities of interest whose members reside in more than one legal services district, and to empower the board to establish and fund measures to meet those needs;
- section 154 of the Legal Services Act be amended to allow greater flexibility in the response to unmet legal needs identified under the section, so as to enable district committees (with the agreement of the board) to
  - fund the activities of citizens advice bureaux, and
  - fund other specialist groups and legal practitioners who can demonstrate their ability to satisfy unmet legal needs,and to impose on district committees an ongoing responsibility to review legal needs irrespective of whether a community law centre exists in the district;
- section 6 (and its companion provision s 55(8)(b)) of the Law Practitioners Act be repealed and replaced by a section which
  - enables a community law centre established or operated under the Legal Services Act to employ practitioners, and

- entitles a practitioner employed by a law centre to hold a practising certificate subject to the power of the district law society to impose such conditions as it thinks are necessary to ensure the adequate supervision of a practitioner who is not otherwise qualified to practise on his or her own account.
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## Cost of legal services: civil legal aid

“State supported aid arises from the basic responsibility of the state to ensure justice for its citizens, and this responsibility is not truly fulfilled so long as any citizen is prevented by lack of means from having his grievances aired and determined fairly and adequately by the courts. The same concept is behind Article 7 of the Universal Declaration of Human Rights, which provides that all shall be entitled, without discrimination, to the equal protection of the law. This requires that the balance of justice should not be loaded in favour of the man with means, the large corporation or the state itself.” (Rt Hon J R Marshall, NZPD vol 363, 1969, 2680)

### INTRODUCTION

- 467 PUBLISHED IN MARCH 1997, *Women's Access to Civil Legal Aid* (NZLC MP8) presented for comment a range of concerns women had raised about the operation of the civil legal aid scheme. The importance of civil legal aid was emphasised by women because of its relevance to the problems, and especially those connected with family breakdown, which are most likely to lead to women becoming parties in the justice system's dispute resolution procedures. The need for an examination of the concerns raised about the scheme was further supported by the fact that the criminal legal aid scheme, but not the civil scheme, has been the subject of a comprehensive study commissioned by the Legal Services Board. (Saville-Smith et al, 1995)
- 468 The responses to the consultation paper confirmed the existence of a number of serious impediments to women's access to legal representation by means of civil legal aid. Among them are impediments which cause inequities between people in the group which the scheme is intended to assist. That result flows, for example, from impediments:
- which prevent some low-income New Zealanders from obtaining legal aid even although they are eligible for it;
  - which mar the quality of the services that are provided to some legally aided clients; and
  - which cause variations in the conditions on which legal aid is made available in different parts of New Zealand.
- 469 The most obvious impediment to women's access to quality legal representation by means of civil legal aid, however, is the erosion over the last decade of the financial threshold for eligibility for aid. This has the effect of steadily reducing the size of the group which is eligible to receive civil legal aid and increasing the size of the group which is ineligible for it but unable to afford the lawyers' services that are needed to take or defend proceedings in most courts.

- 470 Inevitably, measures to redress the impediments which women identified will have fiscal implications. Most obviously, if eligibility for civil legal aid is extended in response to its shrinking availability but without other cost-saving changes, the state, and therefore taxpayers, will be faced with an increased bill for justice system services. Already, the costs of legally aided civil litigation are rising annually, despite substantial efforts in recent years to contain them. In the 1997/98 year, the civil legal aid scheme cost the state \$40.32m (see chapter 5, para 382).
- 471 Both social and institutional factors drive the costs of civil legal aid. For example, if New Zealanders' needs for certain legal remedies increase, or if the law extends the protection available to vulnerable groups, greater demands will be made on the scheme. This has been particularly evident in the use made of civil legal aid in recent years to fund review hearings under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and hearings for protection orders under the Domestic Violence Act 1995. The latest annual report of the Legal Services Board notes that enactment of the De Facto Relationships Property Bill will further increase the number and costs of civil grants. In addition, recent changes in the policies of the Crown Forestry Rental Trust, relating to funding assistance for Waitangi Tribunal claims, have meant that legal aid expenditure on those matters has risen from \$400 000 in 1997 to \$2m in 1998. And, during 1998, a further \$4m of legal aid commitments to Waitangi Tribunal claims were incurred. (Report of the Legal Services Board for the year ended 30 June 1998, 29–30)
- 472 In addition to those cost-drivers, all the factors which determine the costs of civil litigation are reflected in the costs of legal aid. Accordingly, any financial savings that might be made by changing, for example, court procedures, the management of cases or lawyers' charging practices, will meantime be borne as costs to the state and to clients, including legally aided clients who are required to make some financial contribution towards the costs of their litigation.
- 473 Civil legal aid therefore provides a financial bridge into the existing civil justice system for low-income New Zealanders who are seeking to resolve disputes which emerge from the social facts of New Zealand life and which are responded to by law in the manner which Parliament considers appropriate. With those much larger forces impacting on the scheme, efforts to improve its effectiveness and efficiency cannot be confined to the four corners of the scheme itself. Equally, however, when viewing the scheme within the broad social and institutional context which surrounds it, sight must not be lost of the fact that, as is discussed below, New Zealand women have a particular interest in the present arrangements, whatever their faults. Accordingly, any further-reaching reforms must be designed to be responsive to women's diverse needs.
- 474 Since its introduction in New Zealand in 1969, civil legal aid has been predominantly used by women in family proceedings. Research conducted by the (then) Department of Justice shows that, in 1979, (before the creation of the Family Courts), more than 93 percent of civil legal aid applications were made for "domestic proceedings" in the District Court. That research also shows that women were the large majority (some 84 percent) of civil legal aid recipients in 1979 and that the typical applicant for aid "was female, aged 20–40 years, living apart from her husband, working at home and in receipt of a domestic purposes benefit". At that time, 88.5 percent of legal aid applicants

were assessed to have no “disposable income” and 90 percent to have no “disposable capital” (as defined, see paras 483 and 485 below). (*Access to the Law*, Appendix 5, at 75, 85, 115, 101) The similarity with the profile of today’s civil legal aid recipients is striking (see chapter 5, paras 394 and 395).

- 475 The context within which the civil legal aid scheme operates makes it unsurprising that women use it to the extent, and for the types of proceedings, that they do. That these are vital factors to be considered in any efforts to bring about changes in or affecting the legal aid scheme is made plain by the Ministry of Women’s Affairs’ explanation of the benefits of policy analysis that is mindful of women’s circumstances. In particular, the Ministry cautions that:
- Orthodox economic analysis is often gender blind because it assumes a generic ‘rational’ individual, and does not analyse the different needs and responses of women and men. Hence, it can fail to define the problem adequately. (*The Full Picture: Te Tirohanga Whānui*, 10)
- 476 This chapter examines the impediments women identified to their use of civil legal aid in order to highlight, first, the ways in which improvements can be made to the civil legal aid scheme to “promote the just treatment of women” within the prevailing social and institutional context. The recommendations made at the conclusion of this chapter are directed to that immediate goal.
- 477 Second, this examination of the civil legal aid scheme, together with the examinations conducted in other chapters, is intended to assist in the identification and design of further-reaching reforms to the civil justice system which will promote the just treatment of women. Some suggestions are made in chapter 12 about likely areas and directions for such reforms.

## THE CIVIL LEGAL AID SCHEME

- 478 Overseen by the Legal Services Board under the Legal Services Act 1991, the civil legal aid scheme is administered at local level by the district legal services committees and their subcommittees. It provides funding to enable applicants who meet the statutory criteria to obtain representation by a solicitor and, if necessary, a barrister. (Legal Services Act 1991, s 20; see chapter 5, para 384) A brief summary of the scheme is supplied here.

### Financial eligibility criteria

- 479 Civil legal aid is available to applicants with “disposable income” of less than \$2000, or such greater amount as the district subcommittee may in special circumstances approve. (s 28(1); Reg 35, Legal Services Regulations 1991)
- 480 Aid may be refused if the applicant has “disposable capital” of more than \$2000 and the district subcommittee is of the view that the applicant can afford to proceed without civil legal aid. (s 28(2); Reg 35)

### Initial contribution

- 481 A \$50 “initial contribution” must accompany all applications for civil legal aid unless an exemption is applied for and granted by the district subcommittee on the grounds that:
- payment would cause the applicant substantial hardship (s 37); or
  - the application is for orders under the Domestic Violence Act 1995 (s 49A).



## The further contribution

- 482 At the time an application for aid is completed, the applicant's lawyer must work out the applicant's "disposable income" and "disposable capital", and the amount of any "further contribution". The Act requires the further contribution to be paid by a person who receives aid unless the district subcommittee varies or waives it on the ground that payment would cause the person "substantial hardship". (s 37)

## Calculation of income

- 483 Disposable income is arrived at by deducting from the net annual tax-paid income of the applicant (and sometimes her or his spouse) a series of allowances for the applicant and others associated with or dependent upon the applicant. The deductible allowances from an applicant's income are as follows:

Status of applicant	Deductible allowances from annual income
Single person	\$9841
Applicant with a partner	\$14 668 (ie, \$9841 plus additional allowance of \$4827)
Sole parent or sole applicant with other dependants	\$10 361 plus \$1872 for the first or only child or dependent relative and \$832 for each additional child or dependent relative
Applicant with a partner and children or other dependants	\$10 361 plus \$4827 (partner's allowance) plus \$1872 for the first or only child or dependent relative and \$832 for each additional dependant.

(Reg 36, Legal Services Regulations 1991)

- 484 The further contribution from disposable income is calculated on the following basis. For the first \$1000 of income above the deductible allowances, applicants are required to contribute \$1 for every \$2 of income. For the next \$1000 of income, applicants are required to contribute \$2 for every \$3 of income. For example, an applicant who has \$2000 of income in excess of the deductible allowances will be required to make a further calculated contribution of \$500 plus \$666.66, a total of \$1166.66. After \$2000 of income above the allowable level, applicants are required to contribute all excess income towards the cost of their legal representation.

## Calculation of capital

- 485 Disposable capital is calculated by deducting:
- the value of the applicant's interest in a home. A sole applicant's interest in a home may be disregarded by the district subcommittee if it is less than \$41 000. When another person's resources are taken into account, the subcommittee may disregard the interest in the home of both the applicant

and the other person if their combined value is no more than \$82 000<sup>23</sup> (Legal Services Board (Civil Legal Aid Applications) Instructions cl 3);

- the value of any vehicle used principally for domestic purposes;
- the value of the person's household furniture, household appliances, personal clothing and tools of trade;
- the amount of contingent liabilities which may mature within the next six months;
- the amount of any unsecured debts; and
- the sum of \$500 where the person has a dependent child, spouse or relative, or where resources of others are being calculated as the applicant's resources (s 29(2)(f)).

486 With regard to the further contribution from disposable capital, the applicant must contribute two-thirds of the value of her or his disposable capital up to \$2000, and then the value of all disposable capital in excess of \$2000. (s 37)

### Merits eligibility

487 Civil legal aid is available for civil proceedings in a range of courts and tribunals in New Zealand. (Legal Services Act, ss 19 and 34(2)) Aid may be refused by the district legal services subcommittee if the applicant does not have reasonable grounds for taking or defending the proceedings or for being a party to the proceedings. (s 34(1)) Aid may also be refused in original proceedings if:

- the applicant's prospects of success are not sufficient to justify the grant of aid; or
- the nature of the proceedings and the applicant's interests in them in relation to the likely cost suggest that a grant of aid is not justified; or
- for any other cause it appears unreasonable or undesirable that the applicant should receive aid in the particular circumstances of the case. (s 34(3)(e))

### Recovery

488 Both unpaid contributions (whether the initial \$50 or the calculated further contribution) and the costs (minus paid contributions) of the legal aid provided to the successful applicants (ie, the costs of lawyers' fees and disbursements) automatically become a charge for the benefit of the Legal Services Board over any property "recovered or preserved" by the aid recipient in the proceedings. (s 40(1)(c)) The district subcommittee also has a discretion to impose charges on other property, where it is of the opinion that it would not be "unjust or inequitable" to impose such a charge. (s 40(1)(d) and (2))

## DEFECTS IN THE CURRENT SCHEME

489 The weaknesses with civil legal aid delivery which this study has highlighted relate to:

- the erosion of eligibility for civil legal aid;
- in light of that erosion, the difficulties posed for aid recipients by the recovery mechanisms of the scheme;

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<sup>23</sup> The \$41 000 and \$82 000 limits match the value of the interests in joint family homes which are protected under the Joint Family Homes Act 1964, s 16(5).

- inadequate public awareness of the civil legal aid scheme;
- New Zealanders' uneven access to legal aid lawyers;
- the complexity of the application process;
- some lawyers' failure to advise on eligibility for legal aid;
- the unavailability of legal aid for advice unconnected with litigation;
- possible inequity in the operation of the capital test;
- the limited control of the quality of legal aid lawyers' service; and
- the scope for inconsistent administration of the civil legal aid scheme.

Each of these matters is considered in turn.

## THE EROSION OF ELIGIBILITY FOR CIVIL LEGAL AID

- 490 The Legal Aid Act 1969, which established New Zealand's first civil legal aid scheme, stated in its Long Title that it was intended to assist people of "small or moderate means". Its successor, the Legal Services Act 1991, states that its intention is to make legal aid and legal services more readily available to people of "insufficient means". The 1991 Act maintains the 1969 Act's income and capital "tests" for determining a person's financial eligibility for legal aid.

### The income test

- 491 The income test (see paras 483 and 484), which requires specified amounts to be deducted from an applicant's income, runs the risk of becoming outdated, as inflation and other forces affect New Zealanders' income levels over time. The dollar values of the deductible allowances were last reviewed in 1987 and were then transported into the new scheme of the Legal Services Act. (Legal Aid Regulations 1970, Amendment No 14 1987/271; Reg 36, Legal Services Regulations 1991) The \$2000 limit above the deductible allowances was set by the 1969 Act, and has not been revised since.
- 492 In 1983, the Working Party on Access to the Law expressed serious concerns about the erosion in the value of the income test since 1969. The 1987 review of the deductible allowances from income went some distance towards meeting those concerns. But the working party identified other problems with the income test which have not been addressed. One problem relates to the different amounts that the test allows to be deducted from income for (a) the spouse of an applicant and (b) the first dependant of a sole applicant. In 1983, the difference between those amounts was \$312: an applicant with a spouse could deduct an allowance of \$2889 for the spouse, while a sole applicant could deduct \$2557 for the first dependant. The working party recommended that the (upgraded) value of those deductible allowances should be identical. (*Final Report*, 1983, 21)
- 493 As a result of the 1987 review, the amounts were upgraded, but a difference (of \$2435) remains. An applicant with a spouse can deduct from annual income the amount of \$4827, on top of a base allowance of \$9841: a total of \$14 668. A sole applicant with one dependant can deduct from annual income the amount of \$1872, on top of a base allowance of \$10 361: a total of \$12 233 (see para 483).
- 494 A "more significant anomaly" identified by the working party (*Final Report*, 1983, 21) was the small size of the deductible allowance from income for additional children or dependent relatives. In 1983, that allowance was \$312,

and was equivalent to the annual amount of the Family Benefit. The working party recommended that the allowance be raised to \$1300 – the amount then sought to be recouped annually under the liable parent contribution scheme. That recommendation was not adopted either. The 1987 review set the deductible allowance for any further child or dependent relative at \$832. That is the amount which applies today (see para 483).

### **The capital test**

- 495 Since 1974, the capital test has been largely one of kind, making its real value less vulnerable to erosion over time (see para 485). However, three elements of the test remain dollar-based: the \$2000 limit above the deductible allowances; the \$500 capital allowance for any dependants; and the \$41 000 interest in a home which may be disregarded. Of those three elements, only the last (the value of an applicant's interest in a home) has been upgraded in value since 1969. It is the same amount as is protected by the Joint Family Homes Act 1964, and was last upgraded in 1996. (Joint Family Homes (Specified Sum) Order 1996/175, Reg 2)
- 496 With regard to the \$2000 limit above the deductible allowances from capital, the Working Party on Access to the Law calculated in 1983 that the movement in the Consumer Price Index between December 1969 and December 1982 meant that \$2000 was then equivalent to over \$9600. It recommended that the \$2000 capital limit (and the \$2000 income limit) be adjusted upwards using the appropriate index to determine their change in value, and that they be tied to that index in future. (*Final Report*, 1983, 22) That recommendation was not adopted.
- 497 Using the same basis for calculation, the working party estimated that, in 1983, the \$500 deductible allowance for any dependants of an applicant was equivalent to approximately \$2400. Again it recommended that the amount be adjusted upwards according to an appropriate index, and tied to that index in future. That recommendation was not adopted either.

### **The effect: an illustration**

- 498 When the Legal Services Act came into force on 1 February 1992, people with an annual income approximately a third higher than the base levels of the Domestic Purposes Benefit would have been eligible for civil legal aid. For example, a sole parent with one child who applied for legal aid in February 1992 could deduct (as now) \$12 233 of income before the next \$2000 was counted as "disposable income". A domestic purposes beneficiary with one child at that time received a base annual income of \$9 694.40. A sole parent with two children could deduct (as now) \$13 065 of income before any further income (up to \$2000) was counted as "disposable income". A domestic purposes beneficiary with two children at the time received a base annual income of \$10 577.70. (Benefit figures as at 1 February 1992 supplied by Department of Social Welfare)
- 499 Since 1992 there have been a number of increases to base benefit levels, Family Support, the Accommodation Supplement and to allowable earnings. Information from Work and Income New Zealand shows that, as at 1 February 1999, the base benefit rate for a sole parent with one child is \$12 870.70 a year and, for a sole parent with two children, \$14 472.25. Without any further

income then, a sole parent with one child now has \$1600 of “disposable income” in terms of the legal aid eligibility criteria. A sole parent with two children has \$2400 “disposable income”, which means that a district subcommittee would need to determine that “special circumstances” existed before that person could be granted legal aid.

- 500 The Legal Services Board research into 2316 civil legal aid files opened in 1994 and 1995 shows that the average personal annual income of recipients was \$13 453. (AC Nielsen MRL, 41) Since the income test for legal aid has not changed meantime, there is no reason to believe today’s recipients would have higher average incomes. The result is that eligibility for civil legal aid is significantly out of step with other forms of government assistance. The financial test for an Accommodation Supplement makes supplements available to both beneficiaries and low income earners. Eligibility for Community Services Card (CSC) assistance has been kept in line with benefit levels and is currently much higher than base benefit levels. In the 1995/96 year, as part of its tax and benefit changes, the government raised the qualifying income levels of the CSC; and, as at 1 May 1998, 1.12 million New Zealanders held CSCs (over 40 percent of New Zealand adults). Table 4 shows the income levels which establish eligibility for the CSC for families with up to six members. For families with more than six members, the eligibility threshold is now determined (since 1 February 1999) by adding to the six person family income level an amount of \$4840 for each extra person.

TABLE 4: Community Services Card Eligibility Levels

Size of family	Income level cut offs
single person (living with others)	\$17 769
single person (living alone)	\$18 846
two-person family	\$28 000
three-person family	\$32 846
four-person family	\$37 692
five-person family	\$42 538
six-person family	\$47 385

Source: Department of Work and Income, February 1999

### **The gap between eligibility for aid and the ability to afford private lawyers’ services**

- 501 There is little doubt that the 1991 civil legal aid scheme was intended to be less generous than the original 1969 scheme. It may be that the provisions of Part V of the Legal Services Act (enabling certain community-based legal services to be developed and funded) were intended to help meet the deficit. It may have been thought that other changes in the justice system, such as the increased use of alternative (private or public) dispute resolution services, would reduce the dependence on legal representation, and hence legal aid, for some types of proceedings. And it may have been thought that the costs of civil justice in the courts would decrease through structural or procedural reforms (for example, in relation to case management). However, slow progress in all of those areas throws the spotlight on the continuing need for a civil legal aid

scheme of sufficient generosity and flexibility to enable ordinary New Zealanders to obtain legal representation.

- 502 Because eligibility for civil legal aid is steadily shrinking in real terms, the New Zealanders who qualify for aid each year are poorer than those who qualified in any previous year. The adverse consequences of this were the subject of very frequent complaint by those with whom we consulted. It was acknowledged that women's over-representation among low income earners renders them more likely than men to be eligible for legal aid. Indeed, 70 percent of civil legal aid recipients are women (see chapter 5, para 394). But it was also pointed out that, because eligibility cuts out at such a low income level, women are over-represented among those who are close to qualifying for aid, but do not qualify, and whose income is such that they cannot afford to pay for more than minimal legal advice and representation services. People in that situation, which was described as a "black hole", are effectively compelled to reach their own solutions to their legal problems, or to reach solutions with minimal legal assistance.
- 503 There was a high level of agreement among the various groups consulted that this situation tends to penalise women, especially in bitter family disputes. One reason is that in order to reach the least costly solution, particularly when their ex-partners have the income to support protracted litigation, women are tempted to "trade off" their rights to a fair property arrangement so that they may secure custody of children. Another reason is that women often do not have control of family property, and are in a weaker position to identify it and exert their rights to it in the face of recalcitrant ex-partners.

"Women are particularly disadvantaged. They typically have low incomes/few assets and have to fund childcare. Many of the issues that women face are very central to their being, eg, custody/child support/occupancy of the home. Owing to their means, they are often reliant on the civil legal aid system which is not always matched as to eligibility levels with the benefit system, eg, a woman with sufficient children on the benefit can be too rich for legal aid." – *Submission 323 (lawyer)*

"It's a common problem to have clients ineligible [for legal aid] – a kind of 'black hole' particularly with difficult cases which may be expensive and they earn too much to qualify but not enough to pay costs." – *Submission 68 (lawyer)*

"In the end, the woman offered the husband the house (ie, she would not claim half) in return for her having custody of the child. This was offered in court – the judge was aware – and the husband agreed. This meant he had the house, and the mother and child were homeless. The husband also said he would no longer require access to the child: he didn't really want custody or access at all." – *Submission 162 (lawyer)*

## THE EFFECTS OF EROSION OF ELIGIBILITY ON RECOVERY

- 504 The civil legal aid scheme requires aid recipients, where possible, to make some form of financial contribution to their legal costs. In principle, there can be no objection to the notion that those who can afford to should make a

contribution. The evidence collected in this study indicates, however, that potential applicants are deterred from seeking legal aid because they cannot afford the costs which will or can be imposed upon them. In particular, some cannot afford the initial \$50 contribution that is generally required. Others are fearful of being unable to repay any charge which might be imposed on their property.

### The \$50 contribution

- 505 The Legal Services Board's research shows that, before the Domestic Violence Act 1995 took effect, 82 percent of civil legal aid recipients were required to pay the \$50 initial contribution. It also shows that the average personal weekly income of civil legal aid recipients was \$258 (\$13 453 per annum). (AC Nielsen MRL, 10, 41) The initial contribution is nearly 20 percent of that weekly income.
- 506 The 1996 New Zealand study *Women on Low Incomes* (Duncan, Kerekere and Malaulau, 8) found that low incomes cause women to restrict their spending on daily necessities such as food. Rent, power, the telephone bill and sometimes healthcare were paid for first, and food was bought with what was left over. This provides some context for the consistent complaint made throughout this study's consultation programme: that the \$50 contribution is more than many low-income earners can afford, and that it can prevent women from proceeding with their legal matters even when they clearly qualify for legal aid.

"A lot of our Māori women do know what legal aid is but they still can't afford it. The \$50 fee is too much for them to pay." – *Transcript of hui with Māori women, Rohe 9*

"The contribution poses a significant barrier to women on low incomes." – *Submission 23 NZLC MP8*

"Many lawyers pay the \$50 for their clients as yet another impost because the clients are too poor to pay it and at least it gives the lawyer the work. The administration is such that it must be asked whether the contribution is worth the candle." – *Submission 323 (lawyer)*

"Clients regularly cannot afford the contribution and lawyers end up paying it for them. Sometimes this is recovered, sometimes it is not." – *Submission 11 on NZLC MP8 (lawyer)*

"In many cases we write off the \$50 initial contribution if the case genuinely warrants it." – *Submission 361 (lawyer)*

"Our own firm has lost count of the times we ourselves have paid the \$50 on behalf of clients to ensure they did get legal aid." – *Report on Consultation with Pacific Islands Women, 30*

"... it is clear that the \$50 contribution is a substantial burden on many applicants." – *Submission 24 on NZLC MP8*

- 507 Further evidence of the deterrent effect of the \$50 initial contribution is supplied by the 1995 report on the criminal legal aid scheme, *In the Interests of*

*Justice*. It found that proportionately fewer applications were made for criminal legal aid in the areas of New Zealand where a contribution of \$50 was routinely imposed on applicants. (Legal Services Board 1995, 78)

## Charges

- 508 Data from the Legal Services Board's computerised records system shows that 2020 charges were registered in favour of the board in the 1997/98 year in respect of civil legal aid grants. Their average value was \$2729. The average value of a grant of civil legal aid in the 1997/98 year was \$1935 (see chapter 5, table 2, para 390). The following table sets out the 1997/98 data on charges.

TABLE 5: Total Charges Registered in Favour of Legal Services Board  
1/7/97 – 30/6/98

Value	Number	Average amount
\$0 – \$1000	369	\$756
\$1001 – \$2000	729	\$1470
\$2001 – \$5000	694	\$3013
\$5001 – \$10 000	175	\$6859
\$10 001 – \$20 000	41	\$13 064
\$20 001 – \$30 000	10	\$26 327
\$30 001 – \$40 000	2	\$36 969
Total	2020	\$2 729

Source: Legal Services Board, February 1999

- 509 From the fact that 26 113 applications for civil legal aid were granted in 1997/98 (see chapter 5, Table 2, para 390) and 2020 charges imposed, it can be estimated that fewer than 8 percent of aid recipients in that year had charges imposed on their property to secure repayment of some portion of the grant of aid. The board's research on the sample of 1994/95 files showed that 16 percent of those aid recipients had charges imposed. (AG Nielsen MRL, 68)
- 510 The total value of the 2020 charges imposed in 1997/98 was \$5.51 million. That represents 11 percent of the total expenditure on civil legal aid that year. The repayment of 1023 charges in 1997/98 brought in \$2.38 million to the board. All were worth less than \$40 000, and they had an average value of \$2322. (Figures supplied by Legal Services Board)
- 511 To a large extent, women use legal aid to resolve the issues that arise out of breakdowns in their family relationships. Typically, those situations involve the division of one household's assets and income-earning potential into two. Women generally provide primary or sole care for any dependent children after their relationships have broken down, and manage those responsibilities on low incomes. At the time of the 1996 Census:
- 83 percent of sole parents were women;
  - 65 percent of sole parents had been married;
  - the median income of one-parent families in New Zealand was \$16 900; and
  - 40 percent of mother-only families had a total household income of less than \$15 000.



- 512 The evidence collected in this study indicates that women view the possible imposition of a charge on legal aid recipients' property as a significant deterrent to pursuing their legal matters on legal aid. The likelihood of a charge being imposed, and the amount of it, are determined by a district subcommittee only at the conclusion of the aided proceedings. Accordingly, a lawyer acting for an aided client is unable to predict the subcommittee's decision with any certainty. Very often, women who were or had been in receipt of legal aid said that fear of incurring a debt of unknown proportions compounded the financial and emotional strain of their circumstances during legal proceedings.
- 513 Women who had charges imposed on their homes also said that the demands on their incomes were such that they could not repay them in the foreseeable future, except by selling their homes. Typically, however, the women were concerned that if they repaid the charge out of their share of the proceeds from the sale of their home, they would then be unable to purchase another home that was suitable for their family's needs. The values of the homes in question were sometimes very low indeed. It was evident that some women felt "trapped" in their homes because of the existence of the charge in favour of the Legal Services Board. None of those women were aware that an application could be made to the relevant district subcommittee to have the charge transferred to another property upon the sale of the property that was originally charged with the debt. (Legal Services Act 1991, s 49) The board has advised that such applications are rarely made and that repayment of part of the charge would generally be sought as a condition of allowing its transfer to another property.

"People are sitting in their house that they are barely managing to hold together and pay the rates on and things, and they think 'I can't leave it because if I leave . . . and I sell my house and I get \$30 000 for it someone is going to tap me on the shoulder and say, Look here is the \$8000 legal bill to pay'. And so it's very restrictive. You are a prisoner in that house because if you move you will lose. Your equity in the house will go to your legal aid bill, and you may not ever save enough to re-establish yourself in a house. So I don't think that's a very good situation to put people in because by and large women are on lower incomes, often because of looking after children, and they haven't got a high income to take out these mortgages." – *Submission 65*

"A woman who had left a violent relationship bought a very cheap house in [name of rural town]. She had her children with her. Her husband had told her that if she took the kids he would 'grind her into the dust'. The man keeps making custody applications and the woman is on legal aid. It is getting to the stage where the legal aid charge is greater than the equity in the property. The woman is getting really worried about this because she thought the house was an asset that she could use to keep a roof over her children's heads. The house, like most in town, is worth about \$20 000." – *Meeting with Southland community workers, June 1996*

- 514 The Legal Services Board's research on the sample of 2316 files opened in 1994 and 1995 shows that legal aid recipients in matrimonial property and employment proceedings are the most likely to have charges imposed on their property. Indeed, 59 percent of recipients involved in matrimonial property proceedings, and 56 percent of recipients involved in employment proceedings,

had charges imposed. Just over a third (35 percent) of those bringing “other civil” proceedings (such as ACC, social security, administrative and insurance related proceedings) had charges imposed. (AC Nielsen MRL, 68, 72) By contrast, aid recipients involved in mental health proceedings are least likely to have charges imposed. From the sample file study, only 1 percent of these recipients had charges imposed on their property.

- 515 Women involved in matrimonial property disputes are the most likely group of aid recipients to have charges imposed, because women make up the great majority of aid users (70 percent) and matrimonial property litigation is the most likely to result in property being available to charge. As has been seen, the great majority of women aid recipients have dependent children and are “unemployed” (see chapter 5, para 394). It has also been seen that women have lower income levels than men and are more adversely affected financially by marriage breakdown (see chapter 4, para 223).
- 516 There is nothing in the Legal Services Act to suggest that those facts have been considered in the policy which underlies the charging regime. As a result, the “gender-neutral” policy governing the imposition of charges on the property which women recover or preserve as a result of legally aided litigation is likely to entrench the disadvantage which exists because of women’s reduced ability to recover from the economic effects of marriage breakdown.

“Some women have nothing other than a low equity home and children. They can’t see they will ever be able to get ahead. He’s on the dole without kids moaning about \$10 per week and she ends up paying with a charge. Something stinks somewhere.” – *Submission 337 (lawyer)*

“[The] imposition of charges on matrimonial files by way of charge over home which can effectively erode woman’s equity [is] unfair – she frequently has no ability to clear debt from income as a man can . . . .” – *Submission 318 (lawyer)*

“Often it is the woman with children who is in the house, who structures a property settlement with her retaining the house and who then finds that the house is charged simply because it is the easiest asset to identify. She will then be in a position where she has a long term low equity mortgage, very little ability to service repayments as a consequence and her poverty will become more entrenched.” – *Submission 323 (lawyer)*

- 517 It is notable that, by amendments to the Legal Services Act made by the Domestic Violence Act 1995, those who take proceedings under that Act and who are eligible for legal aid are exempted from paying the initial contribution of \$50 and from the recovery scheme. The aim of the exemption provisions was to remove any deterrent posed by the civil legal aid scheme to those seeking protection from violence. Since the amendments took effect, the Legal Services Board’s records suggest there has been a substantial increase in applications for civil legal aid to fund domestic violence proceedings. The records only capture the fact that an aid recipient is involved in proceedings for a protection order, not whether the person is an applicant or a defendant. However, the increased number of recipients involved in those proceedings (approximately 10 000 each year at present) and the amount of the increased costs to the scheme since the Act took effect indicate that the number of legally aided applications for

protection orders has risen as a result. The board advises that in the 1998 calendar year, the cost of legal aid for domestic violence proceedings was \$9.28 million. Publicity about the new Act's wider definition of domestic violence may have encouraged some applications that were previously not able to be made but it seems highly likely that the well publicised removal of the financial disincentives for low-income applicants has contributed significantly to the increase. (New Zealand Institute of Economic Research 1997, 4)

## Conclusion

### *Erosion of eligibility for aid*

- 518 The combined effects of the erosion of eligibility for civil legal aid over many years combined with the absence of alternatives to the resolution of many disputes without legal representation reduce, to an unprincipled and inequitable extent, the ability of ordinary New Zealanders to obtain access to justice. The income levels of the majority of New Zealanders are so low in relation to the cost of legal services that a genuine attempt to bridge the gap would allow not only those in receipt of government income support but also those whose earnings exceed income support levels to receive the benefits of the scheme.
- 519 Determining the cost of raising the financial eligibility threshold for civil legal aid poses considerable difficulties. The New Zealand Institute of Economic Research advises that, because there are no reliable statistics on the three matters relevant to the income and capital tests – savings, property ownership and income – it is not possible to estimate either the proportion of the population that is now eligible for civil legal aid or, therefore, the costs of increasing eligibility. If eligibility were extended, there would of course be a greater likelihood of cost recovery to offset the extra expenditure.

### *Recovery mechanisms*

- 520 The deterrent effect on legal aid applicants both of the initial contribution and the possibility, and reality, of charges has already been described. In their responses to the consultation paper *Women's Access to Civil Legal Aid*, lawyers commonly defended the status quo on the basis that these aspects of the scheme act as a justifiable deterrent to vexatious litigation, and make the civil legal aid litigant, like any private paying litigant, weigh the costs and benefits of their litigation before they proceed. The rationale is that if civil legal aid were simply a grant, recipients would be much less likely to take cost factors into account when making their decision and would have an incentive to continue litigating indefinitely to obtain the best result.
- 521 That reasoning is open to challenge on a number of grounds, however. First, the evidence collected in this study indicates that women take very seriously indeed any decision to involve the justice system in their lives. The Women's Consultative Group of the New Zealand Law Society also commented in its submission on *Women's Access to Civil Legal Aid*:

"If the purpose [of the \$50] is to establish the seriousness of a prospective applicant's intent, then this is misguided. Members of the public do not consult a lawyer unless they are serious."

- 522 Second, there are a number of checks and balances within the process for granting aid to prevent abuse of the scheme: for example, the merits test and the processes for monitoring grants of aid by the district subcommittees. These mechanisms are more appropriate than the imposition of a \$50 contribution for preventing undue use of the civil legal aid scheme. The question of quality assurance is returned to shortly.
- 523 Third, the evidence collected in this study indicates that many clients have little knowledge of, or control over, their lawyers' actions. A particularly strong message from the consultation with Pacific Islands women, for example, was that they had played little part in decisions about their cases, and were on occasions persuaded by their lawyers to go along with courses of action which they disliked or did not understand.

"Women spoke of lawyers having been controlling of them as opposed to there being a partnership relationship." – *Submission 275*

"For sure I had no control over my case. Because I didn't know the legal processes and the legalities in it. I didn't even think to ask my lawyer because I thought he had told me everything I needed to know but he hadn't. It was only when I started getting ugly about not knowing what was going on that my lawyer kept me up with the play." – *Report on Consultation with Pacific Islands Women, 18*

- 524 In any event, the existence of guideline fees removes legal aid recipients from financial control of matters. They are not in the same position as private litigants, who can refuse to pay their lawyers if dissatisfied with the service they receive.
- 525 Fourth, the decision whether to impose a contribution or a charge, and its amount, rests with a district legal services subcommittee, not the recipient's lawyer. As a result, civil legal aid clients often cannot obtain from their lawyers reliable estimates of the likely total cost of the proceedings they are initiating, and so cannot weigh the benefits and possible costs, of continuing.
- 526 Finally, the purpose of the civil legal aid scheme is to give financially vulnerable New Zealanders access to legal representation. It is inconsistent with the purpose of the legislation to exclude, by financial deterrents, the very people it was designed to assist.

### *Options for reform*

- 527 Three options for reforming the recovery mechanisms of the civil legal aid scheme are considered here. None of them is mutually exclusive. The first is to abolish the \$50 initial contribution for all applicants.
- 528 As has been seen, the \$50 initial contribution makes up a significant proportion of any aid recipient's weekly income. Its deterrent effect is obvious. The only other rationale for its existence is as a source of revenue. The Legal Services Board's annual reports indicate that the revenue received from both initial (the \$50) and further (calculated) contributions over the last three years was \$931 000 in 1996, \$917 000 in 1997 and \$1.17m in 1997/98. The board's earlier research indicates that 17 percent of legal aid recipients were exempted from

the requirement to pay the \$50 initial contribution; 82 percent of recipients paid only the \$50; and only 1 percent were required to pay a further contribution. (AC Nielsen MRL, 64) Since that time, the Domestic Violence Act has come into effect, exempting legally aided applicants for protection orders from paying the \$50 contribution.

- 529 Many lawyers commented in their submissions that their firms sometimes bore the cost of the \$50 initial contribution that is required to accompany the application for aid unless a waiver is sought. Some said they recoup that amount by small weekly or fortnightly payments from their clients. (See NZLC, MP8, 16–17.) Others said it was not worth the time involved to do that. The board is aware of the varying practices in this regard and believes that the low rate of exemptions granted by some district legal services subcommittees may be due, at least in part, to lawyers in those areas paying the \$50 contribution on behalf of their clients instead of applying for an exemption. To the extent that this is occurring, it calls into question both the source of the board's returns from the initial contribution and the grounds for its collection in individual cases.
- 530 Although it is not possible to calculate precisely the current revenue from initial contributions, the New Zealand Institute of Economic Research has advised that if there were 20 000 applications for legal aid granted annually, then, taking account of the impact of the Domestic Violence Act, the amount of revenue foregone by removing the \$50 contribution would be in the region of \$640 000. (New Zealand Institute of Economic Research 1997, 5–6) That amount does not take into consideration the administrative costs incurred in collecting the initial contribution from aid recipients. These would erode the potential revenue collected.
- 531 Two further options to reform the recovery mechanisms of the civil legal aid scheme are:
  - to exempt further types of litigation from liability for contributions and charges; and
  - to limit the imposition of charges to property of a particular value.
- 532 The scheme already exempts applicants for protection orders under the Domestic Violence Act 1995. Few would dispute that, if protection from violence must normally be paid for, then those who cannot afford it must be the first to be exempted from doing so. It can of course be argued that, in principle, the exemption should not stop at the obtaining of a protection order but should extend to all other matters made necessary as a result of the violence, including arrangements for the custody of children and division of shared property. On that argument, the Act's response to a serious social problem is very limited for it covers the narrowest range of meritorious situations.
- 533 When considering exemptions for other types of litigation, however, unprincipled distinctions are not only exceedingly hard to avoid but also more difficult to justify on the grounds of "greatest merit". For example, it can be difficult to distinguish between the outcomes of matrimonial property litigation brought to preserve security of tenure and other types of litigation such as the enforcement of mortgages. Likewise, litigation over income (for example, welfare eligibility and ACC entitlements) may profoundly affect the ability of individuals to care for themselves and their families, as may litigation to enforce payment under a contract.

- 534 It needs to be noted too that the financial position of a legal aid recipient is not necessarily dependent on the type of litigation: if recipients own or recover sufficient property, then it seems fair that they should have to reimburse the scheme, irrespective of the proceedings brought. The difficult issue is, what amounts to “sufficient property”?
- 535 A consideration of that question leads to the last option, of excluding a certain value of property from the charging scheme. This would enable those who can afford to repay to do so, and provide those who cannot afford to pay with some “baseline” of future financial security.
- 536 The Legal Services Board’s research on the 1994 and 1995 files provides some information relevant to the value of the property that might be protected in this way. It shows that only a minority of aid recipients (24 percent) own homes, and that they are the people most likely to have charges imposed on their property: 55 percent of recipients with homes had charges imposed, compared to 4 percent of those without homes. (AC Nielsen MRL, 68) The research shows further, that:
- the majority of aid recipients (56 percent) have total assets (minus total liabilities) valued at no more than \$40 000;
  - 70 percent of aid recipients have total assets valued at no more than \$60 000;
  - the majority (60 percent) of charges are imposed on property valued at more than \$40 000. (AC Nielsen MRL, 45, 71)
- 537 In fact, it may be that more than 60 percent of charges are imposed on property valued at more than \$40 000. This is because in 20 percent of the cases in which charges were imposed, the legal aid files did not state the value of the property that was charged. It is relevant too that in the remaining 20 percent of cases, where charges were imposed on property valued at less than \$40 000, over half of the charges were imposed on property valued at less than \$10 000. (AC Nielsen MRL, 71) It is questionable whether charges on property with such a low value provide good security for the debt that is owed to the Legal Services Board.
- 538 In light of those facts, it may be that the value of the property which can fairly be exempted from the charging provisions of the legal aid scheme is near the value of the protected interest in a joint family home (presently \$41 000), which the Legal Services Act allows the subcommittees to disregard in their assessments of applicants’ capital. Any single fixed amount, however, would not allow for regional differences in property values. It has already been noted that the Accommodation Supplement, available to beneficiaries and low-income earners, is adjusted to take into account the reasonable housing needs of people in different regions. This would seem to be a particularly relevant consideration to be factored into the legal aid charging regime.
- 539 Further, any fixed amount would not allow for the fact that different recipients of aid will have different demands upon their income and asset base. At present, this fact is sought to be recognised by district legal services subcommittees when exercising their discretions to determine the amount, if any, of each recipient’s liability and the manner of payment of a recipient’s debt to the board. A more principled method of determining liability could be introduced which takes into account recipients’ actual (and reasonable) living costs as well as the value (above the exempted value) of their asset base. Sliding scales for the recovery

of legal aid costs are a feature of some overseas schemes (for example, the Queensland and soon to be disbanded English schemes) which could well inject equity, in a transparent manner, into New Zealand's scheme. Finally with regard to the manner of payment of recipients' debts, the Legal Services Board has criticised the present arrangements for charging agreements and recommended statutory amendments to increase their effectiveness. (*Review of the Legal Services Act 1991*, Legal Services Board, 1995, 8–9) The board estimates that, aside from the recoveries made from initial and further contributions, statutory land charges account for more than 99 percent of other recoveries made by the board.

## INADEQUATE AWARENESS OF LEGAL AID

- 540 The next defect in the civil legal aid scheme which has been highlighted by this study is the low level of awareness among women of the existence and the terms of civil legal aid. This is no new phenomenon. In the Department of Justice's review of the civil legal aid scheme in 1981, it was found that:
- the most significant trend emerging from the interviews conducted with civil legal aid clients was the widespread public unawareness of the scheme. Deeper than this, was an ignorance of available legal resources generally. (*Access to the Law*, Appendix 2, 449)
- 541 In 1993, the Report from the Women's Suffrage Centennial Forum on legal aid again found little information available. (*Are Women Getting the Help They Need From the Legal Aid Scheme?* 14, 18) At the consultation meetings held during this study, women freely acknowledged that their level of knowledge of the scheme is not high. Among some groups, including Māori women, the need for information was particularly evident.

"Legal aid is only given when you have been really strictly means-tested. Many of our Māori women do not know what legal aid is or what the criteria is for getting legal aid. There is a real need to have that information given to them. It seems that no one, not even their lawyers, are informing them about legal aid." – *Transcript of hui with Māori women, Rohe 8.*

"What does legal aid do? Can you apply for it for any court proceedings?" – *Transcript of hui with Māori women, Rohe 4*

"That legal aid thing, isn't that when you don't have to pay for anything your lawyer does?" – *Transcript of hui with Māori women, Rohe 4*

"Other women I know didn't even know what legal aid would do for them." – *Transcript of hui with Māori women, Rohe 3*

- 542 From what the women said, it appears that misinformation about the scheme's operation is at least as widespread as ignorance of its existence. These are major barriers to citizens' access to legal services, particularly when the cost of legal services was the reason most often given by women for not utilising the justice system to protect and enforce their rights. It defeats the very purpose of a scheme designed to assist the financially vulnerable when those who are entitled to use it are unaware of its existence and ill informed of its conditions of operation.

- 543 The consultation paper *Women's Access to Legal Information* (NZLC MP4) listed and assessed the many tangible information resources available to the public in respect of legal aid. It identified significant problems with the targeting and distribution of those resources. Since the consultation paper was published, the Legal Services Board has produced a revised issue of its pamphlet on legal aid and related services: *Legal aid guide*. The pamphlet will soon be available in several languages. This initiative is timely and encouraging. However, as a written document of some length, it will not meet the information needs of diverse New Zealanders. The targeting of legal information is discussed in more detail in chapter 9.

## UNEVEN ACCESS TO CIVIL LEGAL AID LAWYERS

- 544 For a number of reasons, people who meet the civil legal aid eligibility tests cannot be certain of securing representation. First, as was outlined in chapter 5, lawyers tend to congregate in the cities; some parts of the country have very few lawyers; only a minority of private lawyers do legal aid work; and lawyers employed by community law centres are rarely authorised to represent clients in court.
- 545 Second, while lawyers have an ethical obligation to advise clients of their eligibility for aid, they are not obliged to act for those clients on civil legal aid. And, even if a lawyer willing to act can be found, his or her technical competence to handle the particular matter cannot always be guaranteed. This is less likely in the traditional, and growth, areas of legal practice, such as family and mental health proceedings – although numerous criticisms were made (including by senior lawyers and judges) of junior lawyers' professional and personal qualifications to deal with family proceedings. But in less developed areas of law – for example, consumer and welfare law – expertise is less common and lawyers willing to act for low-income clients are more difficult to locate.
- 546 It is not known whether that fact contributes to the low use of legal aid for civil proceedings outside the family and mental health areas: less than 10 percent of civil legal aid expenditure is incurred in respect of all other types of proceedings. The Legal Services Board's current research on unmet legal needs may shed light on the matter. However, it has long been a criticism of judicare legal aid schemes that, by being "but a small extension" of private legal practice (*Access to the Law*, 1981, 157), they do not promote the development of areas of law of particular concern to low-income people yet outside traditional areas of lawyers' expertise. (See, for example, Zemans 1996) One result of this, as was noted in chapter 6, is that community law centres are uniquely placed to develop expertise in these areas.
- 547 The overall result is that the judicare model of legal aid, which is so tightly tied to the private market for lawyers' services, is subject to significant restrictions on its ability to provide New Zealanders who are eligible for aid with the legal representation they need. Amendments to the Legal Services Act 1991 would be required to empower the Legal Services Board to introduce (even by way of pilots) alternative methods of legal aid delivery in areas of law, or areas of New Zealand, in which it considers there is a need for improved coverage.



## COMPLEX APPLICATION PROCESS

- 548 As the summary at the start of this chapter shows, the method of calculating eligibility for civil legal aid is relatively complex. This not only makes regular reviews of the criteria more administratively difficult but also complicates the application process. Across the range of those who were consulted, it was frequently said that the complexity of that process (which involves providing confirmation of any benefits, wages and savings and of the value of any home that is owned) places substantial hurdles in the path of prospective applicants for legal aid.

“The forms you fill in are terrible. You have to run around proving this and that. They’re not practical. The women have to run around usually with their four children to Income Support, or the bank to prove they are eligible and it’s a real problem for them.” – *Transcript of hui with Māori women, Rohe 10*

“Women come in once, they struggle through filling in a legal aid application. They have to get a letter from their boss, Income Support and pay the initial contribution.” – *Transcript of hui with Māori women, Rohe 7*

“The cost of the paper work is high and gets passed on to the client.” – *Submission 323 (lawyer)*

- 549 There have been regular calls for the simplification of both the application process and the form. Such calls were made, for example, in the 1993 report from the Women’s Suffrage Centennial Forum held in Wellington, and in the report, *A Review of the Family Court*, written the same year by a committee established by the Principal Family Court Judge. That committee commented, having consulted a range of people and organisations during its four month study:

Almost universally, the size and complexity of the legal aid application form was cited as a major irritant. Lawyers have indicated that they have to oversee the completion of the form, that it often occupies two or three different points in time, and is unnecessarily full. We conclude that its complexity is often a deterrent to its completion and thus a possible grant is avoided – but this is not an appropriate method of eliminating an application for legal aid. (Boshier et al 1993, 150)

- 550 Lawyers around the country who made submissions to this study said that prospective clients are deterred from seeking civil legal aid because of the time it takes to gather the necessary information and complete the application form. Their estimates of the time needed to complete the application form varied, from 10 minutes if the client has all the information to two hours if more than one meeting with the client is required. Some lawyers commented that it usually took clients two appointments to get the form completed. Applicants who need that assistance will incur a variety of costs, on matters such as transport and childcare, in order to gather all the necessary information and attend the appointments with their lawyers. Granted that there may be uncertainty about an applicant’s eligibility for aid, and that, for some potential applicants, the prospect of the application process and paying the initial \$50 contribution will be particularly daunting, it is readily understandable why the opportunity to obtain legal aid is not always pursued.

- 551 The New Zealand Law Society *Poll of Lawyers* confirms the view that the complexity of the legal aid application process deters applications. Of the 30 percent of lawyers who said that they had not actively discussed or pursued legal aid as much as they should have, almost half (45 percent) gave as a reason the length of the forms. (*Poll of Lawyers*, 36) Similarly, the Legal Services Board's 1995 review of the Legal Services Act records that 67 percent of participants stated that simplified forms were desirable. (*Review of the Legal Services Act 1991*, 7)
- 552 The Legal Services Board has accepted the need to simplify the form but emphasises that the complexity of the application process is due largely to the requirements of the Act and the regulations made under it. In January 1999, it approved a new application form for civil legal aid, for use from June 1999. The new form is shorter than the previous seven page form, being four pages, with a one page supplement for use by those applicants whose financial eligibility is determined in the light of their own income and assets and those of another person. It will still be necessary, however, for an applicant to provide the same verification as has always been required of their own (and, if relevant, another person's) income, savings and home value. Accordingly, the practical difficulties of gathering the required information are not reduced by the new form. It will, however, enable the data provided to be entered more rapidly in the board's database. In addition, the new form asks applicants to identify their sex and ethnicity, in the latter case by ticking one of 13 options (including "not stated"). That information has not been collected before and even sample studies of files could not identify applicants' ethnicity.
- 553 Part of the problem of the complexity of assessing eligibility could be resolved if eligibility were tied to another form of means-tested government assistance, such as the Community Services Card. A simplified application form could follow, at least for those who are eligible for the other assistance. The New Zealand Law Society has already suggested that a simplified form would be possible for applicants who receive means-tested assistance below a certain level. (*Review of the Legal Services Act 1991*, 7)

## FAILURE TO ADVISE ON ELIGIBILITY

- 554 Women criticised their lawyers' failure to advise them on whether they were eligible for civil legal aid. A related complaint was that, without adequately explaining the benefits of receiving legal aid, some lawyers had offered to work for women clients at legal aid rates (paid directly by the women) rather than applying for civil legal aid on their behalf.

"My three children are in Christchurch and I have no access to them whatsoever. I haven't seen them for a year now. I have had two lawyers helping me. The first didn't help me by telling me about legal aid or my rights. My second lawyer is much better and got me legal aid, and now I am trying to get my children." – *Transcript of hui with Māori women, Rohe 7*

"J is on the DBP and is not receiving legal aid. Her lawyer said not to apply for civil legal aid because she stood to get such a large settlement when it was eventually settled and she would just have to pay it back out of that anyway.

Although she is on the DPB she is paying \$20 per fortnight in costs to her lawyer. To the end of March [1996] she owed her lawyer \$9300 and she knows her bill will be higher now. The lawyer is charging her accumulated interest on her bill and she can't pay until settlement." – *Submission 387 (telephoned)*

"Initially V was on legal aid. V has a charge for \$2000 on her home. Her second lawyer said 'You would be better off not on legal aid as a charge would be made against your house. It would be better if you paid off "so much" on a regular basis'. V has just received a bill for \$900. A friend told her that legal aid rates were lower and she feels as if she has been ripped off. The bill was not itemised and V was unable [to say what her] lawyer's hourly rate was or whether there were any disbursements." – *Submission 330 (telephoned)*

"While the commentary [to the Rule of Professional Conduct] states that it is the duty of the practitioner to draw legal aid eligibility to the client's attention, in my experience this is not always done . . . Insufficient information is available about legal aid, and clients are in the hands of their lawyers who sometimes consider legal aid too much of a fag to go through." – *Submission 323 (lawyer)*

"Lawyers tend to assist applicants with decisions whether to apply for legal aid and whether they are eligible. Lawyers are often not sufficiently informed as to the requirements. There seem to be no real guidelines as to special circumstances allowing legal aid to be granted to persons not meeting the financial eligibility test." – *Submission 323 (lawyer)*

- 555 The 1997 *Poll of Law Firms* revealed that, among the 50 percent of firms with a civil legal aid policy, 29 percent sometimes look for alternative options (such as offering a lower hourly rate) instead of encouraging clients to apply for aid. (*Poll of Law Firms*, 30). The results of the *Poll of Lawyers* suggest that some lawyers do not routinely provide people who may be eligible for civil legal aid with information about the scheme. Over half of the lawyers surveyed (56 percent) said that they do not always assess whether a client is eligible for civil legal aid – this includes 33 percent who never or rarely assess. Only 27 percent of the lawyers polled said that they always assess whether a client is eligible for civil legal aid. (*Poll of Lawyers*, 156) The reasons given for not pursuing civil legal aid with clients include:
- the low remuneration rate for civil legal aid work;
  - the length of the forms that need to be completed in applying for civil legal aid;
  - that payment for work done for an aided person is too slow; and
  - "too much red tape". (*Poll of Lawyers*, 159)
- 556 More recently, the Wellington District Law Society noted that its Complaints Committee had received an increased number of complaints from clients alleging that their lawyers had not fully advised them of their rights to apply for legal aid. (*Council Brief*, May 1997 Issue 249, 1)
- 557 Since the publication of *Women's Access to Civil Legal Aid*, the Ethics Committee of the New Zealand Law Society has placed the following statement in *LawTalk* to clarify the situation for practitioners:
- Question: I have a client who may be eligible for civil legal aid. May I offer to act at the legal aid rate instead of making application for legal aid?

Answer: No, probably not. If you are prepared to work at legal aid rates, if the job is within your competence and if you have time to do the work, then you are bound to accept the client's instructions. You must always act solely in the best interests of your client – see Rule 1.01 commentaries (1) and (2). It is almost invariably in the client's interest to apply for legal aid, since billing will be scrutinised by the District Legal Services Subcommittee; it is possible that no charge or a partial charge only will be imposed; any charge may not be payable immediately; and the protections [relating to costs] accorded under s 86 of the Legal Services Act 1991 will apply. (*LawTalk* 483, 18 August 1997, 8)

- 558 The Ethics Committee is now in the process of drafting new Rules of Professional Conduct to expressly state lawyers' obligations to clients who may be eligible for legal aid. It is likely that the new rules will require a practitioner who proposes to act for a client who may be eligible for aid to investigate that person's eligibility and, if legal aid may be available, to explain the advantages and disadvantages of obtaining a grant of legal aid. Further, the new rules will state expressly that a practitioner may decline to act for a client on legal aid where she or he believes that the legal aid rate is not fair remuneration but must advise the client that there are other competent practitioners likely to be willing and able to do the work on legal aid.
- 559 The proposed clarification of lawyers' obligations to aided clients is a positive step and, if changes to the Rules are accompanied by information about the eligibility criteria and how to investigate financial eligibility, will be of benefit to prospective clients. The need for that information to be made available is apparent from the material gathered in this study which shows that there is uncertainty among some lawyers about the operation of the legal aid scheme, including about eligibility for aid. For example, many lawyers who spoke or made written submissions to us said that they are often unaware of their clients' incomes. Some were under the impression that their obligation to advise their clients about civil legal aid depended upon whether the clients were in the paid workforce.
- 560 There have been limited educational opportunities for lawyers to familiarise themselves with the legal aid scheme. While some districts provide occasional seminars on civil legal aid (including a recent Auckland District Law Society seminar), the most recent New Zealand Law Society seminar was held in March 1992. In 1995 the Legal Services Board provided information to all practitioners about the changes to civil legal aid brought about by the Domestic Violence Act 1995. The most recent changes to criminal and civil legal aid, including the changes to remuneration rates and some guideline fees, have also been well publicised by the board to the legal profession. It is notable that all the recent initiatives focus on some of the "technical" information needs of lawyers rather than on the "bigger picture" which would allow lawyers to see their own legal aid work in its larger context and to understand better clients' perspectives of the scheme's limitations.
- 561 The consultation paper *Women's Access to Civil Legal Aid* suggested that it would be useful for lawyers to have more opportunities to learn about the operation of the civil legal aid scheme. The majority of the submissions received in response were supportive of this suggestion. It is understood that, as a result of the findings presented in this study's consultation papers, the Institute of Professional Legal Studies is incorporating material about legal aid in its 13 week course for law graduates. The New Zealand Law Society is also prepared

to include legal aid in its continuing legal education programme. These are desirable moves. The society can also inform lawyers about legal aid issues through its fortnightly publication *LawTalk* which is sent to all lawyers with current practising certificates. The Legal Services Board's quarterly publication *Sounding Board* has a far smaller audience and the board is very appreciative of the society's efforts to incorporate in *LawTalk* information from *Sounding Board*.

## NO AID FOR ADVICE UNCONNECTED TO PROCEEDINGS

- 562 The philosophy of the New Zealand civil legal aid scheme has consistently been that legal aid should be available only for legal representation in proceedings, not for legal advice which is not connected to legal proceedings. In this, the scheme differs from many overseas schemes, including the (soon to be disbanded) United Kingdom scheme on which New Zealand's was, in all other respects, closely modelled. (See further, NZLC MP8, 24.)
- 563 The exclusion of legal aid for advice unconnected to proceedings would not be problematic if there was an adequate supply of legal advice services readily available to low-income New Zealanders. As the discussion in chapter 5 has shown, however, there are substantial limitations on the availability of low-cost legal advice services. The result of this combination of circumstances provides one example of the need for co-ordination of the different types of legal services.
- 564 The fact that many low income New Zealanders do not have good access to alternative means of obtaining free or low-cost legal advice (such as LawHelp services and the clinics run by community law centres and citizens advice bureaux), may leave the civil legal aid scheme open to some abuse. This would be possible because the dividing line between the legal representation services sponsored by legal aid and legal advice is not always clear. For example, one lawyer who attended a consultation meeting was aware of clients being advised to seek unnecessary consent orders from the court so that legal aid could be applied for. Another lawyer wrote:

"Advice can usually be moulded within s 20 of the Act as steps preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or bring an end to any proceeding." (*Submission 323*)

- 565 As has been described in chapters 5 and 6, the Legal Services Act 1991 facilitates the provision of legal advice by community law centres to those of "insufficient means", a phrase which is apt to cover the range of barriers which can prevent people from engaging private lawyers. In this regard, the Act departed from the approach favoured by the Working Party on Access to the Law which, in 1983, found "a strong case" for making legal aid available for advice. It recommended that the level of expenditure likely to be involved should be investigated by the proposed Legal Services Board and that, meantime, and as a matter of urgency, the LawHelp scheme should be more extensively publicised and existing community law centres should receive an injection of public funds and an ongoing commitment of funding. (*Final Report*, 1983, 19)

- 566 It is not recommended here that New Zealand’s civil legal aid scheme should cover legal advice unconnected with proceedings. Subject to the recommendations made in chapter 6 to increase the diversity of providers, the approach of the 1991 Act in this regard is endorsed.

## INEQUITY IN THE CAPITAL TEST

- 567 With two exceptions, the capital test which makes up part of the financial formula governing eligibility for civil legal aid is one of kind rather than value. The exceptions are:
- the \$500 allowance for dependants (s 29(2)(f) Legal Services Act); and
  - the discretion of a district legal services subcommittee to count as disposable capital some proportion of an applicant’s interest in a home, domestic motor vehicle or household and personal effects where the subcommittee considers it would be inequitable not to do that (s 29(3) Legal Services Act).
- 568 Quite apart from the scope for inconsistency in the exercise of subcommittees’ discretions (see further paras 592–606), the capital test’s primary reliance on the kind of property owned, rather than its value, can create inequities between low income applicants who own property, especially a home, and those with little property but with cash assets in the form of savings. The amount of savings which will disqualify from entitlement to civil legal aid a person who, apart from their savings, would meet the income and capital tests is the amount which satisfies the district subcommittee that “the person can afford to proceed without legal aid”. (s 28(2)) It is not known how district legal services subcommittees interpret this provision, but some lawyers who do legal aid work questioned the resulting situation. It was apparent from their submissions that they believe it can cast people who require legal assistance which they cannot afford into the “black hole” between ineligibility for legal aid and being unable to afford lawyers’ services.

“[T]he \$2 000 benchmark for disposable capital is far too low . . . and that has the purpose of freezing out many lower middle class and middle class applicants from state assistance even though in many cases legal aid could be repaid in time.” – *Submission 323 (lawyer)*

- 569 In 1983, the Working Party on Access to the Law noted that the distinction drawn between savings and other assets may well be seen as unfair, but concluded that it “is a regrettable but unavoidable result of the assessment system used as it would be extremely difficult to devise any other practicable approach”. (*Final Report*, 1983, 23) Advice received from the New Zealand Institute of Economic Research supports that prediction. It is notable, however, that the asset test used in determining eligibility for the Accommodation Supplement is one of value rather than kind.
- 570 There is no information available from which to compare the quantity and quality of legal representation provided to legal aid recipients who own homes and to people who do not own homes and who either do not apply for aid or are not granted it solely because of their savings. The exemption from disposable capital of an interest in a home up to a value of \$41 000 recognises that a

person's interest in a home is of greater intrinsic importance than their interest in savings. The rationale for the exemption is that the legal aid scheme should not operate so restrictively as to require low income people to sell what is literally the roof over their heads (or obtain a commercial mortgage of their interest in it – the chances of which may be slim because of their low income) in order to pursue or defend civil proceedings.

- 571 The net effect is that a home-owning legal aid recipient has the chance to retain their home but subject to a charge to the Legal Services Board – which is likely to have more favourable repayment conditions than a commercial mortgage. For example, charges in favour of the Legal Services Board may not be required to be repaid before the home is sold and, even then, may be able to be transferred from one home to another. (Legal Services Act, s 49) As has been noted earlier, however, this aspect of the legal aid scheme's operation was unknown to women who made submissions about the effects of having charges on their homes in favour of the board.
- 572 By contrast, the rationale for denying aid to people who have savings of an amount sufficient to enable them to pay for their own legal assistance is that if they were to be granted aid, they would then be assessed as having to repay it from their savings. This would merely delay the inevitable and cause administrative costs in the process. If it is the case that the person's savings are sufficient to enable the purchase of legal services, the only possible advantage to them in receiving legal aid in the first instance would be that the legal assistance provided on legal aid, with the cost controls to which it is subject, is likely to be less expensive than the assistance which can be obtained privately.
- 573 Accepting that there is greater intrinsic importance in an interest in a home than in savings which are sufficient to cover the legal assistance that is needed, there is one situation where people with savings rather than a home may be unduly prejudiced under the present scheme. This is when their "savings" are in fact the proceeds of the recent sale of their home and their need for legal representation arises before they have bought another home. This situation is not expressly covered by the Legal Services Act. With legal aid being relied on so often in family breakdown situations, it may be that some New Zealanders are being advised that they are ineligible for aid, or being determined to be ineligible, only by reason of the fact that their family homes were sold before other issues arising from the breakdown were contested.
- 574 The matters raised here warrant investigation by the Legal Services Board. Inequities of the types described could only be overcome by statutory change to the financial eligibility test for legal aid. For example, they would disappear if a solely income-based test was introduced (in line with other state assistance such as the Community Services Card scheme). If a capital test remains part of the eligibility assessment, one way by which the inequities could be overcome would be to increase the \$2000 disposable capital limit, at least for applicants who have little property other than savings. If, in addition, the legal aid scheme also exempted from liability any property owned by such a recipient up to a specified value (as discussed earlier, see paras 535–539), those people too would obtain the benefit of a "baseline" assurance that their ability to provide a home for their dependants would not be eroded below that amount.

## LIMITED CONTROL OF SERVICE QUALITY

- 575 Throughout the consultation meetings, New Zealand women questioned the quality of the service provided by civil legal aid lawyers.

“Sometimes you do get a lawyer that is supportive and will work for you. Some lawyers take it on because they don’t have enough to do, but your work gets put aside. The cases which they get paid to do are their priority and the women on legal aid do not get the service they require.” – *Transcript of hui with Māori women, Rohe 7*

“Lawyers receiving legal aid fail to provide the same degree of service that other ‘paying’ customers receive. A friend using the same lawyer but no legal aid has had far better representation.” – *Submission 61*

“The staff solicitor was new and R thought this was possibly given to her because it was a legal aid case.” – *Submission 210*

“In the area of domestic violence, lawyers tend to show preference in representing the male client over the woman. The clear message given is that the DPB and legal aid is not considered a good money-spinner. Many women have experienced a lack of quality service from lawyers. A practical example is when the client is with the lawyer and the phone rings the lawyer’s attitude is that the call is more important than the client and the client is an interference in the lawyer’s busy and important life.” – *Submission 228*

- 576 In 1997, the Legal Services Board released its research on lawyers’ views of legal aid remuneration rates – *Legal Aid Remuneration: Practitioners’ Views*. As part of the study, lawyers were asked whether there were problems with an uneven quality of work in their area of legal aid practice. The largest group (40 percent) said they were “not sure”, and 38 percent answered “yes”. Only 21 percent answered “no”. (Maxwell, Shepherd and Morris, 32)
- 577 Currently, there are no standards by which to measure the quality of legal services provided by lawyers and paid for by the taxpayer through civil legal aid. Nor do the Legal Services Board, as the funder of the services, or the district legal services subcommittees, as purchasers, have any means of measuring whether civil legal aid services are:
- focused on meeting client needs;
  - technically accurate in terms of the advice provided to clients;
  - timely, both in response to client demand and in making the best use of available court time; and
  - efficient in terms of the amount of money spent on the work done.
- 578 In the criminal legal aid scheme, some mechanisms exist for monitoring the services provided. Successful applicants are assigned lawyers from lists of practitioners that are compiled by the district law societies. The societies, and judges of the District and High Courts, have the power to remove poor quality lawyers from the lists. (Legal Services Act, s 18) However, in many districts, the standards applied in compiling the lists, and governing the removal of practitioners from the lists, have not been clearly defined. The New Zealand Law Society has recently issued guidelines on both matters to assist district societies.



- 579 The matter of quality control for civil legal aid lawyers was raised in the consultation paper, *Women's Access to Civil Legal Aid*. In the submissions made in response, users of legal services were far more supportive of the introduction of quality control mechanisms than were lawyers. Some lawyers considered that sufficient controls are provided by the disciplinary mechanisms under the Law Practitioners Act 1982 and the *Rules of Professional Conduct for Barristers and Solicitors*. They argued further that adequate quality is ensured by the requirements that solicitors work under supervision before practising on their own account and that barristers have an instructing solicitor.
- 580 None of these mechanisms establishes standards by which a civil legal aid lawyer's services can be monitored. Nor do they provide for the removal of lawyers when services do not measure up. The civil legal aid client is the loser. By definition, people eligible for aid are from the lowest income group. Many will have a limited choice of lawyers to turn to for assistance. As was seen in chapter 5, most users of civil legal aid (80 percent) are involved in proceedings relating to the breakdown of family relationships. The circumstances which render those proceedings necessary may require urgent relief, and they will usually be a source of considerable anxiety and upheaval for the family members involved. The next largest group of civil legal aid users (12 percent) is made up of people who are subject to the Mental Health (Compulsory Assessment and Treatment) Act 1992. Clients in these circumstances are unlikely to have either the confidence to insist that their lawyers meet particular service standards or the opportunity to shop around to make comparisons between the services offered by different lawyers. Further, having engaged a lawyer, the prospect of terminating the engagement because of unsatisfactory service and finding another lawyer will not be attractive: it will involve extra time and cost to the client, and the selection of a new lawyer may be no better informed.
- 581 These are compelling reasons for introducing a system of quality assurance in respect of civil legal aid services. Management of the costs of legal aid and the principles of public sector accountability also demand it. The absence of quality control mechanisms increases the risk of abuse of the scheme by lawyers which, to the extent that it may be occurring, puts pressure on the scheme as a whole. It is acknowledged, however, that there are considerable difficulties inherent in grafting on to the present judicare model of legal aid, quality standards which will best meet the dual purposes of client protection and accountability for public expenditure. In particular, it is likely that the introduction of rigorous quality standards into the current civil legal aid scheme, on top of the cost-containment measures that have been taken by the Legal Services Board since 1992, would cause some lawyers, including more experienced lawyers, to abandon legal aid work. That would compound the existing problems arising from clients' limited choice of legal aid lawyers.
- 582 It is indisputable that people need good-quality, accountable legal aid services for the lowest possible cost. Monitoring the quality of lawyers' services is, however, no simple task. Attempts made in the United Kingdom to develop monitoring measures which involve third parties directly assessing lawyers' and CAB workers' service quality have caused considerable contention. (See for example, Smith 1997, 27–29) Overseas experience does show, however, that less “hands-on” methods of assuring service quality can be incorporated in legal aid schemes. For example, in jurisdictions which utilise a “mixed model” of legal aid delivery (where lawyers employed directly by the scheme provide some

legally aided services), the opportunity exists to compare the costs and results of the services provided by the “in-house” lawyers with those provided by lawyers in private practice. This gives those responsible for the administration of legal aid a more solid basis from which to reach policy decisions about expenditure than is provided by the pure *judicare* model of legal aid delivery. As well, schemes which provide for the delivery of some services through “bulk contracts”, or fixed price contracts for individual complex cases, allow those who administer legal aid to require those who are awarded the contracts to conform with quality assurance measures. (See, for example, *Legal Aid and the Poor*, National Council of Welfare, Canada 1995, 50–62; Zemans, 1996; Paterson, 1996)

- 583 It is relevant here that the extensive package of civil justice reforms now being introduced in England and Wales includes a system for assuring quality services to clients of all state-funded lawyers and other providers of state-funded legal services. The range of standards that is to be adopted for different providers has yet to be developed. However, the quality measures for state-funded lawyers in clinical (medical) negligence cases, introduced on 1 February 1999, gives an indication of the kind of standards and conditions to which English and Welsh lawyers working in “specialist areas” will be subject in future. The measures were introduced after a study of legally aided clinical negligence cases revealed that specialist lawyers obtained, on average, more than twice the amount of damages for their clients than non-expert lawyers. Although the specialists’ services cost the Legal Aid Board more on average than those of non-specialists (£3300 compared with £1800), for every £1 of these costs, the specialists won £4.10 in damages for their clients compared with £1.70 won by non-experts. (*The Times*, 2 February 1999)
- 584 Under the new measures, only solicitors who can prove specialised knowledge and experience in clinical negligence cases sufficient to gain membership of a panel of accredited solicitors, and who have been granted a franchise from the Legal Aid Board, are able to represent legally aided clients in those cases. The effects of restricting the number of lawyers able to act for such clients are expected to be offset by the fact that accredited lawyers will travel to people with potential claims who find it particularly difficult to visit the lawyers’ offices. A plan to publicise the new measures, which includes a freephone service providing information about franchised lawyers, is part of the change package. Explaining the reason for the introduction of these quality assurance measures, the Lord Chancellor has said:
- What is important is that when people need specialist legal help in what may be very difficult circumstances that is what they should get – quality-assured, specialist help, not just the nearest solicitors doing their best. And, when necessary, the experts will travel to them. (*The Times*, 2 February 1999)
- 585 The incorporation of formal quality standards for legally aided services certainly demands consideration in any more comprehensive review of legal aid than has been undertaken in this study. Statutory change would, of course, be necessary to introduce either of the quality assurance methods outlined above. It is relevant here that the Ministry of Justice has recently embarked on a review, the aim of which is
- To assist in establishing a well run legal aid system giving value for money that recognises both efficiency and equity considerations, and to assist in the identification of financial and other risks in the legal aid area.

- 586 For as long as civil legal aid continues to be delivered through the Legal Services Act's judicare model, it appears that statutory amendments would also be needed to implement most measures that could be devised to better assure civil legal aid recipients, and taxpayers, of the quality of the services provided. For example, the introduction of a list system for civil legal aid lawyers, comparable to that which the Legal Services Act authorises for criminal legal aid lawyers, would require express statutory authority. That authority would also be needed to support any efforts to require civil legal aid lawyers to undertake specified training before being eligible to perform certain kinds of work for legally aided clients.
- 587 One measure which the Legal Services Board could introduce under the present Act would involve changing its interpretation of the "experience" that is required of lawyers to qualify for the different rates of payment that the Board specifies. At present, a lawyer's experience is assessed solely by reference to the number of years litigation experience she or he has had. However, redefining the necessary "experience", even for only some types of work, would require a reliable new measure of "experience" as the standard. As well, it would carry the risk of reducing legally aided clients' access to lawyers willing to act for them in the areas of work where a new type of "experience" was necessary to attract the higher rates of pay. That risk would need to be very carefully evaluated.
- 588 Relevant to the idea of the board adopting a new measure of "experience" is the fact that tentative moves are now being made towards the accreditation of New Zealand lawyers, at least in the area of family law practice. These moves are not free from contention and if the board were to tie any new measure of lawyers' "experience" to such accreditation schemes as may eventuate, it would first need to be satisfied of those schemes' integrity. The uncertainty involved is such as to render unworkable in the short-term this possible means of assuring the quality of legally aided services.
- 589 In chapter 10, it is recommended that a Code of Client Service, applicable to all lawyers and their clients, should be introduced by the New Zealand Law Society. This is a means by which a minimum standard of service quality could be assured for both privately paying and legally aided clients. For privately paying clients, such a code could require lawyers to disclose (orally and in writing) specific information about fees, about the management of clients' matters and about clients' rights should they be dissatisfied with the service received. For legally aided clients, the code could require the disclosure of uniform information about the legal aid scheme in place of the fee information. At present, uniform information about the scheme is to be found in the standard form letters prepared by the Legal Services Committee of the New Zealand Law Society in response to this study's publication of *Women's Access to Civil Legal Aid*. Those letters have been publicised to lawyers, with a suggestion from the committee that
- clients be sent a letter of engagement together with their application for legal aid. As well as confirming in writing matters such as the solicitor's hourly rate, the estimate provided to the local subcommittee and interim billing procedures, such a letter would serve to draw the client's attention to all potential implications of a grant of civil legal aid, particularly charges and/or the repayment of fees. (*LawTalk* 489, 17 November 1997, 10)

- 590 Until such time as a Code of Client Service is implemented, the Legal Services Board could issue the standard form letters to all recipients of civil legal aid. However, while those letters may be readily comprehensible to lawyers, and very useful for the purpose of setting out the aspects of the scheme which lawyers should explain to their clients, they do not appear likely to be easily read and understood by clients. The reasons for this assessment of the letters are elaborated in chapter 8, where the limitations of written materials as a means of conveying legal information are discussed.
- 591 It is understood that, also in response to this study's findings, the board is now developing its own statement (in pamphlet form) of the information which legal aid recipients need. That statement will be both simpler and more comprehensive than the information contained in the standard form letters. The board intends that, from later in 1999, all recipients of civil legal aid will receive that pamphlet with the letter that advises they have been granted aid. This is a welcome move, especially if (for reasons that are explained in chapter 8) the pamphlet informs recipients that they can and should discuss any questions they have about its contents with their lawyers or other nominated individuals or groups who are known to be prepared to receive inquiries of that nature.

## INCONSISTENT ADMINISTRATION

- 592 District legal services subcommittees have a range of discretionary powers relevant to applicants' financial eligibility for aid and the application of the recovery mechanisms of the Legal Services Act. The available information indicates that the exercise of these discretions is uneven between districts.
- 593 The Legal Services Board's research shows that 82 percent of recipients of civil legal aid in 1994 and 1995 were required to pay the initial \$50 contribution, and 17 percent of recipients were granted an exemption. (AC Nielsen MRL, 66) However, as Table 6 shows, the proportion of initial contributions exempted by individual district subcommittees ranged from 0 percent to 57 percent.

TABLE 6: Percentage of Initial Contributions Exempted by District Subcommittee

Northland	11 percent	Wairarapa	1 percent
Auckland	22 percent	Wellington	25 percent
Hamilton	19 percent	Marlborough	0 percent
Rotorua	3 percent	Nelson	8 percent
Bay of Plenty	3 percent	Westland	3 percent
Gisborne	3 percent	Canterbury	13 percent
Hawkes Bay	5 percent	Timaru	2 percent
Taranaki	3 percent	Otago	57 percent
Wanganui	21 percent	Southland	4 percent
Manawatu	3 percent		

(AC Nielsen MRL 81)

- 594 These figures confirm comments made by those consulted in the course of the project. For example, few critical comments were made in the Otago district, where 57 percent of applicants are exempted from paying the initial

contribution. The Otago Women Lawyers' Association also commented favourably about the exemption procedure in its response to the consultation paper *Women's Access to Civil Legal Aid*:

"It is our understanding that the district subcommittee has the power to waive the \$50 contribution and that this in fact does happen, however, perhaps there needs to be clearer guidelines for the circumstances where a waiver of the contribution would apply, eg, all beneficiaries should be exempt from the contributions. In our view it is lawyers who are letting their clients down if the \$50 contribution is not being waived in circumstances where it would be appropriate for a waiver to occur."

- 595 By contrast, in Rotorua, where only 3 percent of applicants are exempted from paying the \$50, the following comment was made by a local lawyer:

"There is a part on the form where it says one can be exempted from paying the fee but I have never ever seen this happen." – *Meeting with Lawyers, Rotorua, May 1996*

- 596 The possibility has already been noted that some lawyers' practice of paying the \$50 contribution on behalf of their clients affects the number of applications made for exemptions, and so the number of exemptions granted, in some districts (para 529).
- 597 The legal aid recipients who are most likely to be exempted from paying the \$50 initial contribution are those who bring mental health proceedings. In the study conducted for the Legal Services Board, 86 percent of recipients in mental health matters were granted exemptions. (AC Nielsen MRL, 11) Of all the aid recipients who were granted exemptions (17 percent of the total), the fact that aid was sought for mental health proceedings was the reason, or a reason, given by the district subcommittee in 42 percent of the cases. (AC Nielsen MRL, 66)
- 598 The same research shows, however, that in more than one quarter (26 percent) of the cases where exemptions were granted, district subcommittees did not provide reasons for their decisions. In a further 26 percent of exemption cases, one or more of the following reasons was cited: hardship, insufficient income, on a benefit, no funds, no assets. In the remaining 5 percent of cases, "other" reasons were cited. (AC Nielsen MRL, 66)
- 599 District subcommittees gave similarly imprecise reasons for the exercise of their discretion to grant an exemption from the imposition of charges on recipients' property. In 18 percent of the cases in which such an exemption was granted, no reason at all was provided. In the remaining cases the reasons provided were very general; that is, "no assets" (19 percent), "recipient on a benefit" (15 percent), "mental health" (8 percent), "hardship" (1 percent), "insufficient income" (1 percent), "not cost effective" (1 percent), "no funds" (1 percent), some combination of those reasons (34 percent) or "other" (2 percent). (AC Nielsen MRL, 72)

- 600 The inconsistencies among district subcommittees in their decisions to exempt payment of the \$50 contribution, and the generality of their reasons for granting exemptions from both contributions and charges, provide little assurance that aid recipients in different parts of New Zealand are being treated substantially similarly. Relevant to this matter is s 96(1)(b) of the Legal Services Act which confers broad power on the Legal Services Board, “for the purposes of carrying out its functions”, to issue instructions to district committees, subcommittees and Registrars, concerning: “the policy to be followed by District Legal Services Committees, District Subcommittees, and registrars in carrying out their functions under this Act”. The board’s instructions must also be observed by the Legal Aid Review Authority (s 132(2)), the body to which an appeal may be taken against a district subcommittee’s decision.
- 601 Any instructions about the policy to be followed in the exercise of subcommittees’ discretions to impose charges and to exempt the payment of contributions would relate to the board’s function, set out in s 95(1)(c ), to ensure that the operation of civil legal aid “is as inexpensive, expeditious, and efficient as is consistent with the spirit of this Act”. The “spirit” of the Act, in turn, is captured in the Long Title which states the Act’s purpose is “to make legal assistance and legal services more readily available to persons of insufficient means . . . .”
- 602 There is a strong argument that, as the legal aid scheme’s financial eligibility criteria erode in value, the need increases for the Legal Services Board to issue instructions concerning “the policy to be followed” by district subcommittees in the exercise of their discretionary powers with regard to applicants’ financial eligibility and liability for recovery. In other words, as the financial eligibility tests become more restrictive in their effects and require subcommittees to exercise their discretions on more occasions, there is an increased likelihood of inconsistencies among the decisions made around the country. The existence of a right of appeal from subcommittees’ decisions does not substitute for the most careful efforts to ensure that their decisions are reached on uniform grounds and with due attention to policy matters which deserve particular weight. Further, the existence of clear policy guidelines would assist the Legal Aid Review Authority in its task. Its decisions on matters that are the subject of board instructions, and which are made available to district subcommittees as a matter of course, would promote further consistency across the 19 districts.
- 603 Until February 1999, when the Legal Services Board issued new charging instructions to take effect on 1 May 1999, it had been light-handed in its use of this means of influencing the exercise of district subcommittees’ discretions. The new instructions represent a significant move by the board towards the attainment of four objectives:
- achieving consistency in the various district subcommittees’ decisions on charges;
  - achieving more effective use of charging agreements (under which the debt to the board is repaid by instalments);
  - ensuring subcommittees consider factors of particular relevance to women recipients of legal aid; and
  - encouraging the use of mediation in legally aided proceedings for which mediation is not available in the court or tribunal with jurisdiction over the proceedings.

604 The third of those objectives (ensuring subcommittees' attention to matters relevant to women aid recipients) is of particular interest here. The instructions state that subcommittees may consider a number of matters to be relevant when they are determining whether to grant an exemption, in whole or in part, from an automatic charge. One of those matters was included in the previous charging instructions (issued in 1992), namely:

that applying the automatic charge in full would, in the circumstances of the case, leave the aided person with a disproportionately small portion of the monetary value of the property that was preserved or recovered.

But a new matter for subcommittees' consideration, as stated in the 1999 instructions, is:

that the monetary value of the property recovered or preserved in the proceedings was:

- (i) less than \$15 000; and
- (ii) in the special circumstances of the case is immediately needed to assist in providing a residential property as a home for one or more dependent children and their parent or caregiver. (Civil Legal Aid Charges Instructions, 1999, 7)

It is to be hoped that the board will monitor very carefully subcommittees' reliance on these matters in their charging decisions.

605 The Legal Services Board has now demonstrated very clearly its willingness to issue instructions about district subcommittees' charging practices. However, it is understood that the board considers it may not be useful to issue instructions elaborating the policy which should govern subcommittees' grant of exemptions from the \$50 initial contribution. Part of the reason for this is likely to be the board's awareness of the large workload of some district subcommittees and its concern that attempts by it to ensure consistency and equity in their decisions about the \$50 initial contribution may be "the last straw" that deters lawyers from providing their services voluntarily to what may be seen as an increasingly "bureaucratised" regime.

606 The pressures on subcommittees are well-documented and deserve the most serious attention by the government. (See *Review of the Legal Services Act 1991, Part II – Reform of Legal Aid Delivery*, Legal Services Board, September 1997; *Report of the Legal Services Board For the Year ended 30 June 1998*, 23, 36) It is understood that the Ministry of Justice's review of legal aid includes a focus on those matters. The reduction, or even abolition, of the role of district subcommittees may be a result. Whatever the administrative outcome, however, the policy governing the \$50 initial contribution is of vital importance to legal aid applicants and recipients, as has been seen. For that reason it is essential that those responsible for administering the scheme take all possible steps to ensure that the policy is transparent and operates fairly.

## CONCLUSION AND RECOMMENDATIONS

607 As was said at the outset of chapter 6, the ability of the Legal Services Act 1991 to achieve its objectives depends on the extent to which the range of legal services available in New Zealand can be co-ordinated to ensure that appropriate services are accessible to all who need them. The present configuration of the legal services arena, and also the wider civil justice system, means that legally aided representation services provided by lawyers in private practice must fill a very large part of the gap between the needs of low-income New Zealanders' for state-sanctioned dispute resolution processes and their

ability to afford to use them. The deficiencies in the civil legal scheme discussed in this chapter lead to the conclusion that its fitness for that purpose is seriously impaired.

608 Using the principles and process which this study has identified as essential guides to lawmakers' and policy makers' efforts to promote the just treatment of women by the justice system (see chapter 1 paras 64–66), any strategy to address those defects should ensure:

- equitable outcomes between women and men in the operation and application of the civil legal aid scheme;
- the availability of diverse measures to meet the diverse needs of New Zealand women for legally aided services;
- transparency in the means by which legally aid service providers are accountable for the standard and quality of their services; and
- co-ordination of legally aided services and all other legal services.

609 Accordingly, it is **recommended** that:

- the current financial criteria for eligibility for civil legal aid be revised upwards and tied to an appropriate index to maintain their value over time;
- the current general requirement for an initial contribution from legal aid recipients be reviewed to assess whether it is warranted and, if so, to ensure that its level and manner of application ensures equitable results for aid recipients;
- the options for simplified application procedures be investigated urgently;
- the New Zealand Law Society and the Legal Services Board publicise more extensively the availability of free and low-cost legal services other than those provided through the legal aid scheme;
- the Legal Services Act be amended to achieve a more equitable recovery (charging and further contribution) system for all categories of applicants;
- the Legal Services Board in the meantime investigate whether inequity results from the capital test's focus on the kind, rather than the value, of property which may be deducted, and develop measures to reduce any such inequity;
- the Legal Services Board ensure that all legal aid recipients receive a simply worded statement which sets out the conditions on which aid is made available and contextual information which indicates the incidence and value of the recoveries that are required from aid recipients, and which advises recipients to ask their lawyers or other appropriate contact people for clarification of any points about which they are uncertain;
- the Legal Services Board monitor the effects of its new charging instructions;
- the Legal Services Board take all possible steps (including publicity among lawyers) to ensure consistency and equity in the manner by which the initial contribution is required to be paid or exempted by district subcommittees;
- the Legal Services Board and New Zealand Law Society explore the feasibility of accreditation schemes as a means of assuring the service quality of civil legal aid lawyers;
- the Legal Services Act be amended to enable the board to fund the piloting and establishment of alternative means of delivering legally aided services which include quality assurance measures;
- the Legal Services Board develop a more comprehensive programme of public education about civil legal aid;
- the New Zealand Law Society and the Legal Services Board co-ordinate and increase their efforts to inform the profession about the use and operation of the civil legal aid scheme in New Zealand.



610 Chapters 6 and 7 have examined the delivery of community-based legal services and the operation of the civil legal aid scheme. The next chapters consider the regulation and delivery of legal services offered by lawyers in private practice generally.

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## INTRODUCTION TO PART 4

THIS PART EXAMINES IMPEDIMENTS to women's access to the justice system, arising from the regulation and delivery of legal services by lawyers in private practice, which will not be overcome by the law reform and other initiatives recommended in chapters 6 and 7.

Five systemic defects in the delivery of private lawyers' services are identified, namely:

- inadequate and poorly co-ordinated information about lawyers, which hinders women's choice of lawyers and their informed participation in the justice system;
- inadequate diversity in the legal profession, which operates to inhibit women's choice of lawyers, service quality and the promotion of equality through the law;
- an insufficiently user-focused approach, which results in a lack of diversity in service delivery to women, particularly with regard to
  - the use of written materials to publicise legal information,
  - the languages of lawyers and legal resources,
  - clients with caregiving responsibilities,
  - clients with mobility or disability needs, and
  - lawyers' inter-personal communication skills;
- the lack of a transparent, effective means of ensuring lawyers' accountability to their clients, which results in women's concerns about fee information and informed participation in the management of their cases not being addressed; and
- inadequate and unco-ordinated efforts to train and educate lawyers about the effects of gender, which prevent women's needs for responsive legal services and for the promotion of equality by means of the law from being understood by all lawyers.

From the principles and process identified as essential to promote the just treatment of women by the justice system, five key strategies are identified to remedy these defects, namely:

- increased diversity in the publication and co-ordination of information about lawyers' services;
- increased diversity in the legal profession;
- increased diversity in the manner in which lawyers provide services;
- transparency in the method of ensuring the accountability of lawyers to their clients; and
- an enhanced focus on the significance of gender in the training and education of all those seeking to practise as lawyers.

The next four chapters explore these strategies in detail. Chapter 8 examines the issue of choice among private lawyers. Chapter 9 examines the diversity of service provision by private lawyers. Chapter 10 examines aspects of the accountability of lawyers to their clients. Chapter 11 examines aspects of the formal legal education and training of law students and lawyers.

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## 8

### Choice among private lawyers

“Community organisations such as ours need more detailed information. We need lists of lawyers available, particularly women lawyers, which provide details of specialties, and their availability. These lists need to be regularly updated.”  
– *Submission 16 on NZLC MP9 (community group)*

#### INFORMING WOMEN’S CHOICE OF PRIVATE LAWYERS

611 **T**HERE WAS A RANGE OF VIEWS among the women consulted in this study about the qualities of the lawyers they would engage if they had an unfettered choice. Some women said they would choose a lawyer solely on the basis that he or she had considerable experience in the relevant area of law. But many more said that they would give weight to a lawyer’s personal qualities too, especially when the problem for which help was needed was of a personal nature. They would, they said, find it easier to identify with, and so confide in and trust, a lawyer who had particular personal knowledge and skills. The following comments were typical:

“The way I was feeling at the time I felt I wanted a female lawyer as she would be more supportive of me.” – *Submission 65*

“We need more Māori women lawyers . . . Someone who can understand where we come from as Māori. Someone who we do not have to explain ourselves to.” – *Transcript of hui with Māori women, Rohe 1*

“It would be a Pacific Islands woman that I would feel more comfortable with. Some things you can’t talk to a man about not even your husband.” – *Report on Consultation with Pacific Islands women, 10*

612 Whatever significance individual women attached to lawyers’ professional and personal knowledge and skills, a very widespread complaint was that insufficient information is publicly available about either of those matters. As a result, women said that they had often “found” their lawyers (rather than chosen them in any real sense) by means of an ill-informed, and so stressful, process which reinforced their sense of alienation from the justice system.

“Why can’t we have a list of lawyers available to the community which explains whether they are male or female? Even a photo with information about their interests in law and their current work would be really useful for the women.”  
 – *Transcript of hui with Māori women, Rohe 4*

- 613 In most respects, the women’s comments are consistent with results from the 1996 New Zealand Law Society *Poll of the Public*. It found that almost 40 percent of the public did not have an established relationship with a lawyer the last time they sought legal services. It also found that the New Zealanders who are most likely to know their lawyers as personal or family friends, and to have relied on that fact when they last chose their lawyer, are men, those on household incomes over \$80 000, those in administrative or managerial positions and those who live in main metropolitan areas. (*Poll of the Public*, 47, 51)
- 614 Women without contacts within the legal profession said that they would usually turn to friends and family members for information about suitable lawyers. (See further *Women’s Access to Legal Information* NZLC MP4, 28–29) This too is consistent with the poll results about the sources of that kind of information for New Zealanders who do not have personal contacts with lawyers. (*Poll of the Public*, 47) However, prospective clients’ reliance on word-of-mouth referrals from friends and family members can be problematic, most obviously because those people may also not know, or know where to find information about, an appropriate lawyer for a particular matter. No doubt the increasing specialisation of the legal profession and the absence of any professional systems for recognising lawyers’ expertise in particular fields of law compound the difficulties in this regard. Certainly, a number of women said they had been disappointed when a first meeting with a recommended lawyer made it plain that their particular legal problem was not within the lawyer’s area of expertise. In other cases women said they were not told this by their lawyers and, by the time the fact was evident, they were unwilling to change lawyer either because of the time and costs already incurred or because they were still unsure how to find a lawyer with expertise in the relevant area.
- 615 Even if friends or family may be able to recommend an appropriate lawyer it is sometimes not possible for women to ask them for assistance because of the personal or private nature of their legal problems. It was frequently said by women who had been in violent relationships, and by women in small communities where confidentiality was an issue, that they needed to obtain information anonymously, yet were unaware of any reliable means by which they could do so. Some had their lawyers allocated to them by the internal processes of law firms which they had “chosen” simply because of their location, or because the women had heard of them, or because the firm’s Yellow Pages or local newspaper advertisements indicated that somebody there worked in the relevant field of law. Again, the *Poll of the Public* confirms that a firm’s being “well known”, in a “convenient location” or advertising in the Yellow Pages has a considerable influence on people’s “choice” of a lawyer. (*Poll of the Public*, 47)
- 616 The poll found that community groups provided only a very small proportion of people with referrals to lawyers, but that those involved in custody and access issues were the most likely to have asked a community law centre or citizens

advice bureau for advice in choosing a lawyer. (*Poll of the Public*, 50–51) By contrast, the information gathered in this study suggests that community groups are often asked to provide the name of a lawyer, especially to women involved in family disputes, but that few are equipped to provide that information. Some, including most community law centres and women's refuges and many citizens advice bureaux, are supported by their networks with lawyers, with one another, and with state agencies, especially Family Court co-ordinators, from which appropriate referrals can be made. Some groups rely on what they know is only very general, and sometimes dated, information that has been gathered in the course of their various activities. Others rely on no more than their own workers' personal knowledge and contacts, in the same way family and friends do.

"We are often asked for a list of women lawyers – we need a list." – *Meeting in Nelson, May 1996 (community group)*

617 In addition, processes for referral in some areas are cumbersome and unreliable. In one major city the community law centre knew victims of family violence who had been referred by the police to the Family Court, where they had been referred to the law centre, which then made referrals to lawyers.

618 The 1997 E-DEC report on the legal profession commented on consumers' need for information about lawyers:

We are left with the conclusion that there are likely to be significant information-based market failures in the personal services legal market. As these constitute some 60 percent of the overall legal services market (covering services such as conveyancing, estates, wills, trusts, family law) this market failure does appear to be a significant problem.

These information problems are related to what is known in the economics literature as "information asymmetries". This refers to a situation where the purchaser does not have the information required to make a reasonable choice as to the supplier of a good or service. It is an accepted ground for regulation. (*E-DEC Background Report (Parts 1 to 5)*, 96)

The report went on to recommend the introduction of a code of client service to ensure that "legal practitioners meet stipulated minimum standards, [so that] those clients who are unable to assess quality can nonetheless be confident that any lawyer they choose will provide at least a reasonable service". (*E-DEC Background Report (Parts 1 to 5)*, 100) (See further, chapter 10)

619 *Women's Access to Legal Advice and Representation* recorded the law society initiatives which have been taken to assist members of the public to choose a lawyer (NZLC MP9, 26–29). Most notably, the New Zealand Law Society Law Awareness pamphlets advise people to:

- ask friends to recommend a lawyer;
- look in the Yellow Pages;
- ask a citizens advice bureau; or
- contact the local district law society.

620 The pitfalls of the first and third of those options have already been discussed. As to the second option, law firms' Yellow Pages entries are typically spartan in the amount of information they give about either of the two matters that women said would be critical to their genuine choice of a lawyer: the professional and personal knowledge and skills of the individual lawyers who

work there. Even among firms which list their areas of work, it is often impossible to identify whether any of their lawyers are women or from minority ethnic groups.

- 621 Relevant to the fourth option is the fact that only two of the 14 district law societies publish directories of local lawyers, and that few of the women consulted knew that district law societies could provide referrals to local lawyers. The project team's own inquiries revealed that most societies do not regard it as appropriate to recommend one lawyer over another, and so will provide callers with the names of several local lawyers who work in the relevant field of law.

"The Wellington directory of legal services is a good example of a local resource that many agencies can use – a role model that could be built on in other parts of the country." – *Submission 19 on NZLC MP9*

## Conclusion

- 622 It is evident that more information and co-ordination is needed within the community to help women find suitably skilled lawyers. This will not be a simple matter to achieve. A multi-faceted approach is required to take account of women's diverse needs and also the variety, in different parts of New Zealand, in the quantity and degree of co-ordination of the available legal information, advice and representation services. The role of law societies and district legal services committees is critical for they are in the best position to gather much of the information that women need and enable it to be made available to women by as many routes as possible.
- 623 Because word-of-mouth referrals from family and friends are likely to remain a significant source of information about lawyers, education of the public about the work that lawyers do would assist people who are choosing or advising others about which lawyer to approach for legal assistance. Responses to questions asked in the *Poll of Lawyers* are relevant here. A majority of the lawyers polled (55 percent) said they would support an institutional advertising campaign to promote the legal profession as a whole, and more than two-thirds (68 percent) said they would pay an annual contribution towards the cost of increased public relations activity by the law societies. (*Poll of Lawyers*, 67–68)
- 624 The possibility that lawyers' accreditation schemes may be introduced in the future is also relevant. Both the Family Law Section of the New Zealand Law Society and the Auckland District Law Society are investigating this possibility. If, as can be expected, such schemes included components dedicated to gender and cultural issues in a sincere effort to equip lawyers to meet the diverse needs of clients, this would make publicity about the schemes and accredited lawyers pertinent to many women.
- 625 Advertising by law firms is also important, but will not in itself meet the information needs of prospective clients who want a recommendation to a lawyer, not merely a self-promotion by one. This study has not attempted to appraise the publicity efforts of New Zealand law firms, but the *Poll of Law Firms* is instructive for showing that only 7 percent have a formal (written) marketing plan, and a further 42 percent have an informal plan. That poll also

shows that the larger a firm is, the more likely it is to have a marketing plan and that marketing expenditure will be budgeted for rather than incurred ad hoc. (*Poll of Law Firms*, 11–13)

- 626 Those facts may help explain why lawyers working in firms in the central business districts of cities were less in favour of an institutional advertising campaign to promote the profession as a whole than were those in suburban or provincial firms, and why principals in large firms were less in favour of paying a contribution towards increased public relations activity by law societies than were those in small or medium sized firms. (*Poll of Lawyers*, 67–68) In other words, those lawyers who work in firms which are most heavily involved in promoting their own activities would seem to be among those who are least likely to support increased public relations efforts by law societies.
- 627 Throughout all the discussions with New Zealand women about their needs for legal information, including information about lawyers, there was a very strong call for publicity to be given to community-based sources of relevant information. Such sources have to exist, of course, before they can be publicised. In some areas, most notably those with community law centres and with citizens advice bureaux which have close links with local lawyers, there are already community-based sources of legal information, including referral services, which many more people might use if they knew about them. It has been noted in chapter 6, for example, that some women in areas with community law centres did not know of their existence. It was also indicated there that publicising existing community-based sources of legal information can give rise to problems. For example:
- the budgets of community-based providers do not support extensive advertising of their services;
  - if advertising of their services were to be too successful, community providers may not be able to keep up with demand;
  - not all New Zealanders who want information from community-based sources will be comfortable approaching existing providers.
- 628 It is essential, therefore, that the ability of diverse community groups to refer their clients to suitable lawyers needs to be developed alongside the development of community-based legal services. It should be possible, for example, for any woman who lives in an area which does not have a community law centre to readily obtain a referral to a lawyer who is known to work in the relevant field of law and to be empathetic to the woman's circumstances. It should be possible for any woman who does not want to visit the nearest citizens advice bureau because she fears being seen there to readily obtain a referral to such a lawyer. And it should be possible for any woman who does not speak English sufficiently well to talk to an English speaking community worker to readily obtain such a referral.

## Recommendations

- 629 A strategy is needed to increase the diversity of information about lawyers' services. Consistent with the principles and process identified in chapter 1 as being essential to promote the just treatment of women by the justice system, the key components of such a strategy are:
- consultation with women and community groups about the information that is needed to ensure appropriate referrals to lawyers;



- creating diverse information resources to meet those needs;
- co-ordinating efforts to publicise referral services; and
- monitoring the effectiveness of the efforts taken.

630 In light of the predominance of women's concerns for family and legal aid matters, the following initiatives are considered to be among those that are urgently needed to assist women to choose lawyers in whom they can most readily repose trust and confidence. Accordingly, it is **recommended** that:

- district legal services committees ensure that regularly updated information about family and legal aid lawyers is available to women, especially through community groups likely to be approached by women for referrals;
- law firms which offer services in areas known or likely to be of particular relevance to women, including family and legal aid work, consult with community groups which are likely to refer women clients in order to improve the quality and effectiveness of their referrals;
- the Family Law Section of the New Zealand Law Society promote members' efforts to publicise their professional and personal knowledge and skills;
- the Legal Services Board continue its efforts to establish a well-publicised 0800 specialist legal information service, one function of which would be to make appropriate referrals to prospective women clients;
- in the meantime, the Legal Services Board and district legal services committees consider providing relevant information, and operational and advertising funding, to existing 0800 telephone information services so that women can obtain appropriate referrals to lawyers from those services;
- the Legal Services Board and district legal services committees, the New Zealand and district law societies and the Department for Courts coordinate their efforts to publicise the availability of referral services, in consultation with the providers of those services;
- law societies pursue the introduction of accreditation programmes which include training in gender and cultural issues to ensure accredited lawyers have, and maintain, the skills necessary to meet the needs of diverse women clients.

## THE NEED FOR A DIVERSE PROFESSION

The legal profession also carries wider social and political obligations to society as a whole. If the profession is to fulfil its role in protecting the rights of minorities within society and promoting the welfare of the disadvantaged, it is vital that its own composition reflects the social and cultural diversity of today's society. (Lord Chancellor's Advisory Committee on Legal Education and Conduct, 1996, para 1.20)

- 631 Improving the means by which women can choose lawyers is one way of meeting the diverse needs of women for legal services. Another is to increase the diversity of the existing pool of lawyers from which women can choose.
- 632 The New Zealand legal profession does not reflect the population base that it serves. As has been seen (chapter 5, paras 361 and 362), less than 30 percent of practising lawyers are women and the overwhelming majority of lawyers are Pakeha.

## Why is there a need for a diversity of lawyers?

- 633 There are two main reasons why diversity in the demographic composition of the law profession is important. First, in purely practical terms, the

unrepresentative make-up of the legal profession means that many members of the public, most notably people from groups which are over-represented among the most disadvantaged sections of the population, are not able to find a lawyer who understands their background, their language or their experience of disadvantage. Inevitably, this will have a detrimental effect on the quality of the services available to them. Secondly, diversity among the profession and, therefore, the judiciary is critical to those institutions' credibility, especially with regard to their ability to perform their vital roles in upholding the law to avoid discrimination against the very groups who are under-represented in their own numbers.

### *The effect of limited client choice on service quality*

- 634 People's access to justice is restricted when advisers do not understand the experience or background of clients. During the consultation meetings, women consistently said they felt like unwelcome intruders in the legal system because the large majority of lawyers are male, white and middle class. There was little choice for those who would prefer, if they could, to engage a woman lawyer, or a lawyer from the same minority ethnic group as the client, or a lesbian lawyer.
- 635 Sometimes a lawyer from a particular ethnic background would be sought so that the same language could be spoken. The 1996 Census provides information about the languages other than English spoken by lawyers in practice at that time. The most commonly spoken other languages, and the numbers and sex of the lawyers who speak them, are as follows:
- Māori: 133 lawyers (75 men and 48 women);
  - Samoan: 36 lawyers (21 men and 15 women);
  - a Chinese language: 99 lawyers (48 men and 51 women);
  - Japanese: 24 lawyers (15 men and 9 women).

While most lawyers who speak languages other than English are from the relevant minority ethnic groups, 15 of the 99 Chinese-speaking lawyers, and all of the 24 lawyers who speak Japanese, are Pakeha.

- 636 More often, the wish to engage a lawyer of the same sex, ethnicity or sexuality as the client stemmed from the firm belief that this would guarantee better communication between them.

"Only a Māori can understand what Māori go through. We need to connect with another Māori woman. This is really important for us." – *Transcript of hui with Māori women, Rohe 2*

"We need [Māori lawyers] because of the cultural barriers that exist between us and the Pakeha lawyers in town. If we had more Māori lawyers it would be much easier for us women to approach them because they know our culture. So it would be much easier for us to speak more comfortably if we had Māori lawyers . . . Our elders find it more comfortable talking to a person who is Māori." – *Transcript of hui with Māori women, Rohe 7*

"One would assume that a lesbian lawyer would know more about issues for being a lesbian." – *Report on Consultation with Lesbians, 38*

- 637 It was emphasised that lawyers' understanding of the social context within which women's problems arose was of particular importance to women clients in certain situations. Problems of a personal nature, those involving domestic violence, the welfare of children and upheavals to women's everyday lives were frequently included in this category. So too were problems mentioned by Māori women such as those related to whanau and to taonga. Lesbians also talked of situations in which a lawyer's knowledge of their social context was important, such as illness of a same-sex partner, or custody and access of children.
- 638 Some lawyers who attended meetings and responded to the consultation papers tended to dismiss women's emphasis on lawyers' understanding their everyday lives. Their view was that together with technical legal knowledge and skills, a lawyer's personality and character, rather than social experience, are more important in assuring the provision of quality services to clients. It is true that it is not a prerequisite to the provision of competent and appropriate legal advice that lawyer and client share a similar social background. But effective interaction between them depends on the lawyer's awareness of, and sensitivity to, the client's values, experiences and needs. The larger the difference between the world views and experiences of lawyer and client, the less likely it is that the lawyer's personality and character (themselves formed by a different set of life experiences) will be sufficient to bridge the gap. In that situation, the lawyer's understanding of the ways in which the client's life experiences may affect the client, both outside and inside the lawyer's office, is the best defence against miscommunication and its negative flow-on effects for quality service.
- 639 An obvious effect of cultural and other social gulfs between lawyers and their clients is that clients can be intimidated by the very fact of dealing with lawyers. What may be less obvious to some lawyers is the depth of this feeling among clients who perceive themselves to be alienated not only from their own lawyer but from the legal profession and the justice system more generally. This sense may arise from the client's ethnicity, gender or some other factor which is critical to their own identity but which is not readily found within the legal profession, or indeed the personnel of the wider justice system. For clients who, for statistically sound reasons, feel that "people like them" are not adequately represented among lawyers, judges, parliamentarians or any other group with influence in the making and application of the law, the discomfort experienced when dealing with lawyers who are not "like them" can be too deeply rooted to be dispelled by those lawyers' best efforts to put their clients at ease. This is particularly likely to be the case when the matter upon which a lawyer's assistance is needed is itself closely involved with the client's ethnicity, gender, sexuality or other self-identifying factors.
- 640 The clear message conveyed by women who felt alienated from the legal profession because of their gender, ethnicity, sexuality or a combination of those factors, was that they had very few, if any, options when choosing a lawyer in whom they could repose the trust and confidence which is integral to an effective lawyer/client relationship. When the nature of the problem is seen in that light, it is evident that part of the response that is required is to increase the efforts to encourage diversity among the membership of the legal profession. But because those efforts will take time to yield significant results in some areas,

another part of the response must involve increased efforts to inform lawyers, especially those whose services are most likely to be utilised by a diverse clientele, about the social facts which lawyers need to understand if they are to provide quality service to all their clients.

### *Promoting equality through law*

- 641 The second main reason why diversity in the legal profession is important relates to the ability of the profession and the judiciary (whose members are appointed from the legal profession) to play their parts in upholding the rule of law in society, including the enforcement of human rights and the avoidance of discrimination. If the legal profession and judiciary are not seen to promote diversity within their own membership, serious doubts arise as to their credibility in protecting and enforcing those rights within society generally.
- 642 With regard to the situation of women in the legal profession, the 1993 report of the Canadian Bar Association Taskforce on Gender Equality in the Legal Profession, *Touchstones for Change*, observed that “[h]ow an institution treats its female members is a reliable indicator of general institutional attitudes towards equality”. (Canadian Bar Association, 1993, 18) Another Canadian report put it this way:
- Women who are lawyers are a privileged group among women. If they are not treated with equality by the justice system, then it is every woman’s credibility that is questioned by the system. (New Brunswick Advisory Council on the Status of Women, 1992, 3)
- 643 This study has provided ample evidence of a widespread view among New Zealand women, within and outside the legal profession, that the under-representation of women in the legal profession and the judiciary is symptomatic of deeper inadequacies in the capacity of the law and its institutions fully to accept the need for equality between women and men, to recognise the inequalities that exist in society, and to be alert to the law’s ability both to perpetuate the status quo and to promote change. Any suggestion that this must be the opinion of a minority fringe would seem to be answered by the fact that a considerable number of New Zealand’s judges have expressed similar views.
- 644 In a questionnaire answered by 127 (79 percent) of the country’s judges and masters in 1996, one of the statements presented for the judges’ agreement or disagreement was “. . . for a very long time only men have been in a position to make and administer the law, and a necessary, and perhaps inevitable, consequence of that, is that the law responds to, recognises and validates male concerns and male interests”. Half of the judges (63) agreed or strongly agreed with that statement (45 men and 18 women). Fewer judges (53) disagreed or strongly disagreed with it (52 men and 1 woman). Of the remaining 11 judges, eight had no opinion about the statement and three failed to indicate their views. (Barwick, Burns and Gray, 1996, 50)

### **Why the lack of diversity within the legal profession?**

- 645 The under-representation of particular groups within the profession has many causes. However, only the position of women has been significantly researched.

### *Sex discrimination in the profession*

- 646 A growing body of national and international material has concluded that sex discrimination exists in the legal profession.<sup>24</sup> The types of barriers that women lawyers have been found to experience to a far greater extent than men include sexual harassment, lower salaries than men with the same number of years experience, difficulties in securing well paying files, and segregation into certain areas of practice. In addition, women progress more slowly to positions of seniority, and experience unwillingness on the part of law firms to accept their family responsibilities.
- 647 An indication of the effects of these practices is provided by the most recent data available from the New Zealand Law Society database of members. It shows that, in August 1998, there were 3042 partners in New Zealand law firms: 2628 men and 414 women. Accordingly, women, who are 29.5 percent of the practising profession, now make up 13.6 percent of law firm partners. The data also shows that over the last 10 years, more women and than men have been admitted to the profession (1021 women and 999 men). However, only 9.8 percent of those women and 17.8 percent of the men are now partners in law firms. In the 10 years following lawyers' admission to practice then, men are nearly twice as likely as women to become partners in law firms. In addition, women partners are disproportionately concentrated in firms of fewer than five partners and, particularly, in firms with only one or two partners, where the transition to partnership results more (or entirely) from an act of self-will than from promotion by others. Indeed, a third of New Zealand's 414 women law firm partners are in sole partnership (compared to 28 percent of the 2628 men partners), and more than half (52 percent) partners are in firms of just one or two partners (compared to 43 percent of men partners).<sup>25</sup>
- 648 Since 1980 there have been a number of studies and surveys of the position of women in the New Zealand legal profession.<sup>26</sup> Each has identified the existence of discrimination against women lawyers, and most have made extensive recommendations for change. While some of these recommendations have been implemented (see paras 682–686), the results of the two most recent New Zealand surveys, the 1996 New Zealand Law Society *Poll of Lawyers* and Gatfield

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<sup>24</sup> Overseas reports include Law Society of England and Wales, *Equal in the Law*, (London, 1988); Report of the Women in the Legal Profession Subcommittee Law Society of British Columbia, *Women in the Legal Profession*, (1991); Law Society of Saskatchewan, Canadian Bar Association, *A Report on Gender and the Legal Profession in Saskatchewan* (Saskatchewan Branch and College of Law, University of Saskatchewan, 1992); Law Society of New South Wales, *Equal Opportunity Task Force Report* (1992). For New Zealand studies see note 26.

<sup>25</sup> Figures supplied by New Zealand Law Society.

<sup>26</sup> Committee on Women, "Employment of Women in Legal Firms" Wellington, (1980); Auckland District Law Society, *Report of the Working Party on Women in the Legal Profession* (1981); Sargisson, "Women in the legal profession: a discussion of their changing profile", (LLB (Hons) dissertation 1982); Wellington District Law Society, *Full Report: Women in the Legal Profession*, (1983); New Zealand Law Society, *Polls of the Profession and Public: Summary*, (1987); Murray, "Women lawyers in New Zealand: some questions about the politics of equality", (1987) 15 *International Journal of the Sociology of Law*, 349; Gatfield, *Without Prejudice: Women in the Law* (Brooker's, Wellington, 1996); Morris J, *Women's Experiences of the Justice System* (1997) 27 *VUWLR* 649; New Zealand Law Society, *Poll of Lawyers* (1997), Gatfield, *Towards 2000 – Implementing EEO: EEO Management Plan Volume 2 – Report* (Auckland District Law Society and Equity Works Limited, Auckland, 1996).

and Gray's *Women Lawyers in New Zealand – A Survey of the Legal Profession* (1993), confirm that women lawyers still face discrimination.

- 649 As part of the Law Commission's contribution to the May 1997 Gender Equity seminar for all New Zealand judges, the results of the two most recent surveys (above) were analysed and presented at the seminar together with contemporary examples, provided by New Zealand women lawyers in submissions to this study, of the discriminatory practices identified in local and overseas research on women in the legal profession. Also presented were many more examples, again provided in the course of this study, of the ways in which "gender bias" can adversely affect women lawyers, parties and witnesses in proceedings in New Zealand's courts. (For the published text of that analysis see Morris J, 1997) For present purposes, it suffices to repeat just some of the examples provided by New Zealand women lawyers of the barriers to their full participation in the legal profession.

"I am given work of lesser value than the male staff solicitor who is junior to me. I am paid less than the male staff solicitor. I am given less court work than him. I've been told there's nothing worse than a smart woman. I've been told by one of my male partners 'I won't be beaten by a sheila'. The support staff won't assist me as they assist the men and I am given no help addressing this. I have to do my own typing sometimes, and filing, which no male here would have to do. Then I am told I don't earn enough fees. I am not allowed to address letters to both husband and wife – only to the husband. No matter how I dictate them, my memos to older males are always to Mr X from [Susan Y] – ie, they sign me off using my first name. My senior partner walked into my office with this [questionnaire] and said 'You can answer this crap' – so I have! Thank you for the opportunity. I know I am good at my job. I know I am unlikely to get where I intend going because I am female." – *Submission 293*

"I wanted to try litigation in my firm. I was told that as I looked young and was attractive I 'would get ripped to bits in court' because male lawyers wouldn't take me seriously." – *Submission 311*

"Good women are forced out of this profession because of male attitudes to family law and female solicitors. I don't know what can be done to help the situation because access to justice is really access to a male paradigm. The Family Court goes some way to addressing this paradigm but it doesn't address the social values behind it. We all do what we can and I try to take a holistic attitude to my work and never judge any woman for her decisions . . . I think my clients get a good deal from me personally. The reality is that I'm thinking of getting out. I'm pissed off with the whole system of family law being viewed as second rate. Always getting difficult clients etc, etc. I don't earn enough to make it worth it. I would be better off being a teacher. That makes me sad because women need women like me, and the profession makes it too difficult." – *Submission 319*

"There is still a body of practitioners who hold the opinion that women do not belong in the legal profession. As a barrister I was recently seeking chambers when I visited one set and was introduced to one of the other members as coming to view the room. The other member's reply was 'Is she the new cleaner?' and then he passed a number of sexual remarks. While sexism isn't usually this blatant it nevertheless does exist." – *Submission 229*

“I have experienced a disdain from some older members of the judiciary, yet seen those same judges be matey with other, male counsel. I’ve got the feeling I’ve been frozen out although this is never directly said – it’s very difficult to put your finger on or draw attention to. Sometimes this unwelcoming attitude has made me question my ability when in fact there has usually been no need to do so.” – *Submission 104*

### *Race discrimination in the profession*

- 650 There is no detailed research available about the experiences of Māori, Pacific Islands and other minority lawyers, but the information which does exist suggests that these groups too experience discrimination. For example:
- In the research conducted for the Auckland District Law Society’s report *Towards 2000 – Implementing EEO*, Pacific Islands lawyers were found to be concerned that their particular skills were not valued within the profession, and that their access to quality work was limited. They perceived that their prospects of advancement were poor and that procedures to deal with race discrimination were lacking. (Gatfield, *Towards 2000*, Vol 2 1996, 75–76)
  - In the New Zealand Law Society *Poll of Lawyers*, 16 percent of lawyers said that there were not equal opportunities in their law firms for people from racial minorities. Among younger lawyers this view was more common, with almost 25 percent of lawyers aged up to 35 stating that there are not equal opportunities within their firm for people from racial minorities. (*Poll of Lawyers*, 111–113)
  - The E-DEC report also found that many practitioners have a real concern about discrimination. (E-DEC *Background Report*, 186)
- 651 During this study, Pacific Islands women and, particularly, Māori women referred frequently to the under-representation in the legal profession and judiciary of both women and men from their own groups. This fact was seen to be part of the evidence of the distance that lies between the women’s values and lives and those of the justice system and its personnel. Among Māori women, the criticism that non-Māori lawyers and judges have an inadequate appreciation of matters integral to Māori culture was couched as part of the broader criticism of the justice system’s limited ability to understand and respond to the needs of Māori in ways which are consistent with the Treaty of Waitangi. (See further, *Justice: The Experiences of Māori Women: Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53), chapter 3)

“I would like to see some of the judges in this area retired early. Only because they have no perception about how the other half lives. For us Māori the judges have no knowledge of our culture. God, the way they pronounce our names is like a loud screeching noise being placed in our ears.” – *Transcript of hui with Māori women, Rohe 9*

“Pakeha judges do not understand what land means to Māori. If they had some people who know about Māori land ownership that would have been better.” – *Transcript of hui with Māori women, Rohe 3*

## **The need for diversity in the judiciary**

- 652 The credibility of the judiciary depends upon judges being equipped, and being seen to be equipped, to deal with all New Zealanders fairly. New Zealand's judges are even less representative of the New Zealand population than are practising lawyers. Detailed information about the ethnicity of judges is not available, but it is estimated that more than 90 percent of judges are Pakeha, with approximately 5 percent Māori and a smaller percentage from other ethnic groups.
- 653 One in eight judges is a woman. Of the 23 women judges, four are permanent judges of the High Court. (There are 38 permanent judges in the High Court and Court of Appeal and six temporary High Court judges.) The other 19 women are judges of the District Court, which has 113 judges in total. One of the five Masters of the High Court is a woman. There are no women judges in the Māori Land Court, the Employment Court or the Court of Appeal.
- 654 The profile of women judges differs from that of their male counterparts in several respects. On average, women judges are younger and are likely to have been more recently appointed. Among women judges who live with their husband or partner, 92 percent of their partners are in full-time paid work and 8 percent are engaged in unpaid work. However, among male judges who live with their wife or partner, 23 percent of their partners are in full-time paid work and 52 percent are engaged in unpaid work. (Barwick, Burns and Gray, 66)

## **Why the lack of diversity in the judiciary?**

- 655 New Zealand judges have been surveyed on why they consider women are under-represented in the judiciary. The main reason given by male judges was that the structure of the legal profession works against the advancement of women, and prevents them from gaining the experience necessary to become a judge. The prevailing view was that this occurs because women are not attracted to areas of law, such as criminal law and commercial work, which enable a lawyer to gain the experience traditionally valued in candidates for the judiciary. The other two reasons most commonly given by male judges were that the composition of the bench reflects the way society works and the relative importance given to the roles of men and women; and that women are reluctant either to undertake the travel required of judges or to relocate to take up judicial appointment, largely because they are reluctant to ask their partners to move. (Barwick, Burns and Gray, 28)
- 656 Women judges also identified the nature of the legal profession as a primary reason for the low proportion of women in the judiciary. But, unlike the men, some of the women felt strongly that there is not only systemic discrimination within law firms but also some direct discrimination which makes it more difficult for women to obtain good work. They also mentioned the profession's overwork of "bright young graduates", saying that it causes many women, at about age 30, to reject such an unbalanced life.
- 657 The women judges also attached more importance than the men to the informality of the judicial appointments process. In particular it was thought that the "profile" which a lawyer needs in order to be considered for



appointment – for example, by being active in a range of law-related activities is more difficult for women to obtain than men because of women’s responsibilities for childcare and domestic tasks. The isolating nature of judges’ work, and the difficulties of combining it with a family, were also considered to make judicial appointment less attractive to women than to men. The reluctance of women to relocate to take up judicial appointment was thought by women judges to stem from women’s reluctance to lose the support systems they had established in order to manage the demands of a job and often family as well.

- 658 The final issue which the women judges, unlike the men, talked about “at length” was the culture of the judiciary. This was described as being strongly male and, for women, alien for the reason that it is not a co-operative and supportive environment in which the women would prefer to work. (Barwick, Burns and Gray, 29–30)

## **Recent initiatives**

### *Judicial training*

- 659 Since this study began, there have been a number of relevant developments in the judiciary. In fact, this study was officially launched together with the establishment of the Judicial Working Group on Gender Equity by the Courts Consultative Committee. That group commissioned research on judges’ perceptions of gender equity in society, the law and the courts and organised a two-day judicial training seminar in May 1997 which was attended by nearly all New Zealand’s judges. The information gathered in the course of this project had a substantial impact on the content of that seminar, which was overwhelmingly rated by the judges who attended as being valuable to their work.
- 660 At the time the seminar was organised, it was intended that it would be followed up in the work of the Institute of Judicial Studies, which was then in the process of being established. However, funding for the institute was unavailable in the 1997/98 year. With funding now available for the 1998/99 year, and a strong commitment within the judiciary to continuing education, the opportunity for gender issues to be pursued in future judicial training programmes has been restored. So too has the opportunity for educational initiatives designed to increase judicial awareness and skills in relation to the Treaty of Waitangi and cross-cultural issues, which the institute is currently developing.
- 661 Before the advent of the Institute of Judicial Studies there had been since 1988 an annual orientation programme for new District Court judges. In 1992 that programme was extended to serve new judges from all New Zealand courts. Australian and Pacific Islands judges have also attended regularly. The purpose of the programme has been to enhance the quality of justice delivered by the courts by:
- providing up-to-date information on changes to the law;
  - enhancing judicial skills; and
  - providing information on the social context of the law.

- 662 Since the programme's inception, issues related to women's access to the courts and gender have been included. The last two orientation programmes have included a substantial focus on gender equity, the dynamics of domestic violence and the needs of victims. Both have utilised the research and analysis conducted in the course of this project. The success of those efforts may be gauged by the fact that the Employment Tribunal and the Tenancy Tribunal incorporated similar sessions in their own recent annual conferences. In the last three years, the orientation programmes have also included a substantial focus on Māori cultural issues. Again, the success of those efforts can be gauged by the fact that some of the individual courts and tribunals have incorporated similar sessions in their own annual conference programmes.

### *Judicial appointments*

- 663 In 1997, at the instigation of the Chief District Court Judge, the process of appointing District Court judges was changed to allow greater transparency. In place of the previous process, by which the Minister of Justice made appointments after considering the recommendation of the Chief District Court Judge, interested candidates are now able to put themselves forward for selection or their name may be put forward by one of a number of individuals or groups from whom the Minister of Justice seeks nominations. The range of groups consulted is broad, including Principal Court Judges, Law Societies, universities, government departments, community law centres and other community groups. This is intended to ensure that the pool of candidates is socially diverse. Short-listed candidates are interviewed by the Minister of Justice or by the Chief District Court Judge and/or the appropriate Principal Judge if it is a Family or Environment Court position and by the Secretary of Justice. The Minister then makes a decision and reports to Cabinet.
- 664 Late in 1998, the Attorney-General announced that a similar process is to apply to the appointment of all judges, except the Chief Justice and Māori Land Court judges. For each vacancy, a short-list of applicants will be determined by a panel of lawyers and judges. The Attorney-General will then recommend to the Governor-General to make an appointment, guided by the panel's recommendation. The Ministers of Justice and Labour will no longer have a role in recommending these appointments. The Chief Justice will continue to be appointed by the Prime Minister, and the Māori Land Court judges will be appointed, as now, by the Minister of Māori Affairs. Each of these changes in the process by which judges are appointed has followed considerable discussion within the legal profession. The Women's Consultative Group of the New Zealand Law Society has been particularly active in promoting the changes as means by which women's representation in the judiciary may be increased.
- 665 There has also been recent debate, initiated by the Chief District Court Judge and the Women's Consultative Group of the New Zealand Law Society, about allowing the appointment of part-time District Court judges. The idea of part-time judicial appointments is also under serious consideration in Canada and Australia. One of the reasons why it is thought this would attract New Zealand women lawyers into the judiciary is that at present nearly all appointees outside of Wellington and Auckland must leave their home area to take up their judicial

duties. The possibility of part-time appointments would give greater flexibility to women who are reluctant to relocate themselves and their families permanently. (*LawTalk* 510, 16 November 1998, 9)

- 666 The process for complaints against judges has also been reviewed to make it more transparent and, on the advice of the judiciary, includes a procedure by which a lay observer can recommend reconsideration of a complaint which has been considered by the head of the relevant court to be without merit. The Attorney-General will become involved in cases so serious that removal of a judge is possible. In those cases, a panel of retired judges will consider whether to recommend removal and, if so, the Attorney-General will be required to take the matter to Parliament. (*LawTalk* 510, 16 November 1998, 9)
- 667 The judiciary has shown considerable leadership in the matter of improving judges' awareness of gender issues and developing initiatives to increase the representation of women in the judiciary. The research and judicial training conducted by the Judicial Working Group were ground-breaking, both in their content and in involving all judges in all courts. They have provided a solid foundation for the launch of related initiatives, such as the moves to ensure greater transparency in the judicial appointment process and the proposal to make judicial appointments more amenable to women's lives and values. The judiciary's efforts have also been influential in ensuring that the 1996 New Zealand Law Society's triennial conference programme included keynote speakers and other presentations on gender bias in the legal profession and in the law. The 1999 New Zealand Law Society's conference programme also includes a focus on gender issues in its plenary and other sessions, with one of the international speakers at the judicial seminar returning to give a keynote address at the conference.

## Conclusion

- 668 There is a common belief that an increase in the diversity of the legal profession will be achieved by women, Māori, Pacific Islands and other minority lawyers on the basis of their own efforts, and that, with time, the situation will improve. This underestimates the force of the systemic barriers which under-represented groups experience in their attempts to participate in long-established institutions, such as the legal profession and judiciary, which have been designed without particular attention to those groups' values and needs. The Canadian Bar Association commented in its report on women in the Canadian legal profession:
- The view that time and the example set by the growing number of able women lawyers will dispel discrimination is a seductive one. It absolves individuals and the profession from taking action. There is little evidence, however, within the profession or elsewhere, that the *laissez faire* approach is effective. (*Touchstones for Change*, 269)
- 669 The 1996 *Poll of Lawyers* found that a majority of New Zealand lawyers (58 percent) believe it is more difficult for women than men to make progress in the profession, and that this is a problem for the profession as a whole. In fact the great majority of women lawyers (71 percent) believe this to be a major problem, while only 17 percent of men lawyers regard it as seriously. When asked whether there were equal employment opportunities for women in their own firms, just under a third of women lawyers (29 percent) said there were not, compared with only 10 percent of the men. (*Poll of Lawyers*, 104, 113)

- 670 As noted earlier (para 648), complete reports have been written about the discrimination experienced by women lawyers, and about the most likely solutions and strategies to overcome it. They offer considerable guidance on the directions the New Zealand profession could take. There have been various efforts made in recent years to improve the representation of minority groups in the legal profession and to reduce the barriers to women's full participation in all areas and at all levels of legal work (see paras 682–686). However, this study supports the conclusion that the pace of change must be increased. The primary concern must be for the diverse clients and potential clients of New Zealand's lawyers. They need the services of a profession whose members are diverse and proud to be so. But, in order to flourish, women lawyers and lawyers from minority groups also need an environment which values diversity.
- 671 Again, using the principles and process which this study has identified as essential to promote the just treatment of women by the justice system, any strategy to increase the diversity of the legal profession must include as key components:
- consultation with women and community groups about the assistance that is necessary to achieve that goal;
  - the development of diverse measures to reach under-represented groups;
  - co-ordination of efforts to gather information and develop policies for the implementation of those measures; and
  - monitoring the effectiveness of the efforts taken.
- 672 In light of the predominance of concerns voiced in this study about the substantial shortage of Māori and Pacific Islands lawyers, and the need for specific initiatives to address discrimination in the legal profession, the following sections focus on two institutions in which these strategies must be implemented as a priority: law schools and law societies.

### **The role of law schools**

- 673 For some groups, most notably Māori and Pacific Islanders, there is still a need for greater representation at law school to ensure that increased numbers enter the legal profession. While Māori make up 14.5 percent of the New Zealand population, only 1.7 percent of lawyers identify as Māori. And while 4.8 percent of the population are Pacific Islanders, less than 0.7 percent of lawyers identify as Pacific Islanders.
- 674 The geographic distribution of both population groups is uneven, making some universities' law schools more attractive than others to potential students. For example, 58 percent of Māori live in the northern half of the North Island, with Gisborne, Northland, Bay of Plenty and Waikato having the highest proportions of Māori in their regional populations. Pacific Islands people are overwhelmingly concentrated in Auckland, Wellington and Christchurch: 80 percent of Pacific Islands people live in those three metropolitan areas.
- 675 Between 1991 and 1996, the total number of Māori students enrolled in any university course in New Zealand more than doubled (an increase of 103 percent). The number of Pacific Islands students increased by 116 percent in the same period. (Ministry of Education 1997, 9) The available data on enrolments of Māori and Pacific Islands students at each of the five law schools in 1997 (and with 1998 figures for two schools) are as follows:

TABLE 7: Percentage of Māori and Pacific Islands University Law Students

1997	Māori		Pacific Islanders	
Auckland	11.4 percent	(1998 = 11 percent)	8 percent	(1998 = 9 percent)
Waikato	23 percent		3.7 percent	
Victoria	11 percent		2.8 percent	
Canterbury	9 percent		1.5 percent	
Otago	5.5 percent	(1998 = 8.7 percent)*	2.6 percent	(1998 = 2.9 percent)*

\* The 1998 Otago ethnicity figures will be inflated by the fact that students can specify up to three ethnicities, all of which are included in the figures supplied.

- 676 Most of the law schools have initiatives in place to increase the number of Māori law students. For example, Auckland, Victoria and Canterbury have quota systems for Māori students. Recruitment drives targeted at Māori students are run annually at Auckland and Victoria. Waikato has a particularly close relationship with the Tainui people and has a range of means by which Māori students are recruited.
- 677 All of the law schools provide some form of support for their Māori law students. For example, there are Māori Law Students Associations at all law schools, and four of the five schools provide special tutorials for, and employ additional support staff to assist, Māori students. Not all law schools monitor the effectiveness of these programmes. At least one law school has an annual scholarship available for a Māori student, sponsored by a law firm. It is generally agreed that Māori academic staff provide invaluable support to Māori students. There is, however, considerable variation among the law schools, especially between those in the North and South Islands, in the proportion of the academic staff who are Māori.
- 678 There are fewer initiatives aimed at encouraging Pacific Islands students to study law. Auckland and Victoria law schools target Pacific Islands students in their recruitment drives. Both also provide support at law school in the form of Pacific Islands Law Students Associations, supplementary tutorials and additional support staff. Victoria has recently assessed the effectiveness of its initiatives; Auckland has an ongoing monitoring system in place.
- 679 The government has recently identified as a goal for tertiary education the need to improve the participation and achievement of currently under-represented groups. (Ministry of Education 1998, 9) It is likely that this will provide an incentive for the collection and analysis of better information about those groups than is currently available. As well, it may lead to increased interest in the comparative success of the different strategies that have been tried at each of the law schools. At present, there are few opportunities or incentives for the law schools to learn from one another about such matters.

## Recommendations

- 680 To increase the diversity of the group of people who will enter the legal profession in the future, it is **recommended** that:

- law schools at which Māori and/or Pacific Islands students are under-represented review their initiatives in consultation with Māori and Pacific Islands people in their communities;
- those law schools develop new initiatives in order to attract Māori and/or Pacific Islands students, utilising all relevant sources of information, advice and assistance, including community sources, to help in the support of those students.

### **The role of law societies**

[A] number of lawyers felt that women, gay and lesbian, and ethnic minority lawyers were being held back in their career advancement and felt that law societies failed to provide leadership on EEO issues. It was felt that law societies should be more active in promoting EEO issues and should be active in trying to bring about changes within law firms which would improve the position of women lawyers, gay and lesbian lawyers, [and] lawyers from particular ethnic groups. (*E-DEC Background Report*, 80)

- 681 The *Poll of Law Firms* conducted in 1996 revealed that half of all New Zealand law firms did not have an equal employment opportunities (EEO) policy of any kind, formal or informal. Further, only 6 percent of law firms had a formal – that is, documented – EEO policy. The other 44 percent of firms had an informal policy, that is, one which was described as being known but not documented. Large firms (11 or more partners) were more likely than others to have formal or informal EEO policies. Only 20 percent of law firms had a designated person responsible for EEO, and just 3 percent had conducted a review of their EEO policy. (*Poll of Law Firms*, 19)
- 682 Largely as a result of the information available about the experience of women in the profession, the New Zealand Law Society, including its Women's Consultative Group, some district societies and women lawyers' groups, are actively encouraging the implementation of EEO within the legal profession. The New Zealand Law Society's monthly magazine *LawTalk* gives very good coverage to EEO issues as they relate to the situation of women in the profession. Over the past 18 months, for example, there have been articles explaining the benefits of EEO, including one publicising a large law firm's newly adopted paid maternity leave policy; articles summarising the content of papers presented at the 1997 Judicial Gender Equity seminar and the Prime Minister's 1998 Ethel Benjamin commemorative address; and articles publicising the newly established "friends' panel" of women lawyers (who are available for confidential and anonymous discussions of work problems), and the mentoring programme established by the Wellington Women Lawyers' Association.
- 683 The society also supports the work of its Women's Consultative Group, which is currently preparing a report outlining the steps the society should take to promote EEO in the profession. It has been noted earlier that the group has also devoted considerable recent effort to making judicial appointments processes more transparent and promoting the possibility of part-time appointments to the District Court bench. (NZLS 1997 Annual Report, *LawTalk* 494, 30 March 1998, 15)
- 684 In the 14 law society districts, the activities of the Auckland and Wellington societies warrant particular mention. The Auckland society is now implementing a five-year EEO management plan, which was devised as a result

of an extensive project commissioned by the society in 1995. EEO workshops, to be run over a period of 15 months for 11 large and medium sized Auckland law firms, have recently been launched. The production of resource materials, intended to be applicable and available to all law societies around the country, is part of that initiative. The Law Foundation has provided a significant part of the funding for these projects.

685 As part of its EEO plan, in March 1998 the Auckland society conducted its first two-hour seminar, "Multi-Cultural Issues in Everyday Practice". The seminar, led by five lawyers from different ethnic groups (Chinese, Tongan, Samoan, Māori and Fijian-Indian), was designed to impart understanding and appreciation of six matters:

- clients' perceptions of lawyers, courts and the legal system in the multi-cultural community;
- matters of etiquette and social convention which affect solicitor-client relations, and the conduct of business;
- influences on the client's legal affairs by the minority community and institutions;
- dispute resolution within minority groups – in court and out;
- beliefs and customs affecting legal and business matters; and
- how specific types of legal matters may be affected, ie, family, adoption, commercial, wills/estates, conveyancing, criminal and others. (*Northern Law News*, Issue No 8, 1998)

686 The Wellington society adopted an EEO policy several years ago, and is currently canvassing Wellington law firms to identify how many have EEO policies, whether they need help in implementing them and whether there is support for the society's Council promoting EEO policies among employees. The information gathered will determine whether a project to promote EEO policies in law firms will be pursued.

687 The law societies have a central leadership role to play in changing the attitudes, policies and practices of the law profession which reduce women's opportunities to participate in all of its activities. To date, however, many of the societies have played a limited role and the efforts of the societies which have been active have not been without controversy. In particular, some lawyers question whether the New Zealand and district law societies have a role in promoting non-discriminatory practices in lawyers' employment. In light of the information gathered in this study, the answer must be that action by the societies is wholly consistent with their statutory functions set out by s 4 of the Law Practitioners Act 1982, and, in particular, with their functions to:

- promote the interests of the legal profession and the interests of the public in relation to legal matters;
- promote and encourage proper conduct among members of the law profession;
- suppress illegal, dishonourable, or improper practices by members of the legal profession; and
- preserve and maintain the integrity and status of the legal profession. (s 4(1)(a)–(d))

688 It is considered to be highly likely that the profession will continue to have a vital interest in the promotion of non-discriminatory practices. Further, it is considered to be essential for its credibility with the diverse communities which make up New Zealand society that it does so.

## The role of law firms

- 689 It has been argued that the setting and monitoring of compliance with standards of non-discriminatory practice is a matter for individual law firms, and not a proper role for the societies. In fact, it is a matter for both. Law societies have always had some regulatory control over law firms, and the Human Rights Act 1991 sets clear standards for employers with regard to non-discrimination in employment.

## Recommendations

- 690 In light of the predominance of women's concerns for increased diversity in the legal profession, the following are considered to being among the initiatives most urgently needed to ensure the legal profession is truly reflective of the society it serves. It is **recommended** that:
- the New Zealand Law Society, together with the district law societies, collect information about the effects of discrimination on minority and ethnic groups;
  - the New Zealand Law Society and district law societies work collaboratively to develop a coherent and comprehensive policy for the implementation, development and monitoring of EEO in the legal profession;
  - the EEO policy incorporate targets for change so that progress can be monitored;
  - the New Zealand Law Society consider appointing an EEO resource person to promote and monitor the progress of the profession towards the attainment of its planned targets;
  - law firms demonstrate compliance with the EEO policy and employer obligations by the development and implementation of written EEO policies.
- 691 Having examined, in this chapter, issues of choice and diversity among private lawyers, the next chapter examines diversity in service provision by private lawyers.
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## 9

# Diversity of service provision by private lawyers

“It’s very difficult to understand. You need a dictionary to understand a lawyer. It should be everyday language.” – *Report on Consultation with Lesbians*, 33

### INTRODUCTION

692 THE DISCUSSION in this chapter explores women’s needs for legal services to be delivered in diverse ways. It pays particular regard to women’s concerns about:

- the limited accessibility of written legal information;
- the languages of lawyers and legal resources;
- caregiver-friendly services;
- physical access to legal services;
- lawyers’ interpersonal communication skills; and
- the separation of lawyers’ services from other relevant services.

693 The examination of these concerns leads to the conclusion that a strategy is needed to ensure a more user-focused approach to the delivery of private lawyers’ services. Key components of the recommendations that are made, relating to each of the above areas, involve:

- reviewing current practices;
- improving those practices where appropriate;
- developing new measures in consultation with women from diverse groups;
- co-ordinating the promotion of new measures;
- improving lawyers’ skills training; and
- integrating private lawyers’ and relevant community services through, for example, community or lay advocates.

### THE LIMITED ACCESSIBILITY OF WRITTEN LEGAL INFORMATION

694 Legal information has traditionally been conveyed to the public by means of written pamphlets. However, it was constantly stressed at the meetings throughout New Zealand, and in the submissions on the consultation paper *Women’s Access to Legal Information* (NZLC MP4), that reliance on pamphlets

and other written materials as the primary medium for providing legal information to women is not appropriate for several reasons.

- 695 First, there was a clear preference among women generally for oral rather than written communication. This was particularly strong among Māori women, Pacific Islands women, women from other ethnic groups, and women with disabilities. A 1993 survey by the Ministry of Consumer Affairs on the receipt of information by women in its target groups has also found that:

an oral culture, lower literacy levels for some, together with a loss of reading skills through lack of practice and/or energy resulted in people not being able to make use of the written information developed by the Ministry. (Ministry of Consumer Affairs, 1993, 19)

- 696 Second, it was frequently said that the legal information contained in pamphlets is too general to be readily applied to particular problems in readers' lives and does not direct them, with sufficient specificity, to people who can provide further help. This was of particular concern to women whose problems required urgent attention.

- 697 Third, women told us that written information is simply not accessible to many because of its complexity. The preliminary findings of the 1997 Ministry of Education Adult Literacy Survey are relevant here. The survey examined 4223 randomly selected adult New Zealanders (16–65 years of age) for their ability “to use printed and written information to function in society, to achieve one’s goals and to develop one’s knowledge and potential”. Three “domains” of literacy were examined:

- prose (text);
- document (formatted information such as that presented in timetables, graphs and forms); and
- quantitative literacy (arithmetical numeracy).

Performance in each literacy domain was assessed in terms of five skill levels, with level 3 being the minimum required for individuals to meet the “complex demands of everyday life and work in the emerging ‘knowledge society’”.

### **Preliminary findings of Adult Literacy Survey**

- 698 The survey found that:
- only one in five New Zealanders is operating at a highly effective level of literacy; and
  - over 1 million adult New Zealanders are below the minimum level of competence in each of the three literacy domains required to meet the demands of everyday life.

Approximately 20 percent of all New Zealand adults are assessed to be at the lowest level, level 1, which means they have “very poor skills, and could be expected to experience considerable difficulties in using many of the printed materials that may be encountered in daily life”. A further 30 percent are at level 2, which means they “would be able to use some printed material but this would generally be relatively simple”.

- 699 The survey also found that certain factors affect different groups of New Zealanders’ prose (text) literacy skills, including ethnicity, age, education and employment status. The effects of these factors is outlined below.

### *Ethnicity*

- 700 In the prose literacy domain, high proportions of each ethnic group were assessed to have literacy skills below the level 3 minimum level of competence. There are variations among the groups, however, with some 40 percent of Pakeha adults, over 70 percent of Pacific Islands adults, over 60 percent of Māori adults and some 65 percent of adults from other ethnic groups being assessed at below the minimum level of competence. Levels of prose literacy are quite evenly balanced between women and men from the same ethnic background.

### *Age*

- 701 In all three literacy domains, skills were found to peak among those in the 20–24 years and 35–39 years age groups, and to decline among those over the age of 50 years. The study notes that the relatively poor performance of those in the 55–64 years age group may be related to the fact that a much lower proportion of this group than any other received secondary education. It may also be related to the effects of the aging process itself which adversely affects the cognitive functioning of some people.

### *Education*

- 702 The very strong relationship between educational attainment and literacy is evidenced by the fact that 75 percent of those who had not gone beyond primary school were at the lowest level of prose literacy, compared with only 7 percent of those who had tertiary qualifications. Overall, those who were at the higher levels of prose literacy (levels 3, 4 and 5) included:
- 79 percent of the tertiary-qualified respondents;
  - 65 percent of those who had completed form 6 but were not tertiary qualified;
  - 38 percent of those who had some secondary education but had not completed form 6; and
  - 8 percent of those who had not gone beyond primary school.

Very similar distributions were evident in both of the other domains of literacy.

### *Employment*

- 703 There were found to be stark contrasts in the literacy skills of those who were unemployed and those who were in paid work. Almost half of the unemployed were at the very lowest level of literacy in each literacy domain, and 75 percent were in the two lowest levels. Retired people also performed poorly in each domain. “Homemakers” performed slightly better than retired people. Students and employed people had the highest levels of literacy, with between 55 percent and 62 percent respectively in the higher levels across all three domains. (From *Adult Literacy in New Zealand, Results from the International Adult Literacy Survey*, Ministry of Education, Wellington, 1997)

### **Women with disabilities**

- 704 The information gathered in this study shows that written material may also be inaccessible because of its format. Specific groups of women with disabilities

said they found reliance on written legal information to be either problematic or too restrictive. For example, women with visual disabilities were either completely unable to read or required the information to be in a large-sized font or in some other format. Women with hearing disabilities also suggested that certain types of telephone services would better meet their needs for legal information. For example, these women favoured access to an 0800 telephone advice service that had a tele-text typewriting (TTY) facility. TTY facilities enable deaf people to have a two-way conversation with another person via words typed into a liquid crystal display.

## Conclusion and recommendations

- 705 Plainly, it cannot be assumed by legal information funders, producers and distributors that merely providing people with written material will enable them to understand their legal situation. Written materials are a valuable resource for some sectors of the population, including community workers, but they cannot be relied upon to meet the needs of all. All written legal information, including letters from lawyers to clients, is subject to the risk of being excessively difficult for some clients to understand. The usefulness of computer-generated information for New Zealanders who need to clarify the legal implications of their problems must also be subject to that risk.
- 706 As the presentation of women's concerns in chapter 3 reveals, there are factors other than those canvassed so far in this chapter which affect people's ability to seek and absorb written information. For example, the qualities of the information provider are important to many information-seekers with the result that mistrust of the provider can deter approaches to it. Also, if those who need information are distressed at the time they are provided with it, or are afraid to ask questions about the information provided, their ability to absorb its meaning will be reduced. It is with the larger range of factors in mind that the following recommendations are made.
- 707 It is **recommended** that:
- funders, producers and distributors of legal information re-evaluate the effectiveness of pamphlets and other written sources as the primary means of communicating information;
  - funders and producers develop alternative and supplementary media for the provision of legal information to women;
  - funders and producers consider the development of legal information in media that will meet the specific needs of women with disabilities;
  - all organisations involved in the provision or distribution of legal information to women consider the following when developing a communication strategy:
    - what information the target audience needs,
    - how people in the target audience are feeling when they seek information,
    - whether other barriers to effective communication with the target audience exist – ie, literacy, culture, socio-economic status, and
    - the respective roles of the provider and receiver of information, ie, does the provider have an enforcement role which may discourage users of information to seek it from that provider.

## THE LANGUAGES OF LAWYERS AND LEGAL RESOURCES

“It’s not that we don’t understand. It’s that we don’t understand English.” –  
*Meeting with Pacific Islands women, Wellington, 1996*

- 708 Many women identified the limited availability of lawyers who speak languages other than English, and of legal resources in other languages, as further examples of an insufficiently user-focused approach to the provision of legal services. The overwhelming necessity for clients to be fluent in English is a substantial barrier for those who are not sufficiently familiar with the language to describe their legal problems in English or to understand any explanation that is provided.
- 709 At the time of the 1996 Census, 605 019 New Zealand residents (17.5 percent of the population) had been born overseas, a 14.7 percent increase over the previous five years. The New Zealand-born population increased by only 1.3 percent during the same period. While a significant proportion of immigrants are from English-speaking countries like Australia, the United Kingdom and Ireland, a large and increasing proportion are from countries in which English is not the predominant language. For example, between 1991 and 1996, over 60 000 new immigrants came from Northeast Asia, South East Asia, Africa (excluding North Africa) and Southern Asia.
- 710 The Census asked people to specify the languages in which they could have a conversation about a lot of everyday things. Almost a quarter of new immigrants (22.2 percent) did not speak English to this level. A higher proportion of adult female immigrants than adult male immigrants did not speak fluent English.
- 711 It is not only new immigrants who do not speak fluent English. For example, among Pacific Islands people who have lived in New Zealand for between five and 15 years, close to one quarter do not speak English. Among Asians who have lived here for that length of time, 18 percent do not speak English.
- 712 In the result, the Census reveals that over 12 000 Pacific Islands adults in New Zealand (6684 women and 5331 men) and over 21 000 Asian adults (12 423 women and 8649 men) do not speak English. These numbers exclude those who did not specify in the Census whether they speak “everyday” English (over 3000 people), and the approximately 1200 people from “other” ethnic groups who do not speak English.
- 713 Given that these figures relate only to conversations about “everyday things” and that the language of law is specialised, it is likely that far greater numbers of the immigrant population would not be able to communicate with their legal advisers in English. As was noted in chapter 7, there are few lawyers who speak other languages. For example, at the time of the 1996 Census, Samoan was spoken by 36 lawyers and a Chinese language was spoken by 99 lawyers.
- 714 One of the languages other than English in common use in New Zealand is sign language. At the time of the 1996 Census, 26 592 people (11 601 men and 14 991 women) in the population at large could use sign language. This compares with only 24 lawyers (15 men and 9 women) who could use sign language.

## Interpreters

- 715 At several meetings with deaf women, the profound difficulties they experience when attempting to gain access to services were described. These include:
- the shortage of sign language interpreters (who are few in number and often booked up in advance);
  - service providers' failure to understand deaf people's need for sign language interpreters;
  - common misapprehensions by providers; eg, that deaf people can lipread, that a family member or friend can help, or that information can be understood if it is written down.

"What lawyers are available for deaf people? The lawyer had no sympathy or empathy for this woman. I told the lawyer that I was not an interpreter and this was ignored. Who helps this person? No one was available to interpret for her. No one is available to interpret to our people who are deaf." – *Transcript of hui with Māori women, Rohe 12*

- 716 Problems of a very similar nature were described by immigrant women. It seems that lawyers are more aware of immigrants' need for interpreters, but immigrant women still reported using family members as interpreters in circumstances where they would prefer the services of an independent person. Concerns about the quality of interpreters were also raised. Clearly, there are many dangers associated with using unqualified interpreters in legal matters. They may lack professional interpreting skills (as opposed to conversational skills) and be unfamiliar with the meaning and use of particular legal terms. Lawyers cannot be certain in these circumstances that their clients have obtained the greatest benefit from their advice.

"Where Pacific Islands women are granted legal aid, interpreters' costs should be able to be included in the legal aid application as a disbursement. It is, in our experience, dangerous to rely on family members to interpret on legal matters. In some cases we have found that the people interpreting have not really understood the process themselves. Strict guidelines would have to be put in place for the training and certification of any such interpreters." – *Report on Consultation with Pacific Islands Women, 32 (comment from consultants conducting the consultation)*

- 717 An improved awareness by lawyers and other legal service providers of the need for interpreters, the processes of interpretation, and the risks of misunderstanding because of linguistic and cultural differences would reduce some of the barriers described to us. Appropriate training programmes for lawyers would clearly be of assistance. It is considered, given the structure of legal education in New Zealand (see chapter 11), that lawyers could be introduced to these issues, and to the practical skills involved in using interpreters, in the Institute of Professional Legal Studies' training programme. The law societies' continuing legal education programmes could then provide more in-depth training.

- 718 Some women called for more interpreters and more information about the existence of interpreters. Relevant here is the fact that the Wellington Community Interpreting Service has produced pamphlets which tell people in their own language how to access an interpreter if they are having difficulty communicating with English speakers. Each of two pamphlets contains information in 10 languages. The pamphlets also include a panel which says, in English, "I need an interpreter", which can be shown to the English speaker. Legal service providers and members of the public could benefit from such information and further material about the services offered by interpreters. The two legal services directories (published by the Wellington and Auckland District Law Societies) now contain information about interpreters and lawyers who speak languages other than English. Such resources are to be encouraged.
- 719 Interpreters are not always available in areas where need arises. Another initiative of the Wellington Community Interpreting Service is TeliS, a service which since April 1997 has provided nationwide, 24-hour, seven-day-a-week access to interpreters. The service provides interpreters in more than 60 languages, and in most cases contact with the interpreter is immediate. Interpreters with the service are usually native speakers who have been trained in interpreting. While not as flexible as face-to-face interpreting, TeliS provides legal service providers with one means of communicating with clients who do not speak English. It is notable that early in 1998, as a result of the problems identified in this study, the Legal Services Committee of the New Zealand Law Society met with the co-ordinator of TeliS and offered to support its work. (*LawTalk* 495, 14 April 1998, 8)
- 720 A number of other concerns about the provision of interpreters in legal matters were raised by those consulted in the study. These include the limited training opportunities for people seeking to become qualified interpreters, the poor rates of remuneration paid by some state agencies for interpreting services, and the lack of clear career structures for interpreters. Research by the Department of Internal Affairs in 1997 confirms that these problems are widespread and that there is a need for further work before they can be tackled. (*Status Report on Interpreting*, 1997) In Australia, a multi-cultural country similar to our own, significant research has been completed by government and non-government agencies on a range of issues relating to the availability of appropriately qualified interpreters and translators. Certified training programmes, including national standards, have been established, which could provide a model for comparable New Zealand initiatives.
- 721 The range of concerns about interpreters which this study has highlighted would best be met through co-operative effort among state and community agencies which routinely interact with the many New Zealanders who do not speak English. Relevant state agencies include the Department of Social Welfare, Department for Courts, the Police, the New Zealand Immigration Service, the Department of Internal Affairs and the various health authorities. Relevant community agencies include the New Zealand Federation of Ethnic Councils (which has recently established a Women's Committee), the Deaf Association of New Zealand, the New Zealand Refugee and Migrant Service, the New Zealand Society of Translators and Interpreters and the Wellington Community Interpreting Service.

## Translations

- 722 While fluency in a language does not necessarily mean literacy in that language, in an increasingly multi-cultural society it is important that legal information resources are available to be used by those who read languages other than English. This study's review of the legal resources available to the public in the areas of domestic violence, civil legal aid, and custody and access (see *Access to Legal Information* (NZLC MP4)) revealed that most of the material was available in English only. Depending on the group targeted, legal resources in a greater range of languages may be appropriate.
- 723 There is one caveat. It is clear from the information gathered in this study that providing pamphlets and other legal resources such as videotapes in languages other than English is not simply a matter of translation. The information must be meaningful to the audience. For example, particular concepts may need more or less explanation, depending on the language and culture targeted.

## Conclusion and recommendations

- 724 The diversity of New Zealand women and their language needs clearly indicates that legal information must be available in a wider variety of languages. Accordingly, it is **recommended** that:
- the Institute of Professional Legal Studies and New Zealand Law Society work together to develop educational strategies to promote better understanding among law students and lawyers of the needs of people with limited fluency in English, and the needs of deaf people;
  - the Legal Services Board and Department for Courts foster the co-ordinated efforts of state and community agencies responsible for providing services to New Zealanders from non-English and non-Māori speaking backgrounds, to develop programmes for the training, career development and use of interpreters in the justice system;
  - funders and producers of legal information develop and implement policies for the translation of written and other forms of information (for example, videotapes) in consultation with the groups of women most likely to use them.

## CAREGIVER-FRIENDLY LEGAL SERVICES

Addressing the needs of women as customers may not require the development of new products, but rather attention to issues such as ability to access. For example, it may be easier for women to use services if children are also welcome. (Ministry of Women's Affairs 1996, 21)

## Lawyers' services

- 725 Many women were concerned about the effects of an insufficiently client-focused approach by lawyers to caregivers. Whether in the context of a two-parent or one-parent family, women are usually the primary caregivers of children and other dependants. For example, 43 percent of women aged 25–29 years, compared with 23 percent of men in that age group, specified that they were looking after children at some time during the four weeks prior to Census night.



- 726 Those who offer services to the public are obliged, by s 44(1)(b) of the Human Rights Act 1993, not to treat any person less favourably than would otherwise be the case, by reason of any of the prohibited grounds of discrimination. Those grounds include family status, which is defined as “having the responsibility for part-time care or full-time care of children or other dependants”. (s 21(1)(l)(i)) Women responsible for the care of dependent children frequently said their lawyers seemed to take too little account of that fact. The most common complaint was that lawyers’ offices were not always child-friendly in their layout and facilities. Clients who had no option but to take small children with them to appointments felt particularly uncomfortable, as if they had “broken the rules”. Both lawyers and women clients also told us that the presence of young children in a lawyer’s office during appointments and meetings can distract clients from absorbing information and advice. Another complaint made by women was that lawyers and their staff can be unaware of the inconvenience that is caused by appointments at times which clash with the daily schedules of young children and their primary caregivers.
- 727 It is obvious that the presence of children at clients’ meetings with lawyers cannot always be avoided, for reasons which include the needs of breastfed infants, the desire to keep visits to lawyers secret from those who would otherwise be relied on to mind small children, and the difficulties of obtaining suitable and affordable childcare every time it would be convenient to have it. Where any of these conditions prevail, the only alternative to taking children to a lawyer’s office is for the prospective client not to go at all.

“A city lawyer was confident a particular woman client could have made a successful claim which would have been very worthwhile financially. However, the woman abandoned the claim when she was made aware of the number of times she would likely have to travel into the city from the outer suburbs to attend appointments with the lawyer and others: it was impossible for her to obtain childcare during the times she would need to be away from home.” – *Submission 8*

### **The courts and caregivers**

- 728 It is not only lawyers’ office facilities and appointment times which present problems for clients responsible for the care of dependent children. The courts attracted criticism from New Zealand women in these regards too. Lengthy delays, especially in family and criminal court hearing schedules, were frequently said to be distressing for caregivers and their children, whether the children were at court or being cared for elsewhere by people who had not planned to look after them for so long. And women who had taken their children with them to court were particularly critical of the paucity of recreational, and even sanitary, facilities which are provided there.

“There are no facilities for children. We tried to set up a creche here but they wouldn’t listen to us. There is not even a changing room available for young mothers and their babies. One mother I know arrived at the court at 9.00am

and she was still sitting there at 5.00pm that afternoon. The court people had forgotten about her. She had her child with her all day and was too scared to leave just in case she had a warrant served on her.” – *Transcript of hui with Māori women, Rohe 4*

“... it is very distressing when women turn up with young children, the victim of executing a husband’s guarantee, even for a credit card, the husband’s often left the country and the women are unable to get legal advice. They are always embarrassed in courtrooms with no counsel, often with young children, even babies, and no facility nearby which is clearly available to them to leave the children, unlike the hospital creches.” – *Submission 339*

- 729 The project team’s inquiries of 59 courts around the country revealed that only five have a children’s play area and that 10 have toilet facilities suitable for attending to the needs of babies. Māori women clearly regarded this as evidence of the justice system’s more general disregard for the importance of whanau in Māori culture, and so of the importance of whanau support for Māori who are involved in court proceedings. (See *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*, chapter 3)
- 730 The Department for Courts’ courthouse design standards require all new court buildings to contain a baby changing facility. In addition, all new Family Courts are required to include a designated children’s play area. When existing courts are being altered, the department tries also to include the facilities required for new courts, but the constraints of the existing buildings may prevent this. The standards certainly represent a positive move but their limited application means that many courts will continue to provide inadequate facilities for children and their caregivers for years to come. As well, the requirement that children’s play areas be included in Family Courts may not best meet the needs of court clients in different parts of the country, and in particular the needs of Māori who are providing whanau support to defendants and witnesses in criminal proceedings.

## Conclusion and recommendations

- 731 In light of the strong concerns voiced by women that their choice of lawyer may in reality be quite limited, especially when they have caregiving responsibilities, it is clear that the manner in which legal services are provided to women who are caregivers must be diversified. Accordingly, it is **recommended** that:
- law firms extend their efforts to promote the caregiver-friendly nature of their facilities and services, and the availability of home visits to clients who find it difficult to attend appointments at the firms’ offices;
  - law firms review the caregiver-friendly nature of their facilities and services (through the use of client surveys, for example) and consult with women and community groups about ways to improve them;
  - the New Zealand Law Society, its Family Law Section and district law societies publicise lawyers’ obligations under the Human Rights Act and co-ordinate the promotion of practices to overcome the access barriers currently faced by women who are responsible for the care of children.

It is **recommended** further:

- that the Department for Courts review its courthouse design standards with regard to the provision of play areas in courts, and develop options to allow sufficient flexibility in meeting the needs of court clients in each area of the country.

## PHYSICAL ACCESS TO LEGAL SERVICES

It is unacceptable for any society to develop services intended for everyone's benefit to which some people have limited or no access. What can possibly justify the exclusion of any person from what most members of society feel are indispensable amenities? If the service was created for all and it exists for most, it cannot be allowed to be unavailable to a remaining few. (Abella 1983, 2–3)

- 732 The 1996 Household Disability Survey reveals that nearly one in five adult New Zealanders (19 percent) has some form of disability. Two-thirds (67 percent) of that group have a physical disability (including mobility and/or agility disabilities) and 42 percent have a sensory disability (including hearing and/or visual disabilities). More than half of all adults with disabilities (55 percent) have an annual personal income of less than \$15 000. Nearly half (45.8 percent) live in households which have a total annual income of less than \$30 000. The proportion of adult New Zealanders with disabilities is likely to grow: more than one third are aged 65 years or more, and New Zealand has an increasingly ageing population.
- 733 Public awareness of the needs of people with disabilities is growing. This is apparent in legislation which recognises the right of people with disabilities to obtain access to buildings and services. Under s 47A of the Building Act 1991, new and altered buildings must make “reasonable and adequate provision by way of access, parking provisions, and sanitary conveniences” for persons with disabilities who may be expected to visit or work in the building and carry out normal activities and processes there.<sup>27</sup> The Human Rights Act 1993, with limited exceptions, prohibits discrimination in the provision of access to premises which members of the public are entitled to enter, and in the provision of goods and services.<sup>28</sup>
- 734 Despite those legislative provisions, women with disabilities said that gaining physical access to legal services presents them with major problems. They made particular mention of the difficulties posed by the siting of legal services in older buildings with poor physical access. New buildings, too, can present insurmountable problems for people with disabilities, because of:
- limited car-parking facilities;
  - lack of wheelchair access;
  - architectural features, such as elevators designed to form part of the wall facade (a problem for those with visual impairment);
  - difficult access to washroom facilities.

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<sup>27</sup> There is provision for this to be waived in cases where a building is being altered.

<sup>28</sup> Sections 42 and 44. Broadly, the exceptions (s 43(2) and s 52) relate to situations in which it would be unreasonable to require special facilities or special services to be provided.

“The women said that the hassle of getting there is often the first barrier to getting any legal information or legal advice. They said that new buildings are not vision friendly. Buildings often have reflective material on the outside, unmarked stairways, lifts which are difficult to use.” – *Meeting with VIEW women, Palmerston North, 1997*

- 735 Many of the women with disabilities who attended consultation meetings said that they were unsure of their legal rights, including those under the Building Act and the Human Rights Act. Ironically, the physical inaccessibility of the sites of the justice system, including the premises of legal service providers, may deny people with disabilities the assistance they need to enforce the very rights which promote their participation in society.
- 736 The obligations of the general law prohibiting discrimination in the provision of services are relatively clear. What may not be clear to legal service providers is how they should move to meet these obligations. In some areas of New Zealand, women with disabilities knew that certain lawyers are “disability friendly” because they will make home visits or meet clients in venues that are more accessible than the lawyers’ offices. The existence of such services is uneven but should be encouraged. Better publicity about the availability of such services, especially among community groups and agencies which provide support to people with disabilities, should also be encouraged.
- 737 It is relevant to note here that community law centres can be expected to play an important role in providing legal information and further services to New Zealanders with disabilities. In chapter 5, it was noted that limited resources are available to community law centres. The Legal Services Board, as funder of community law centres, has a particular responsibility to ensure that its funding criteria for community law centres take account of the costs associated with providing physically accessible premises. One step it could take is to establish a capital works fund for alterations to law centre premises. It could then assist the centres to undertake physical access audits of their premises. Further, the board, working in co-operation with law centres, could develop guidelines to ensure the accessibility of community law centre services to people with disabilities, whether by improved physical access or by the provision of mobile services.

## Conclusion and recommendations

- 738 Women with disabilities clearly face barriers to their access to justice in light of the problems of physical access to some legal services. Accordingly, it is **recommended** that:
- all law firms carry out a disability audit of law firm premises to identify existing physical access barriers;
  - the Legal Services Board and district legal services committees promote the development of new and increased disability-friendly services options by lawyers, including increased publicity of those services among community groups;
  - the New Zealand Law Society educate law firms about the requirements of the Building and Human Rights Acts to assist firms to meet the requirements of the current law;

- the Legal Services Board establish a capital works fund for law centre premises which need to be made accessible to people with disabilities;
- the Legal Services Board and community law centres work together to develop guidelines to ensure accessible community law centre services to people with disabilities.

## LAWYERS' INTERPERSONAL COMMUNICATION SKILLS

- 739 Another area in which an insufficiently client-focused approach operates as a barrier to women's access to legal services relates to lawyers' interpersonal communication skills. A competent lawyer requires many different skills to perform proficiently in day-to-day legal practice. These include drafting, advocacy, research, presentation and communication skills. From the extensive consultation conducted during this study, it is plain that women clients regard a lawyer's interpersonal communication skills – their use of legal language, and their ability to listen, to check their understanding of the client's situation and to provide advice in terms which the client can understand – as being of utmost importance. Yet diverse women, spanning the range of socio-economic levels and educational achievements, were highly critical of their lawyers' abilities in these regards.

### Legal language

- 740 Plainly, deficiencies in lawyers' interpersonal communication skills can prevent clients from being properly informed of their legal rights and options. It was startling how frequently women said they were not adequately informed of their rights for the reason that their lawyers used legal terms – including terms like “custody”, “access” and “guardianship” – which were either not explained or explained in ways that the women did not fully understand. Indeed, a constant complaint made in the consultation meetings about legal information generally, and lawyers' communications with clients in particular, was that the law is full of alien jargon which is too often assumed to be understood by non-lawyers.
- 741 Failures in communication can leave clients feeling very uncertain about the appropriateness of their lawyers' advice. Women at the consultation meetings repeatedly said that such failures had left them with the highly troubling sense that they had no control over their lawyers' conduct and were therefore totally dependent upon them. This unwanted sense of dependency is the antithesis of an effective lawyer/client relationship.
- 742 It has been noted earlier that the women who were consulted had mostly sought legal assistance in relation to matters which seriously threatened their own and their families' welfare, including family violence, custody and access, family property and criminal matters. These may not be the only stressful circumstances to confront them. The very process of seeking assistance can compound existing fears and anxieties, and further impede their ability to ask for and absorb information. The factors most often said to hinder women clients' ability to question their lawyers' words and conduct were:
- the unsettling and highly personal nature of the situations which bring women into contact with lawyers, which can distract them from identifying and asking questions about matters they do not fully understand;

- the gulf which can be seen to exist between lawyers and women clients for reasons of culture, gender, education, wealth or other matters which have the effect of reducing clients' confidence to ask questions, especially about issues which lawyers may not have mentioned, such as their fees;
- clients' embarrassment, or loss of pride, at being thought to be ignorant or stupid for not understanding matters that their lawyers assume they know, or that have been inadequately explained.

"The women felt that although lawyers may feel they are explaining things, often the language is such that the women do not understand what is being said. This means they fail in some cases to be in a position to predict what the long-term results of a decision will be. Sometimes they have agreed to arrangements without understanding what is inherent in that decision, eg, guardianship rights. Sometimes lawyers assume a basic understanding of the law on the part of their client that just is not there. One woman said that after she had asked a question once and not understood the reply she felt too dumb to ask again." – *Submission 29*

"I was too ashamed to ask the lawyer to explain things, especially when the lawyer had already told me that thing and I still didn't know what he was talking about. I kept thinking I should know." – *Report on Consultation with Pacific Islands women, 16*

"When women are brought up with the attitude that they can leave business and legal matters to men to deal with, it is difficult for many to confront these issues and demand explanations and a right for their views to be heard." – *Submission 244*

"When I went to see a lawyer he kept talking in big words that I couldn't understand. I left his office not even knowing what he had said to me. I felt so stupid. I never went to another lawyer again. Why can't they talk the same language as us? Why do they have to hide behind those big words?" – *Transcript of hui with Māori women, Rohe 9*

"... I don't feel comfortable going to lawyers at all. It's like walking into domains of wealth and opulence and it's not just the surroundings, it's not just the decor, the furniture. It's where they've lived, how they've lived their lives and for me to talk about some of the 'grubby' things that have happened in my life was really hard – and I've had to go out at times of stress and stuff." – *Report on Consultation with Pacific Islands women, 21*

- 743 The very frequent criticisms made of lawyers' use of specialised legal terms and other complex language suggests that lawyers must be encouraged to learn to speak about the law and legal processes in everyday terms. For competent lawyers, who understand the meaning of the concepts and processes for which specialised legal terms have been coined, this should not be a difficult task.

### Understanding clients' information needs

- 744 Women were not only critical of lawyers' use of terminology they do not understand. They also gave many examples of lawyers not listening, and overriding or evading the women's questions and concerns.

“A woman made a few comments about her lawyer. She said that he is either overloaded or incompetent. He doesn’t appear to have heard her in terms of her requests at all although it is not worth changing lawyers as she is near the end of the settlement process with her ex-husband.” – *Submission 381 (telephoned)*

“Legal aid clients are not encouraged to assert their rights, and lawyers tend to portray the attitude of wanting to close up the file as quickly as possible in order to get along with ‘real business’.” – *Submission 228*

- 745 A particular concern among many women was that their lawyers’ failure to provide information about the practical details of the processes in which the women were involved indicated that they did not understand how important those matters were to the women. Women wanted to be informed about the processes in which they would be directly involved: where and when will meetings or fixtures related to their case take place? how much time will they take? who will be there? what is the role of any people with official-sounding titles who will be there too?

“For sure I had no control over my case, because I didn’t know the legal processes and the legalities in it. I didn’t even think to ask my lawyer because I thought he had told me everything I needed to know, but he hadn’t. It was only when I started getting ugly about not knowing what was going on that my lawyer kept me up with the play.” – *Report on Consultation with Pacific Islands Women*, 18

“There is a feeling of being cut off and removed from the system while two lawyers make their own solutions, and their clients, who are the people most affected, are left out of the process.” – *Submission 146*

“Our experience is that clients referred to counselling under section 10 of the Family Proceedings Act are often inadequately informed about what to expect – their lawyers have not explained what counselling is or what it is for.” – *Submission 16 on MP9 (Relationship Services)*

- 746 By contrast, women whose lawyers had kept them well informed about the processes relevant to their legal matters praised the quality of service they had received.

“One woman felt very happy about an instance where she felt her female lawyer went to a great deal of effort to ensure that she (the client) remained in control of the process. The lawyer kept up with correspondence, coped well with the client’s children, ensured meetings were short and to the point, and always kept the client informed and legal documents up to date.” – *Submission 331*

- 747 A 1995 study commissioned by the Law Society of New South Wales illustrates that client satisfaction is based only in part on expectations of the outcome of

legal matters, because clients' knowledge of the outcome is limited. Certainly clients hope that the service they receive is "bigger, better, faster and cheaper", but they have no certain way of telling whether it is. The study found that clients make their assessment of the quality of the service by relying on their own interactions with their lawyers.

Clients complained about the quality of their lawyers' services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect ("he made us feel small and unimportant"). Equally, they acknowledged and commended these qualities when they are exercised ("He was more than a solicitor, he was human"). Indeed, the pre-eminence for clients of indicators of process over outcome is encapsulated, at an anecdotal level, by one client describing how she didn't mind her lawyer losing her case because she knew "he had done everything that could be done"; and by another, "[H]e made me feel like I was his only client (even though of course I knew that I wasn't)". (Armytage 1996, 365)

- 748 In New Zealand, the 1995 Legal Services Board study, *In the Interests of Justice*, commented, in respect of criminal legal aid matters:

It is frequently assumed that a client's level of satisfaction with their lawyer's service is *determined* by the outcome of the case either in terms of verdict or sentence. This is not supported by the data. There is a link, but it is moderate to weak rather than moderate to strong. (116)

- 749 In both Australia and New Zealand it has been noted that complaints against lawyers are often caused by breakdowns in communication rather than by breaches of the rules which govern lawyers' conduct. In *The Rain Dance – A Marketing Book for Lawyers*, Australian writers Jane Fenton and Anna Grutner note that:

. . . the majority of complaints about law firms arise from client dissatisfaction with *service* rather than *a service* . . . . Complaints about the calibre of legal advice are comparatively rare. (Fenton 1996, 140)

Recent district law society annual reports include the following comments:

The vast amount of complaints received do not amount to "misconduct" by a practitioner as such, but rather arise out of a lack of communication by the practitioner . . . . (Waikato Bay of Plenty District Law Society Second Annual Report 1995–1996, 9)

It is clear from the Committee's experiences that most of the problems could be avoided by better communication. (Canterbury District Law Society Annual Report and Statement of Accounts for the Year Ended 31st December 1996, 12)

And in Auckland, the cost revisers (who determine clients' complaints about lawyers' fees) have recently stated that, in their experience, costs disputes are seldom just about money. The real issues might turn out to include, among other things, failure of timely, essential, two-way communication between lawyer and client. (*LawTalk* 495, 14 April 1998, 9)

### **Communication skills training**

- 750 Women around New Zealand made strong calls for legal service providers, and particularly lawyers, to be better trained to communicate with diverse New Zealanders. The skills that it appears lawyers need most urgently to develop are listening and understanding, giving appropriate information in understandable terms, interviewing, and cross-cultural and other skills associated with client relations.



751 In *The Education and Training of Law Students and Lawyers* (NZLC MP 11) and in the meetings held with legal educators, it was asked whether there should be a greater emphasis placed on training lawyers in interpersonal communication skills. Because the 13-week compulsory course which law graduates must complete before being admitted to practice is skills-based and already includes relevant training, those questions were focused on whether there should be increased efforts to teach interpersonal communication skills in university law courses and by means of lawyers' continuing legal education. Traditionally, university legal education has placed a strong emphasis on written communication skills and, more recently, on the use of plain language. There has also been a focus on advocacy skills, through the use of university moots, for example.

752 A small minority of those who made written submissions in response to the consultation paper thought that universities should not be involved in that sort of training, and two respondents, one a district law society, said that communication skills cannot be taught. By far the majority of respondents, however, including community groups, lawyers, legal educators and state agencies, thought that further efforts were needed to train law students and especially current practitioners in interpersonal communication skills.

"A lawyer without interpersonal skills is like a mechanic without a wrench." – *Submission 8 on NZLC MP11*

"Interpersonal communication skills should be obvious at the time of selection of candidates for entry to law school; it should stand alongside academic competence and be an important asset for deciding who gains entry to law. Skill training should be an integral part of the degree throughout." – *Submission 18 on NZLC MP11*

"It is important that this training be as experiential as possible and involve, constructively and when appropriate, those who receive legal services (and may have stories to tell!). There should be a required level of competence in this area, as there is with any other topic." – *Submission 17 on NZLC MP11*

753 The responses from legal educators confirm that there is an increasing focus on these matters, especially during the 13-week compulsory professional training and in the continuing legal education which is offered to members of the profession. Each of the five university law schools offers some courses (for example, in mediation, negotiation or interviewing) which develop law students' interpersonal communication skills. Factors that were said to limit the more widespread availability of such courses at university level, and their effectiveness at that stage of a lawyer's training, were:

- that skills courses, with their "hands-on", practical focus can be run only with quite small groups of students, which makes them an expensive use of university resources;
- that there are always limitations on mock dealings with "clients", especially when trainees are not working in the environment in which the skills will be able to be practised immediately;
- that the law degree is a finite block of study time upon which there are numerous demands by those with vested interests in the quality of law graduates;

- that, especially in light of the law schools' responsibility to equip law graduates for careers other than in legal practice, the post-university stages of lawyers' education, particularly the continuing education provided by the profession for newly admitted lawyers, are vital for building onto the base of knowledge and skills which are the universities' and the professional training programmes' focal points.

754 It appears that there is widespread acceptance among legal educators that each of the three stages of lawyers' education in New Zealand has a part to play in developing the interpersonal communication skills that are so necessary for the competent practice of law. Of those three stages, however, only the necessarily limited curriculum of the 13-week professional training course is provided to all potential lawyers. With the exception of one law school, the university courses which emphasise interpersonal skills are optional, and the continuing legal education programme contains no component that is mandatory for all lawyers. In addition, as is elaborated in chapter 11, each of the three stages of lawyers' education in New Zealand is undertaken with a considerable degree of independence of the others. There is no one body which has oversight of the three stages, and legal educators from the three stages have few opportunities for discussion of matters that are relevant along the continuum of lawyers' education and for which an agreed plan, or statement of intent, might be devised.

## Conclusion and recommendations

- 755 It is of critical importance that those who are and will be lawyers are highly-skilled in communicating with the full range of New Zealanders who are and could be their clients. To this end, it is **recommended** that:
- the Institute of Professional Legal Studies provide in its courses information about, and teach techniques to overcome, the barriers to communication that diverse clients experience when seeking information from a lawyer;
  - the New Zealand Law Society continue to include wherever possible in its continuing legal education programme material on interpersonal communication skills;
  - the proposed Code of Client Service emphasise the vital importance of high-quality, plain-language communication between lawyers and their clients.

## SEPARATION OF LAWYERS' SERVICES FROM OTHER RELEVANT SERVICES

- 756 Women frequently commented that lawyers divide up women's problems into the "legal bits" and "everything else", and that some lawyers are not equipped to provide relevant information beyond the "legal bits". In response, lawyers often reminded us that they are not social workers. Many lawyers said that, particularly upon family breakdown, women clients may expect their lawyers to provide a range of services, including counselling services, which are both beyond lawyers' ability to offer and beyond clients' ability to pay for – particularly given the legal aid time "ceilings". Women lawyers, in particular, frequently commented that women clients can expect more of them, in the way of emotional support and lower-cost services, than they are able to provide.
- 757 Accordingly, some lawyers were of the view that women's concerns about the separation of lawyers' services from other relevant services did not justify a

response from the legal profession. Rather, they suggested, clients tend to have unrealistic expectations of the service they will receive from their lawyers.

- 758 However, discussions with women who had been disappointed with aspects of their lawyers' service revealed few "unrealistic expectations" that could not have been corrected by their lawyers' carefully explaining the tasks to be done, and by whom, and the likely time and cost involved in the process. There were certainly some misapprehensions about the roles of different professionals who may become involved in the resolution of family disputes. For example, the title "counsel for the child" can cause confusion because it implies that the person will act as a "counsellor" for the children whose interests are to be represented. That in turn leads to expectations that counsel will, at least, meet with and talk to the children, and perhaps take further steps to help them adjust to the circumstances which have led to counsel's appointment. But these are not "unrealistic expectations": they are predictable misunderstandings, caused by unfamiliarity with legal terms and processes. Lawyers who act for parents of children need to be alert to them so that information is provided to clarify the situation.
- 759 From what women said, and as lawyers acknowledged, it cannot be assumed that clients know the "right" places to go to for help when they are confronted with an upheaval in their everyday circumstances. Given the limited availability of community-based legal services which might otherwise provide assistance, it is readily understandable, from women clients' standpoints, why many would expect lawyers to give up-to-date and relevant information about other services which could assist the women to deal with the variety of issues confronting them. Many women commented on the desirability of their lawyers providing them with relevant social services information, perhaps with the aid of a community worker or lay advocate.

"... anyone involved in the legal area, especially lawyers, needs the aid of a 'community worker'. Often when a person sees a lawyer there are other issues which need tending to, eg, inadequate housing, lack of parenting skills. These issues can then be taken up by the community worker. I know there is a high demand in the community for these workers, as my own schedule dictates. Not enough time, too much work and not enough resources. There is a need to provide all-round service. This can happen if more funding is made available for community workers." – *Submission 11 on NZLC MP4*

"One thing that could happen immediately is if every law firm employed at least one or two community workers. That's an instant fix which could happen immediately." – *Report on Consultation with Lesbians*, 69

- 760 There is a range of means by which lawyers might meet their clients' needs for information about services related to the problem for which they have sought legal assistance. For example:
- lawyers who are not familiar with relevant social services in their district could learn about their location, what they offer, and on what terms so that they can pass on that information;
  - lawyers could encourage their district law society to include in an annual publication (such as a legal services directory) a list giving the contact details

- and an explanation of relevant services in the area, so that lawyers can pass on that information;
- law firms with clients likely to benefit from that kind of information could employ community workers to assist those clients;
  - individual firms, or a number of firms together, could establish an arrangement with either a social service organisation, or individual community workers equipped to meet the range of commonly requested client needs.

## Conclusion and recommendations

- 761 It is desirable for legal services to be integrated as much as possible with related social services. Accordingly, it is **recommended** that:
- lawyers and law firms review their current familiarity with social services that are relevant to the needs of their women clients;
  - lawyers and law firms explore the development of new and diverse ways to link with relevant social services in their areas (such as through the employment of a community worker);
  - district law societies explore the development of resources (in consultation with local communities) that would assist lawyers and law firms to contact social services relevant to their women clients in their area.
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## Accountability to clients for the quality of lawyers' services

Better information and increased choice is, of course, only part of the equation. Consumers also need the protection of an effective and independent complaints system to which they can turn if there is a dispute over a lawyer's fees or conduct in handling a case. (Attorney-General's Department *Justice Statement*, 51)

### INTRODUCTION

- 762 **T**HIS CHAPTER DISCUSSES the need for a transparent and effective means of ensuring lawyers' accountability to their clients. The particular concern is that inadequate information about lawyers' fees and the management of clients' cases results in women being ill equipped to participate in the justice system in an informed manner. The introduction of a Code of Client Service is recommended as an appropriate means by which lawyers can be accountable for the quality of legal services they deliver to all clients.

### INFORMATION VITAL TO INFORMED PARTICIPATION

- 763 Throughout the consultation programme women were united in their view that the fundamental purpose of lawyers' services is to enable clients to make informed choices about the management of their legal matters. Lawyers would surely agree with this view. The women also believed it was critical to the achievement of that purpose that they be informed about:
- the options available, within and outside the justice system, to manage the problems which they bring to lawyers;
  - the processes involved in utilising the justice system to manage their problems; and
  - the conditions upon which their lawyers' services will be provided.

Accordingly, lawyers' provision of information about these matters was regarded as a vital ingredient of competent service.

- 764 The complexity of the justice system, and its unfamiliarity to many New Zealanders who become involved with it, means that there is no single measure which lawyers, individually or collectively, can rely on to meet clients' needs to participate in the justice system in an informed manner. That end can be attained only by a strategy which has several component parts, including the use of legal information and public education services outside the private lawyers' market. The role of the legal profession in the larger strategy is vitally important, however, because lawyers often occupy, in fact or in effect, the privileged position of gatekeepers of the justice system's processes.

- 765 There is a variety of ways by which the legal profession can help ensure that all lawyers will provide services of a quality which enables clients to make informed choices about their involvement with the justice system. Among the most obvious is through the education of lawyers, during all three stages of their formal education, about their duties to, and effective communication with, clients. In earlier chapters, a number of matters relevant to the effectiveness of educational initiatives of these types have been discussed. The discussion in the following chapter is also relevant.
- 766 One relevant educational initiative that is soon to be implemented is the result of the New Zealand legal profession's attention in recent years to its responsibilities and its acknowledgement of some deficiencies in lawyers' understanding and performance of their professional duties. (See, for example, Forbes, 1996 New Zealand Law Society Triennial Conference; the 1996 Cotter and Roper report; and the E-DEC final report on the structure and functions of law societies) The major outcome is that, from midway through the year 2000, each of the three stages of lawyers' education and training in New Zealand will have an increased focus on professional responsibility. All law students who intend to practise law will be required to pass a university course (of a minimum of 24 hours' instruction) in professional responsibility and ethics. The 13-week course which law graduates must complete before being admitted to practice will contain a much expanded professional conduct "module". And the New Zealand Law Society's continuing education programme will give increased attention to issues of professional responsibility.
- 767 Another way in which the legal profession might help ensure that lawyers meet clients' needs to be informed participants in the justice system is through the accreditation of lawyers who have met, and who maintain, certain standards of training and experience in particular fields of law. Through publicity of what is involved in gaining accreditation, and of how to find accredited lawyers, prospective clients will gain the advantage of their proven skills and experience. As has been mentioned (see chapter 8, para 624), tentative steps in this direction are now being considered by the Family Law Section of the New Zealand Law Society and by the Auckland District Law Society.
- 768 Educational and accreditation measures by the profession are undoubtedly valuable components in a larger strategy. But, by themselves, such measures do not demonstrate an unequivocal commitment to achieving the goal of ensuring clients' informed participation in the justice system. Nor do they provide a transparent and accessible process by which individual lawyers can be held accountable for the provision of services that are of sub-standard quality in this regard.
- 769 The *Rules of Professional Conduct for Barristers and Solicitors* do not fill the gap. They define "the bounds within which a practitioner can practise the profession" of law (Introduction to the *Rules*), and are directed at discouraging conduct which may warrant disciplinary action rather than conduct which may constitute poor service but not warrant that action. In addition, the means by which the profession upholds the *Rules* under the Law Practitioners Act 1982 (by formal costs revision procedures and separate formal procedures for other complaints) are not appropriate for many complaints of poor service quality. (See further NZLC MP10, 32, 40)
- 770 Apart from the profession's own complaints and disciplinary processes, lawyers' clients have available to them the protection of the Consumer Guarantees Act

1993. In broad terms, Part IV of that Act guarantees consumers that services will be supplied with reasonable skill and care, be reasonably fit for the purpose for which the consumer requires them, be completed within a reasonable time and be reasonably priced. Dissatisfied clients who wish to challenge the quality of their lawyers' services in any of these respects can initiate proceedings to that end. The Disputes Tribunals' jurisdiction (for claims up to \$7 500 or, if both parties agree, \$12 000) means that many complaints of this kind could be determined in that forum. (s 10(3) and s 13(2) Disputes Tribunal Act 1988)

- 771 In light of the concerns women raised, it is apparent that many clients who are dissatisfied with their lawyers' service quality are not well placed, either financially or otherwise, to take legal action to obtain an appropriate response to their complaints. Further, the protection offered by the Consumer Guarantees Act is of a general nature, and not tailored to the specific needs of lawyers' clients to be informed participants in the processes by which their matters are managed. In other jurisdictions with comparable consumer legislation, it has been recognised by the legal profession that the legislative protection is not a substitute for the profession providing a set of client-care rules, enforced by a user-friendly complaints system, the primary purpose of which is to assure all lawyers' clients of minimum standards of service quality. The current moves to reorganise the New Zealand legal profession provide a valuable opportunity for its consideration of whether and how it should now introduce measures of that kind.
- 772 The following sections outline the serious criticisms made to us by New Zealand women of lawyers' failure to provide clear information about both their fees and their management of clients' cases. These were among the most frequently mentioned criticisms that were made of lawyers' services.

### **Fee information**

It is in your interest as well as that of your client to have the whole question of billing sorted out and agreed at the outset of a job. It is not good enough to hope that the job will sort itself out and that the client will be satisfied with the bill. (The Law Society of England and Wales, 1997)

- 773 Information about fees is integral to the legal advice provided to clients. It is one of the pieces of information which enables them to make informed choices about the benefits and disadvantages of resolving particular disputes according to the available options. Yet a pervasive theme of the meetings with, and submissions from, New Zealand women was that their lawyers had given them inadequate information about fees. It was regularly said, for example, that lawyers had not mentioned their hourly charge-out rates, had not explained how work done was to be charged for, had not offered to provide an estimate of the overall costs of the matter, or had not said when bills for work done were likely to be sent. Some women acknowledged that their lawyers may have told them about these matters at a time when they were too distracted to absorb the information. In the absence of written confirmation, however, or regular updates about progress and cost, that information, if given, was worthless. As a result, the study was provided with evidence of numerous situations in which women did not know about the costs of their legal matters until they had received a bill in the mail, by which time it was too late for them to have made provision to pay it. (See further NZLC MP3, 1–5)

- 774 Inadequate fee information is an issue of concern to all clients, but especially to those who have little disposable income. As has been seen, women are over-represented among low-income earners in New Zealand, and face particular financial difficulties as a consequence of the breakdown of marital or other domestic relationships (see chapter 4, para 223).
- 775 Until the early 1980s, the New Zealand Law Society promoted *Scales of Professional Charges within New Zealand*. Upon their abolition in 1984, the *Costing and Conveyancing Practice Manual* was issued, containing principles of charging. Lawyers and clients are now able to make their own fee arrangements subject to the principles in the *Rules of Professional Conduct for Barristers and Solicitors* (reprinted in *Conveyancing Practice Guidelines*, August 1998, 20–21).
- 776 *Information about Lawyers' Fees* (NZLC MP3) was the first consultation paper to be released during the course of this study. It presented, within the context of the rules relating to lawyers' fee disclosure in New Zealand, the concerns women had raised about the inadequate information they had been given. The paper also presented the fee disclosure rules in force in several Australian states and in the Australian Family Court, and some proposals for fee disclosure rules for other federal courts. Those rules and proposals are generally more prescriptive than the rules in force in New Zealand, and also differ in respect of the detail required to be provided to clients and the penalties for non-disclosure. (See further NZLC MP3, 18–26)
- 777 The paper received a positive response from New Zealand women and community groups, who expressed strong support for the introduction of fee information rules. The response from lawyers was more circumspect, although their submissions did indicate widespread agreement with the view that the provision of fee information, where possible, is good practice.
- 778 It is evident that many lawyers provide some fee information to their clients and that some are assiduous in this respect. However, it is equally evident that there are substantial variations in the kind of information disclosed, and in how and when it is disclosed. (See further NZLC MP3, 5–9) For example, among the 203 lawyers who responded to the study's questionnaire, which included questions about fee disclosure practices, there was little mention made of written confirmation being given to clients who had been given fee information orally.
- 779 Results from the *Poll of Law Firms* are relevant too, for they show that only 20 percent of firms have a formal (written) policy about recording lawyers' terms of engagement at the outset, and that a further 55 percent have an informal (unwritten) policy. Although the larger firms (of 6 to 10 partners, and more than 11 partners) were much more likely to have a formal policy, the majority still had either an informal policy or none at all. Among smaller firms, fewer than one in five had a formal policy on recording terms of engagement at the outset. (*Poll of Law Firms*, 16–17)
- 780 There are a number of inter-related reasons for the variations in lawyers' practices in disclosing fee information. First, the rules governing fee information do not specify in any detail what, when or how fee information should be provided. In fact, the sole reference in the *Rules of Professional Conduct for Barristers and Solicitors* to the fee information that *must* be provided by lawyers to clients relates to information about the costs revision process. (Rule 3.01, Commentary (3)) Otherwise, the guidance provided is directed at a "willing practitioner" responding to a request for fee information from the client.



- 781 The lawyers who responded to the questionnaire made it clear that the manual's guidance is often strictly interpreted. For example:

"[I give an estimate of the cost of services] if required. If not requested I don't tend to do this as it is 'down time', making less time in the day to achieve my budget of chargeable time for the day." – *Submission 141*

"I only explain [billing] if the client asks." – *Submission 292*

"If asked [I provide an estimate or quote], otherwise not invariably. [I] find it difficult to discuss." – *Submission 297*

"Disclosing the hourly rate is plainly embarrassing, as people who have never run a business cannot conceive of the necessity to charge so much." – *Submission 16 on NZLC MP3*

- 782 It is also apparent from the questionnaires, discussions with lawyers and from lawyers' written submissions that many believe it is too difficult, especially in litigation, to provide clients with estimates of the costs involved.

"[I]t is notoriously difficult to estimate legal costs . . . There are so many variables." – *Submission 13 on NZLC MP3*

"It can be extremely difficult to give an accurate estimate because there are so many contingencies, especially in the litigation area." – *Submission 20 on NZLC MP3*

- 783 Some lawyers who were critical of those who do not disclose fee information believed that it must be junior members of the profession who are not providing that information. The questionnaire responses show that it is not only junior lawyers who do not volunteer fee information, but that junior lawyers may well be less likely to provide it than their more senior colleagues. If this is so, the obvious question to be asked is whether the supervision and training which lawyers receive in their early years of practice is adequate. In this regard, we note that there has been little effort made by the profession as a whole to assist new practitioners. The last New Zealand Law Society seminar on "Costing" was held in mid 1989. In July 1998, the Auckland District Law Society ran a late afternoon seminar entitled "Billing the Client – Best Practices". Also relevant is the New Zealand Law Society series of workshops on "Effective Supervision Skills", held in four main centres in May 1999.
- 784 If lawyers are reluctant, for whatever reason, to volunteer fee information to their clients, the onus is put on their clients to ask for it. Yet women who had engaged lawyers often said that they had been unable to ask for that information. This was particularly common among women who were first time clients, or who had engaged a lawyer at a very stressful time, or who were intimidated by the social or cultural gulf which they perceived to exist between them and their lawyers.

“F can’t get any more legal aid and has a charge on the house and will have to refinance. Her lawyer is still acting for her. F said it was unclear whether he is charging her and what sort of bills will emerge.” – *Submission 178 (telephoned)*

“I’d be too shy first thing to ask how much it cost.” – *Meeting with refugee and migrant women in Christchurch*

“C called the Commission and talked about receiving a very large bill from her second lawyer. C said that she had not known what to do about it and said ‘I just left it for a certain period of time.’ C said that she has now asked for a detailed breakdown of the account. C said that she wished that she had known more when she first went to the lawyer.” – *Submission 142 (telephoned)*

- 785 These issues are not specific to New Zealand. In response to criticisms of lawyers’ skill and competence, legal professions in a number of jurisdictions have taken steps to focus more closely on the quality of service provided to the public. Client care codes or guides are an increasingly common result: for example, the manual issued by the Queensland Law Society in 1993, *Client Care: A Guide for Solicitors*, to assist lawyers and law firms to improve the relationship between lawyers and clients, and the client guide, *Keeping Clients: A Client Care Guide for Solicitors*, launched in July 1997 by the Law Society of England and Wales. These initiatives have been well received by the public.
- 786 In many of the Australian states there are rules requiring lawyers to disclose fee information to their clients, and sanctions for non-compliance with the rules (see NZLC MP3, 18–20). Client dissatisfaction in those jurisdictions has decreased since the rules’ introduction. For example, the 1997 Annual Report of the Professional Standards Division of the New South Wales Law Society notes that the number of complaints relating to overcharging fell from 304 to 180 as a result of new rules. Further, lawyers have commented that the new rules provide not only the incentive to discuss with clients the matters of fees and the management of their cases but also the framework within which to do that. (*Professional Standards*, 1997, 4)
- 787 Apart from the difficulty of estimating fees in certain areas of legal work, the main reasons lawyers gave for resisting fee information rules were:
- their opposition to compulsion as a general point of principle;
  - their belief that current practice was adequate; and
  - their belief that fee disclosure would require more administrative work which would not necessarily be recompensed.
- 788 The first reason does not sit easily with the fact that lawyers are already compelled by the Law Practitioners Act, and the rules made under it, to behave in particular ways. Compelling fee disclosure would be an additional requirement rather than a new type of imposition on practice. The second reason (that current practice is adequate) is one that is refuted by the information gathered in this study. The third reason (more administration) does not raise any point of principle but is an objection to the temporary inconvenience of adapting to new practices.

## Information about how the case is being handled

- 789 It is not only inadequate information about lawyers' fees which prevents women from making informed choices about their use of the justice system. Women's other major concern was that they received insufficient information about the processes involved in managing their legal matters. In the project's consultation papers, these concerns were presented in the context of family law disputes, for that was the context in which women most often voiced them. (See NZLC MP10, 8–12) In many instances, it was apparent that the women had not been given basic information about:
- the sequence, and purpose, of the steps to be taken towards resolving their matters;
  - the causes of delays; or
  - law firms' practices with regard to dealing with clients' matters.
- 790 More specifically, women often said that their attempts to obtain information on the progress of their matters were evaded or ignored by lawyers. For example, telephone calls were not returned, or their questions about procedures, delays or outcomes were not answered directly. Women also complained about being passed around a law firm and having their matters dealt with by another, often very junior lawyer without prior explanation or warning.

"You have to be pushy in asking questions to be told when things are happening or when something is going to happen. The court procedure was very hard because at a time when you are feeling most vulnerable you have to be very pushy to get what's needed." – *Submission 280*

"The first account was not itemised at all and was for the sum of \$712.00. I rang their accounts department and was told that I had received [an itemised account] and it took some arguing to convince them that I had not and that I insisted on getting one. When I received this itemised account I saw I was being charged for [a lawyer's] time, even though I had not seen her and she had done nothing for me." – *Submission 63 on NZLC MP3*

- 791 The New Zealand Law Society poll results relating to law firms' practices in recording terms of engagement (see para 779) are indicative of attitudes within the profession to the level of care that is needed to explain to, and record for, clients the range of matters about which many are uncertain. The absence of information about the management and progress of their legal matters was a cause of very real distress to many women. Some women who attended consultation meetings said they had abandoned the pursuit of their legal rights as a result. Many others had persisted despite their fears of the unknown time and costs that would be involved.

## A CODE OF CLIENT SERVICE FOR NEW ZEALAND?

- 792 The report prepared for the New Zealand Law Society by E-DEC Ltd proposes the introduction of "a set of client entitlements" in the form of a Code of Client Service, which would apply to all lawyers. With regard to fee and case-handling information, the report suggests that a code could require lawyers to act in the following manner:

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### Engagement

- (1) The lawyer must agree with the client, at the commencement of an engagement, the objective and the intended output of the engagement (ie the service to be provided).
- (2) The lawyer will discuss with the client what is involved in an engagement of this kind, the events likely to occur, the processes to be gone through, and the actions to be taken. The lawyer will give the client the lawyer's best estimate of the likely outcome of the engagement.
- (3) The lawyer will define for the client, at the commencement of the engagement, the basis for charging and the procedures which will be followed in charging for the engagement. If requested by the client, the lawyer will provide the client with an estimate of the likely cost of the engagement although such an estimate will not be binding unless agreed to by both the lawyer and the client. The lawyer will inform the client of the client's entitlement to this cost estimate.
- (4) The lawyer will provide the client, at the commencement of the engagement, with an estimate of the time required to carry out the engagement and an estimate of the probable time schedule for the main components within the engagement.

### Performance

- (1) The lawyer will inform the client when the main components of the transaction are completed and if major changes occur. The lawyer will respond in a timely manner to all client questions. The lawyer will inform the client if the engagement develops so that the likely achievements, time or costs start to diverge significantly from the estimates initially provided.
- (2) The lawyer will provide a reasonable quality of legal service to the client. Charges to the client will not be unreasonably high.

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(E-DEC Final Report, 20–21)

- 793 A Code of Client Service will, of course, be of greatest benefit to clients if it is upheld by a transparent and accessible complaints process. At the consultation meetings, few women knew of the current formal complaints processes available to lawyers' clients. A number of other concerns about current processes were identified:
- there was a perception that the legal profession "looks after its own" in its disciplinary and cost revisions processes;
  - the separate processes for costs revisions and "other" client complaints were thought to be confusing; and
  - the processes were generally regarded as being cumbersome, daunting and time consuming.
- 794 The 1996 *Poll of the Public* found that only one-third of New Zealanders were aware that the district law societies handle complaints about lawyers. Men were nearly twice as likely as women to be aware of the societies' complaints role. (98–99)
- 795 It is widely accepted that the current rules and processes governing the legal profession's handling of complaints and cost revisions are not user-friendly to clients. Recent efforts to improve their accessibility (including the New Zealand

Law Society's establishment of an 0800 number for information about the complaints process in relation to solicitors' misuse of clients' money and some cost reviewers' use of mediation) do not overcome the mismatch between the disciplinary focus of the present regulatory system and the client-service focus that women believe is essential to assure lawyers' clients of competent service. The New Zealand Law Society noted in its submission on the consultation paper *Lawyers' Costs in Family Law Disputes* (NZLC MP10) that:

"The Society is the first to acknowledge that the current complaints and disciplinary system is not perfect. Indeed it is confidently expected that the system will be restructured following the current review of law societies' functions and structures.

One difficulty with the current system is that, under the relevant provisions of the Law Practitioners Act 1982, it is focused upon whether a disciplinary charge should be brought against the practitioner rather than upon the resolution of the complainant's concerns."

- 796 The E-DEC *Background Report* contains a similar list of lawyers' concerns about the processes. (77–78) It also states:

A client complaints handling system must be designed with both effectiveness and efficiency in mind. To be effective, it has to focus on ensuring that a minimum reasonable standard of service is provided to clients. This means it has to provide an avenue for clients to complain when they feel they have not received adequate service, and it must also include mechanisms to correct the clients' problems if the complaints have substance. This is the main priority. (*Background Report* 172)

- 797 For all these reasons, the E-DEC report recommends the introduction of a client-focused complaints system to support the code. It envisages each law firm having a documented complaints system within a larger system established by the profession's governing body. The report suggests the following statements as being suitable for inclusion in the Code of Client Service:

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### Complaints

- (1) Each law firm must have a documented complaints receipt and handling system and must use this system to handle all complaints. This documentation must be made available to the client on request and in the event of the client expressing a complaint. The current documentation also must be provided to the New Zealand Law Council.<sup>29</sup>
  - (2) Each lawyer and law practice is subject to the oversight of the New Zealand Law Council in matters concerning client service. This oversight will take place within the framework defined by this Code of Client Service. This oversight will include also investigative and resolution procedures as adopted and as executed by the New Zealand Law Council.
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(E-DEC Final Report, 21)

<sup>29</sup> This is the name given by the E-DEC report to the new body which it proposed should be created to assume responsibility for the regulation of lawyers' services, including responsibility for adopting and enforcing the code's provisions. Presently, the district law societies and the New Zealand Law Society share responsibility for determining complaints about lawyers' conduct.

- 798 In order to achieve the primary goal of resolving complainants' concerns about the client service matters specified in the code, the E-DEC report recommends that those complaints be approached and managed differently, and separately, from matters of lawyers' discipline. This study confirms the wisdom of separate approaches to the two types of complaint as well as the report's general approach to the handling of client service complaints made under the proposed code. The report suggests the creation of an Office of Client Service, funded by a levy on all lawyers providing legal service to clients, to manage those complaints. It concludes that most complaints would be made by telephone and received by a trained complaints handler who, if unable to resolve the matter then and there, would refer the complainant to the complaint handling process within the law firm. If that process failed, the Office would investigate the complaint and attempt to resolve it, either informally or by mediation. Only if that failed would the matter come before a panel (of two lawyers and one non-lawyer) empowered to make a binding decision on the basis of written material placed before it by the client, the lawyer and the Office of Client Service. If the panel was satisfied that a breach of the code was established, it would have a range of remedies available, from requiring an apology or corrective action to imposing a financial settlement. (*E-DEC Final Report*, 23)
- 799 The more formal disciplinary processes envisaged by the E-DEC report to deal with alleged breaches of the *Rules of Professional Conduct* would be administered by a new Office of Lawyer Conduct, which would be empowered to prosecute lawyers before a new decisionmaking body, the Lawyer Disciplinary Tribunal. (*E-DEC Final Report*, 24)
- 800 It is clear that the E-DEC proposals relating to client complaint and lawyer disciplinary processes have been made in the light of the "best practice" principles developed by the New South Wales Law Reform Commission to govern the operation of that state's professional regulatory system. The principles have been largely implemented in the Legal Profession Reform Act 1993 (NSW), and in 1994 the Australian Access to Justice Advisory Committee, appointed by the Commonwealth Attorney-General to recommend reforms to the legal system, urged the Commonwealth actively to engage all states to examine their disciplinary systems against that Act's model and enact legislation as necessary to incorporate the best practice principles:
- 801 The committee summarised the best practice principles in these terms:
- independence and impartiality, including supervision of the process by a body independent of the professional organisations, empowered to take over the investigation of particular complaints;
  - identification and recognition of multiple aims (consumer redress, lawyer discipline and maintenance of legal professional standards);
  - accessibility;
  - efficiency and effectiveness;
  - procedural fairness;
  - openness and accountability, including the participation of non-lawyers in all stages of the disciplinary process;
  - external scrutiny and review;
  - enhancement of professional standards, including extending the system not only to serious professional misconduct but to unacceptable breaches of professional standards of competence;

- proper funding and resources; and
- appropriate redress to complainants through procedures to enable compensation to be awarded to clients who sustain losses by reason of breaches of professional standards (whether or not attracting disciplinary sanctions) and to provide for speedy resolution of solicitor-client disputes. (*Access to Justice Advisory Committee* 1994, 210)

- 802 It is not clear what the New Zealand Law Society's response will be to the client-service recommendations made in the E-DEC report. A letter written late in 1998 to all members of the society from its president makes plain the view of the society's council that all practitioners will remain subject to a regulatory scheme in the future even if, as the council proposes, membership of the society becomes voluntary. The nature of the regulatory scheme envisaged by the council is unknown at this stage. The president's letter suggests that the profession's costs revision process may not be necessary in future, presumably because of clients' access to alternative fora. Whether the alternatives will include a new client-oriented forum, established to support a larger set of client entitlements, remains to be seen.
- 803 What is known is that, in 1997, the society established a Professional Standards and Liability Committee which has undertaken a careful study of the New South Wales Professional Standards Act 1994 and schemes approved under it. (A similar legislative scheme is also in force in Western Australia.) The Long Title of the New South Wales Act describes its policy objectives as being:
- to provide for the limitation of liability of members of occupational associations in certain circumstances and to facilitate improvement in the standards of services provided by those members.
- 804 To those ends, the Act establishes a Professional Standards Council to supervise the preparation of limited liability schemes and assist in the improvement of standards and the protection of consumers. The New South Wales Solicitors Limitation of Liability Scheme was gazetted in October 1996. It provides for a statutory cap on the liability of members who opt in, and imposes a number of requirements on them, including evidence of insurance cover, certification of completion of continuing legal education requirements, and the inclusion of a statement on all documentation that their liability is limited by the scheme.
- 805 It is understood that the New Zealand Law Society's Professional Standards and Liability Committee intends to explore with other professional associations the question of a joint approach to the government in advocating a similar regime for New Zealand. Enhanced service standards, including client-care measures, seem certain to be among the measures offered by the professions in return for a statutory cap on liability.

## CONCLUSION

- 806 The introduction of a Code of Client Service in order to promote consistent practices within the legal profession would provide a direct and transparent response to a number of the problems which this study has identified in the delivery of lawyers' services to women clients. Consistent practices will facilitate the informed participation of women in the justice system, whether as privately paying or legally aided clients of lawyers.
- 807 It is evident that some, perhaps many, lawyers believe this goal can and should be achieved through other measures which would encourage improvements in

the quality of lawyers' service but not require adherence to a uniform set of standards. Such measures would doubtless have a heavy emphasis on education of lawyers and of the public, and might involve the introduction of accreditation schemes.

- 808 On the basis of the evidence gathered in this study, it is considered that any alternative strategies are less likely to give practical effect to the principle of informed participation by clients as effectively as would a Code of Client Service. This is not intended to diminish the value of supplementary measures which the legal profession can and should also take to facilitate informed client participation in the justice system. What a Code targets most directly and comprehensively, however, is the imbalance of power that exists between lawyers and many of their clients and potential clients which, as this study has shown, presents a range of impediments to their ability to discuss with their lawyers matters upon which mutual clarity must be obtained. If clients are to be participants, not puppets, in the decisions made about their use of the justice system, that source of difficulty in matters as basic as those discussed in this chapter must be tackled by means that will reach all lawyers and all clients.
- 809 The E-DEC final report's statement of the code's content provides a useful starting point for the New Zealand Law Society. It does not, however, capture, or sufficiently specify, all the matters which would be contained in a code which is focused on the needs of women clients. For example, its statement that clients must be informed when costs "diverge significantly" from estimates is open to very different interpretations by lawyers and clients. The specification of a percentage variation (for example, 10 percent) or of a dollar amount would demonstrate a more informed awareness of clients' needs. As well, the E-DEC report's statement would not require the disclosure of several matters which are of particular importance to women clients, namely:
- the name and status within the firm of the person responsible for the day-to-day conduct of the matter, and, if appropriate, the partner responsible for its overall supervision;
  - the name of the person in the firm or, if appropriate, a nominated person outside the firm, who should be approached if the client has any complaints about the service provided which cannot be resolved with the person who is responsible for the day-to-day conduct of the matter;
  - the steps required to complete the matter, and the time likely to be needed to conclude it; and
  - how often the client will be advised about the progress of the matter.
- 810 On the basis of this study, it is considered that a code should require the prescribed information to be disclosed to a client both orally and in writing at the outset of the engagement, as soon as all the necessary information has been supplied by the client. It is envisaged that a model disclosure document would be issued by the New Zealand Law Society in a standard format (either in printed form or electronically) and in a variety of languages that are in common use in New Zealand. It is implicit that both the oral and written disclosures need to be made in plain language. However, in light of the various difficulties with written information that have been discussed in chapter 9, the production of supplementary means of explaining client entitlements, such as videotapes in different languages, would be a valuable aid for clients who may have particular difficulty understanding the information the code requires lawyers to convey.



- 811 In other jurisdictions, there are exceptions to the disclosure requirements of a Code of Client Service. Common exceptions relate to the following situations:
- where the client is a long-standing client of the law firm or lawyer;
  - where disclosure is reasonably considered to be unnecessary, taking into account the knowledge and experience of the client in instructing and dealing with lawyers;
  - where the lawyer reasonably anticipates that the matter will be concluded and billed within 21 days (or such other time as may be specified); and
  - where the practitioner reasonably anticipates that the amount of the bill, excluding disbursements, will be less than some specified amount.
- 812 It is accepted that a very urgent matter may need to be exempted from the requirements: a lawyer may simply not have the time to prepare a full disclosure document. The New Zealand Law Society would need to provide guidance on reasonable compliance in that respect. In other respects, however, and in light of this study's findings, blanket exemptions to the code's requirements do not appear to be either necessary or desirable.
- 813 Finally, it is noted that if an Australian lawyer fails to disclose fee information or does not disclose it in the required way, each of the various rules has mechanisms to protect the client until the matter has been resolved through a complaints processes. Such mechanisms are essential. The Australian Access to Justice Advisory Committee, after reviewing the existing Australian rules, proposed the following:
- Where a lawyer fails to make the required disclosure, any costs agreement between the lawyer and client should be unenforceable. Any fees charged by the lawyer should not be recoverable except after an assessment by a costs assessor and then should only be recoverable on the same basis as for that applied in determining costs between the parties to litigation. (*Access to Justice Advisory Committee*, 148)

## RECOMMENDATIONS

- 814 It is apparent that inadequate information about lawyers' fees and the management of their cases results in women being unable to make informed choices about the conduct of their legal matters. The barrier this poses to women's access to legal services responsive to their needs confirms the need for a transparent and effective means of ensuring lawyers' accountability for the quality of legal services they deliver to all clients. Again, using the principles and process which this study has identified as being essential to guide all efforts to promote the just treatment of women by the justice system, any strategy to address the issues raised must ensure:
- a client-focused approach to the management of legal matters;
  - informed participation, by which clients are kept up to date with the legal processes relevant to their circumstances; and
  - transparency in the means by which lawyers are accountable for informing clients about the management of their legal matters.
- 815 Accordingly, it is **recommended** that:
- the New Zealand Law Society act urgently to introduce a Code of Client Service, the content of which pays particular attention to the information needs and circumstances of women clients;

- the Code be supported by an accessible means of resolving clients' complaints about service, consistent with the best practice principles identified by the New South Wales Law Reform Commission;
  - the code and the complaints process be promoted to the public in the context of a publicity campaign designed to raise public awareness of the services provided by lawyers.
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## Communication: understanding law in its social context

The judiciary, the profession and all who work in the courts need to be aware of and understand the hidden or unconscious gender bias in the law and the administration of justice so that it can be consciously and conscientiously eliminated. (Malcolm CJ, 1993)

### INTRODUCTION

- 816 **T**HE INTRODUCTION to Part 4 identified five systemic barriers to women's access to private lawyers' services. This chapter discusses the fifth of those; namely, inadequacies in the education of lawyers which prevent the social context of women's lives (and therefore their needs when seeking to rely on the justice system) from being sufficiently well-understood by all lawyers.
- 817 As has been seen, many women believe that lawyers' insufficient awareness of the social and economic facts that characterise women's lives results in their legal services needs not being met. While criticisms of lawyers' technical competence (and so of their legal education in that regard) were relatively rare, it was very widely believed that the training lawyers receive, especially before being admitted to practice, does not equip them well to serve diverse women clients.
- 818 This chapter examines the three stages of formal legal education, the extent to which each incorporates gender specific information and analysis, and the need for its inclusion throughout. In the light of this information, three main strategies are proposed to overcome current inadequacies:
- the development of specific proposals for gender-related legal education, the outcomes of which are measurable;
  - the development of skills and expertise among legal educators; and
  - co-ordination of those initiatives across the three stages of formal legal education.

Specific recommendations are made to implement these strategies.

### FORMAL LEGAL EDUCATION – THE THREE STAGES

- 819 Education is a life-long process. Those who begin the formal study of law at one of the five New Zealand universities which award law degrees will already have obtained substantial knowledge of, and attitudes towards, matters which are relevant to law. The greater diversity of today's university law students,

compared to those of even 30 years ago, enlarges the pool of relevant knowledge, experiences and values which are brought to law school. In the future, as a result of the increasing emphasis on law-related matters in primary and secondary school education, those who enter law school may be expected to bring with them a more reflective awareness of the need for law, the values which underlie it and its utility for diverse New Zealanders.

- 820 There are three main stages of formal legal education: university education, pre-admission professional training, and post-admission continuing legal education. All have undergone substantial changes over time, and especially in the last decade. Indeed, it was the objective of the Council of Legal Education in 1988, when it reduced the core curriculum for the law degree to six subjects, to facilitate a shift in understandings and approaches to the teaching of law at university level. At that time, the chair of the council stated that the significant reduction in the size of the core curriculum for the law degree would allow:

development of courses to meet or anticipate current needs. Several areas may be noted. One group involves minority rights, the Treaty of Waitangi, cultural influences in law and women's studies; another includes dispute resolution, professional responsibility, ethical responsibility and clinical education; and a third interdepartmental studies in law and economics and law and sociology. (Sir Ivor Richardson, 1989, 88)

- 821 It was also in 1988 that the Council established the Institute of Professional Legal Studies, ushering in the current era of pre-admission professional training. In the past decade too, there has been an expansion in the opportunities available to lawyers for continuing legal education through the New Zealand Law Society's programme and those of the larger district societies, especially the Auckland society. Without detracting from the many efforts that have been made to improve the scope and quality of formal legal education, it is timely to reflect on whether the changes that have been made are sufficient to "meet or anticipate current needs" of lawyers' clients and, in particular, their women clients.

### **University education**

- 822 The formal study of law at university occupies a comparatively brief portion of any lawyer's life experience. A law degree involves four years of study, at least three of which are dedicated to law courses. At present, six courses are compulsory in every New Zealand student's law degree: Legal System, Contract, Torts, Criminal Law, Public Law and Property Law. The descriptions of these courses, as specified by the Council of Legal Education, are very general, ranging from one-line to five-line statements of their contents. They contain no mention of any expectation that students should be encouraged to reflect on the law's application to and meaning for diverse New Zealanders.
- 823 In addition to these courses, four of the five law schools specify a small number of other courses as being compulsory in their students' degrees. Beyond the compulsory courses, which, at most, make up about half of a student's degree, each student selects optional courses from the range on offer. There is a considerable amount of commonality in the areas of law covered by the optional courses offered at the five law schools. (See NZLC MP11, 8) However, each school prizes its freedom to design its courses to meet the needs of all the "stakeholders" in the education that is being provided.

### **Pre-admission professional training**

- 824 A New Zealand law graduate who wishes to practise law must complete a 13 week professional training programme provided by the Institute of Professional Legal Studies (IPLS). Having successfully completed the IPLS programme, any person who is at least 20 years old and “of good character and a fit and proper person to be admitted” is entitled to be admitted as a barrister and solicitor. Upon paying for a practising certificate (and so becoming a member of the relevant district law society and of the New Zealand Law Society), a newly admitted lawyer can commence work on behalf of clients. A newly admitted lawyer cannot, however, practise as a solicitor on his or her own account before gaining at least three years’ “legal experience” in New Zealand and demonstrating, by examination, a knowledge of the financial duties of solicitors. (ss 44, 46, 55 and 56 Law Practitioners Act 1982) (See further NZLC MP11, 7–11)

### **Post-admission continuing legal education**

- 825 Naturally, the work experience which lawyers accumulate throughout their careers, and the life experience they accumulate as members of New Zealand society, are vital to the continuing acquisition and development of knowledge, skills and values necessary for the discharge of their professional responsibilities. In addition, the New Zealand Law Society and some of the larger district societies offer a variety of seminars and workshops each year to accelerate and extend lawyers’ professional development. Some law firms also offer structured in-house training programmes of varying standards.
- 826 The continuing legal education programme offered by the New Zealand Law Society has been developed in recent years to include a closer focus on the needs of newly admitted lawyers. This has been achieved through a “planned curriculum” of workshops, each of which is designed to develop lawyers’ skills in, for example, domestic conveyancing, or acting as a duty solicitor or as an advocate in the Family Court. In some areas of legal practice (for example, duty solicitor work), only those who have completed the society’s training programme will be rostered for that work. As well, the majority of lawyers (80 percent) who are appointed by the Family Court as counsel for the child have attended the Society’s training programme relevant to that work. (Gray and Martin 1998, 32) (See further NZLC MP11, 12–13)

### **The role of formal legal education**

- 827 A fundamental objective of lawyers’ formal education is that it should produce practitioners who are competent to serve their clients. Views may differ, however, on the role which should be played by each of the three stages of formal legal education in building up the armoury of knowledge, skills and values that is needed by a competent lawyer. The following are some of the features of legal education in New Zealand which influence views about the role of each stage:
- the university law schools are not educating students only to become practising lawyers: it is estimated that about one half of law graduates practise law;

- university education is undergoing substantial change as a result of increasing student numbers, funding changes and greater competitiveness among tertiary education providers;
- the legal profession is becoming increasingly specialised, with implications for what may be regarded as the common areas of knowledge and skill required by competent lawyers;
- the costs of professional legal training (the IPLS programme) now fall on trainees, with implications for the length of the course and, therefore, the role it can play in the continuum of lawyers' formal education and training;
- there is not a high level of co-ordination between the activities of the Council of Legal Education (the body responsible for the oversight of legal education and training prior to admission as a barrister and solicitor) and the activities of the professional bodies (the national and district law societies) which are responsible for post-admission legal education and training;
- the supervision of newly admitted practising lawyers by employers is not monitored and is of variable quality;
- there is no mandatory continuing education for New Zealand lawyers; and
- the organisation of the legal profession is under review and the outcome is bound to affect the roles of the national and district law societies and, perhaps, the role of the Council of Legal Education.

## GENDER IN LEGAL EDUCATION TODAY

- 828 The consultation paper *The Education and Training of Law Students and Lawyers* (NZLC MP11), asked whether, and if so how, law students' and lawyers' education and training should ensure that members of the legal profession achieve an understanding of the relevance of gender to the law, and to clients' use of and faith in the law. The overview it provided of the curricula of the university law schools, of the IPLS professional training programme and of the continuing education programme offered to practising lawyers (NZLC MP11, 7–14) is summarised and updated here.

### University law schools

- 829 In the university law schools, it is generally in the optional, rather than the compulsory, courses that students may encounter an approach to the law which specifically considers "gender issues". The major exception is Waikato School of Law, where teaching of the differential impact of law upon women and men is mainstreamed. From information provided by the law schools about their compulsory courses, three of the other four schools include a feminist legal theory component in their compulsory Jurisprudence course; two include some gender-related material in the compulsory Legal System course; and one includes some material in the compulsory Equity course.
- 830 With regard to optional courses, all of the law schools identify Family Law as a course which includes relevant material: for example, in the words of one law school, "the financial problems consequent on the breakdown of relationships and domestic violence". All the schools except Waikato have one course dedicated to either Law and Gender or Feminist Legal Theory. Three of those schools offer another two or three optional subjects which have some gender-

specific content; for example, Law and Medicine, Employment Law and Advanced Criminal Law. The fourth law school has identified a further seven of its optional courses as including gender-specific material, namely, Media Law, Sentencing, Negotiation, Labour Law, Civil Liberties, Law and Psychiatry, and Company Law.

### **The IPLS programme**

- 831 The 13-week IPLS programme, which consists of a Litigation module and a Commercial/Property Law module, is focused on developing skills which trainees will need in legal practice. It is designed “to bridge the gap between the learning of substantive legal principles in the academic context of the law schools and the supervised practice of law in a range of legal settings”. (Report: Review of Practical Legal Training, 1 October 1996, 22) The standard materials used in the training have little specific focus on the needs of women clients. (See further MP11, 52–53)
- 832 Recently, the Council of Legal Education has approved a prescription for the IPLS professional conduct “seminar”, which is to be taught from the year 2000. The prescription includes a statement that IPLS trainees will be made familiar with “the need to strive for the maintenance in the profession of certain values”. These include:
- (a) serving the public in a competent manner
  - (b) the aim of providing adequate legal services to those who cannot afford to pay for them
  - (c) the aim that the law and legal institutions act fairly and with justice and
  - (d) ensuring that at all times the profession and the members of it act without any bias based on race, religion, ethnic origin, gender, sexual orientation, age or disability.
- 833 Communication with the IPLS suggests that the course materials to be developed for this part of the professional conduct seminar will promote trainees’ understanding of gender issues as they affect both clients and lawyers. It also suggests that the area of Professional Conduct may develop into a third “leg” of the IPLS programme, with the other two “legs” being made up of skills training related to Legal Practice and Litigation.

### **Continuing legal education**

- 834 The consultation paper *The Education and Training of Law Students and Lawyers* recorded that the New Zealand Law Society has not canvassed the possibility of including on a formal basis, across its continuing legal education programme, material focusing on the impact of gender, nor of addressing areas of the law that may be particularly important to women clients.
- 835 Communication with the society since that time suggests that it considers that its own willingness to enhance the focus on gender is not matched by lawyers’ willingness to attend continuing education seminars and workshops which have such a focus. By way of example, it pointed to the disappointing attendance levels at the 1997 seminar, “Women in the Criminal Justice System”, presented in five centres and led by the Chief District Court Judge, a woman Queen’s

Counsel and a senior woman academic. Despite that, the society is making further efforts to include materials on gender issues in its continuing education programme where possible. In that regard, it noted that the consultation papers published in this project have been used as resource materials by some presenters in recent workshops.

## RESPONSES TO THE CONSULTATION PAPER

- 836 *The Education and Training of Law Students and Lawyers* presented a number of historical and contemporary facts which illustrate the constraining effects of gender on women's opportunities to participate in the public world and to live as independent citizens whose contributions to society are valued equally with those of men. For example, the paper referred to the fact that, by law, women were excluded from membership of the legal profession (and so from the judiciary) until 1896, and from standing for Parliament until 1919, and outlined the slow progress over the last century in increasing women's participation and influence in those primary institutions of justice. It also outlined the economic disparities between New Zealand women and men; the distribution between women and men of primary responsibility for the rearing of children, and the economic value attached to that responsibility; and the incidence of violence against New Zealand women. (NZLC MP11, 15–18)
- 837 In the light of those facts, the paper then presented the criticisms of lawyers' quality of service to women clients that were most frequently made in the consultation programme. As has been seen, those criticisms were focused on the shortcomings in some lawyers' interpersonal communication skills, and in their knowledge and understanding of the social and economic facts of women's lives.
- 838 The majority of the 25 written submissions made in response to the paper expressed the clear view that lawyers' education should do more to assist the development of law students' and lawyers' understanding of the impact of gender on the law, and on women's experiences and opinions of the law. Notably, community groups, as well as women lawyers' groups and the Ministry of Women's Affairs, supported the introduction of educational initiatives, including compulsory initiatives at university level, designed to enhance lawyers' appreciation of the causes and effects of gender distinctions, and their relevance to law.

"There should be no question that teaching of a gender perspective on the law should be optional . . . Fifty percent of the potential client population is female and stand to be disadvantaged and poorly served if the legal practitioners they engage have no understanding of the gendered nature of both society and the law . . . The project has produced enough evidence of extremely poor service to women from (male and female) lawyers who are clearly ignorant of gender issues to demonstrate that optional courses will be of little use in making inroads into a very unjust situation. The status quo will only serve to entrench male privilege further . . . It cannot be argued that only a small proportion of legal issues may require a gender perspective and that fields like 'corporation law' are gender neutral." – *Submission 9 on NZLC MP11*



“All aspects of legal education must employ gender-inclusive language and avoid sexist stereotyping. Issues portraying feminist analysis and gender analysis should be included as case studies. Law schools must begin to include an acknowledgment of difference and the impact of difference in their core curricula, if the law profession is to improve its reputation and its service provision . . .” – *Submission 8 on NZLC MP11*

“[S]ystemic change would be far more effective than any ‘add on’ course which would only serve to further marginalise groups that are currently not part of the mainstream.” – *Submission 11 on NZLC MP11*

- 839 Two submissions, one from a lawyer and the other from a district law society, questioned the need for gender issues to be the focus of any heightened educational efforts.

“Although ‘gender equity’ is a fashionable topic for advancement at the moment I favour a policy of gradualism here, as with the incorporation of Māori issues. With 28 percent of the practising profession now being women and with 18 percent of the District Court bench now being women, beneficial changes are bound to occur naturally.” – *Submission 2 on NZLC MP11*

“The five law schools should not develop a policy about the inclusion of gender materials in their curricula. Obviously, with over half the students being female and, in my experience, quite assertive as to their positions, lecturers would ignore at their peril issues and ramifications of their teaching which affect women.” – *Submission 5 on NZLC MP11*

- 840 In lieu of written submissions from legal educators, a meeting was held with members of each of the university law schools, the IPLS and the continuing legal education committee of the New Zealand Law Society. In addition, several university and other law teachers made written submissions, both before and after that meeting. As well, members of the project team had further meetings with a smaller number of those who had attended the earlier meeting of law teachers, and with other law teachers. A number of law students were also consulted at meetings organised by law schools to discuss the consultation paper or the project more generally.
- 841 Those submissions and meetings revealed a stark division of views about the need for and the appropriateness of including in lawyers’ education information and critiques which explore women’s experiences and perspectives of law. For example, in their written submission, the staff of the IPLS expressed differing views on the question of whether materials focused on gender issues affecting clients should be developed for inclusion in the programme. Some staff considered that there is scope for doing so, and that their inclusion would make the programme’s content more reflective of issues which arise in legal practice. Some considered that the IPLS materials insufficiently promote the need for lawyers to be aware of, and act appropriately in relation to, gender issues. It was noted too that while IPLS staff are encouraged to discuss gender issues in relation to women lawyers’ careers, this is not compulsory. Some staff considered that any materials to be developed should include information of that kind.

- 842 Other IPLS staff were unsure about, or opposed to, the inclusion of materials focusing on gender issues. Their view was that the present materials are “gender neutral” and function well as “the basis upon which to teach skills rather than to teach or facilitate discussion on social, political or gender issues”. (Letter from National Director and staff of IPLS, February 1998)
- 843 The division of views appeared to be most acute, however, in relation to law students’ university education. Those who favoured finding ways to increase the focus on gender in law school courses highlighted the difficulties they had experienced to date in attempting to achieve that result. For example, a number of academics reported that their efforts to incorporate women’s experiences and perspectives in their classes have been met with the response, from some colleagues and students, that “real law” should be taught instead. Some students who had taken feminist law courses reported both ridicule from other students and veiled criticism from prospective employers who suggest that something more worthwhile should have been studied. Some students also reported being afraid to question the omission of gender-related material from other law courses because of the risk of ridicule from teachers.
- 844 There were three distinct reasons given for opposing the suggestion that the university law schools, in particular, should adopt a planned approach to introducing all students to material which highlights the influence of gender on the law. The first reason is that there is no need for any such planned focus because the issues are not relevant to most lawyers’ work. Where they are relevant, as in family law and criminal law, there is already adequate scope for them to be considered by individual lecturers and students who wish to do so. Beyond that, the knowledge and skills needed by lawyers for the effective practice of law will be gained “on the job”, and those who work in the areas of law in which women most need assistance will, with maturity, develop the empathy that is needed to provide quality service.
- 845 The second reason for opposing the idea that university law schools should introduce all students to gender analysis stems from the notion of academic freedom. While those who rely on this reason may accept that issues arising from gender distinctions are integral to some areas of law or even to the entire field of law, the objection is to the notion that any part of a law student’s university education should be required to focus on those issues. The dangers of compulsion that were described are that it can lead to undesirable rigidity in the law schools’ ability to respond to the needs of all those who are stakeholders in the education that they provide; to a lack of innovation within and competition between law schools; and to temporary “compliance” by students with the “emphasis” which is being taught, rather than the development of their capacity for independent and critical thought which, it was said, is the product of exposure to the variety of emphases that is offered in law schools.
- 846 The third reason is far more pragmatic. It is that the general level of knowledge among legal educators of what might be involved in the teaching of “gender issues” in law courses is not yet sufficiently developed to allow an informed debate on whether and how more of it should be done. Inevitably then, conditions are not ripe for the successful implementation of any proposal that there should be more widespread use in university (or further legal education) of material focused on the relationship between gender and law. Accordingly, the current priority is to encourage legal educators as a group to learn more

about the ways in which gender and law may be connected. Meantime, those who are already well placed to incorporate gender-related material in the courses they teach can do so, and can act as resource people for others.

- 847 From the discussions held with legal educators in particular, it appears that the third reason provides an accurate summary of the present situation. By its very nature, it precludes an immediate and comprehensive response to the clear call from New Zealand women that law students be taught in a way which is more sensitive to the facts of women's lives and to the impact of law in perpetuating women's inferior social and economic status. It does appear, however, that there is a widespread commitment among university law teachers, and other legal educators, to the introduction of initiatives which will encourage the development of their own understanding of the relationship between gender and law so that they will be better placed to decide how to pass on that knowledge. Accordingly, the suggestions made here for immediate action are directed to the implementation of that commitment.
- 848 Before turning to those recommended strategies, some observations may be made about the first and second reasons that were given for opposing the suggestion that legal educators, particularly those in university law schools, should adopt a planned approach to the inclusion of gender analysis in their courses.

### **Gender is relevant to all law**

- 849 The first reason tends to assume that the relevance of gender to law is confined to specific areas of the law, most notably family and criminal law. But this is not the case. An exploration of the relationship between gender and law can be conducted in any legal field at all; it does not consist of a set of topics in which women are already known or seen to be interested. Rather, it consists of a particular way of approaching law, even areas of law which may seem to have little direct or indirect impact on women's lives. This point has been made often in the available literature, including an article by an Australian academic, the title of which helps makes the point: "Exploring the Corporations Law Using a Gender Analysis". (Canberra Law Review, 1996, Vol 3, No 1, 82)
- 850 It is explained there that, in addition to utilising the "full range of methods of legal reasoning", gender analysis does three things. It "asks the woman question" in order to see how the substance of law may submerge the perspectives of women and perhaps even render them invisible from legal discourse. It also applies "practical reasoning" which expands traditional notions of legal relevance in order to make legal decision-making more sensitive to features of cases that are not already reflected in legal doctrine. Thirdly, and as a result, it challenges "the dominant paradigm" or the prevailing way of thinking about, justifying and even critiquing law. (See also Barnett 1998, 21–27)
- 851 That last idea, that there is a "dominant paradigm" of legal thought which tends to exclude or minimise women's experiences and perspectives, is hardly a radical one these days. It has already been noted (see chapter 8, para 644) that half of New Zealand's judges expressed agreement with that basic proposition in their responses to the questionnaire circulated on behalf of the Judicial Working Group on Gender Equity before the 1997 Gender Equity Seminar. It would be interesting indeed to know whether, since the seminar, an increased proportion

of judges would now agree with the proposition. Certainly, in the evaluations returned at the seminar's conclusion, the great majority of judges (85 percent) rated the seminar highly, with half giving it the top rating possible. All found it increased their understanding of gender issues and 97 percent said they would do things differently as a result of attending the seminar. (*LawTalk* 513, 15 February 1999, 1)

- 852 There has been a great deal written, mainly overseas, on why and how the law is not “value-neutral” as between the interests of women and men. For example, the Australian Access to Justice Advisory Committee commented in its report to the federal government that one result of the predominance of men in legal institutions has been the establishment of laws and legal systems that reflect and represent “social ideals of masculinity”. By way of example, the committee continues:

Adversarial legal procedures assume a contest between equal competitive, autonomous, self-interested actors, each eager to best the other, a role for which it may be said that men are more likely than women to be fitted by their socialisation. Tests of “reasonableness” have assumed the values of the reasonable man, excluding and marginalising women’s experience in a wide range of areas of the law, from torts to sexual harassment to self-defence. (*Access to Justice Advisory Committee* 1994, 31)

- 853 One of the many explanations provided in the overseas literature of how the law can exclude or marginalise women’s experiences includes this passage:

Many doctrinal areas of the law are . . . fundamentally structured around men’s perspectives and experiences . . . Tort law defines injuries and measures compensation primarily in relation to what keeps people out of work and what their work is worth. It is in this framework that non-economic damages, such as pain and suffering or compensation for emotional injuries, which are often crucial founts of recovery for women, are deemed suspect and expendable. In the language of criminal law, the paradigmatic criminal is a male, and women criminals are often viewed as doubly deviant. Another example of the manifestation of the male reference-points is how self-defense law looks to male notions of threat and response to assess what is reasonable. Contract law is built around the form of transactions that predominates in the male-dominated marketplace, and doctrines that are regarded as necessary to assist the weak (ie, helpless women), such as reliance and restitution, are subtly demeaned by the language as “exceptions”, as deviations from the normal rules of contract. All of this suggests that for feminist law reformers, even using the terms “equality”, “work”, “injury”, “damages”, “market”, and “contract” can involve buying into, and leaving unquestioned, the male frames of reference. It also leaves unspoken, and unrecognised, the kinds of work women do, or the kinds of injuries women suffer. (Finley 1989, 898)

### Academic freedom

- 854 The passages quoted above are also relevant to the academic freedom reason that was given for rejecting the idea that law school courses should include some compulsory focus on the relationship between gender and law. In particular, that reason assumes that there is no “compulsory emphasis” in the law courses taught at present, and that the mix of teachers at each law school guarantees that students will be exposed to a variety of viewpoints which will foster students’ independent and critical thought. But if law is not value-neutral as between men’s and women’s interests (and so has an in-built “emphasis” which favours the experiences and values more likely to be had or held by men than women), and if law teaching is not generally concerned to explore and

challenge that emphasis – despite the law’s commitment to the equality of women and men – then the argument may be turned against its proponents. Further, the “mix” of teachers at law schools is far from being representative of the mix of men and women in the general population. Men significantly outnumber women at all but one law school, particularly in the senior academic positions. (See NZLC MP11, 39)

- 855 The argument for academic freedom was directed against the idea that there should be a requirement imposed on law schools to focus more on the relationship between gender and law. Accordingly, it does not deny that an increased focus on gender and law could be introduced at any law school through the processes by which it ordinarily determines its course content and its staff, both of which are within its academic freedom to determine. The two points can become confused, however, because some who argue on the basis of academic freedom that there should be no imposed focus on gender in law courses will also be of the view that any greater focus than already exists is not merited. That would lead them to oppose the adoption of any policy proposed within their own law school, or by any other body with relevant authority, which stated an expectation that law courses should be taught in a manner which is mindful of the relationship between gender and law.
- 856 The possibility of the Council of Legal Education introducing such a statement was raised and welcomed by some of the academics with whom the project team spoke, and particularly by women academics. They saw it as legitimating the efforts of those who presently endeavour to introduce gender-related information and critiques in their law courses, and encouraging the exploration of that approach by other academics, without the counter-productive effects of a prescriptive requirement that particular material be taught, which could be objected to on academic freedom grounds, at least.
- 857 Part of the academic freedom argument is that there is already ample scope for gender-related information to be introduced in law courses. Presumably this scope exists because of the aspect of academic freedom which is described in the Education Act 1989 as:
- the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions. (s 161(2)(a))
- 858 There are numerous obstacles, however, in the path of individual law teachers (and even more in the path of individual students) who wish to explore the relationship between law and gender in their law courses, and these may have the effect of unduly limiting their “freedom” to do so. One obstacle lies in the fact that, by comparison with the United States, Canada and Australia in particular, there is a paucity of local academic commentary upon, and sociological information and analysis relevant to, the relationship between gender and law. Further, the wealth of international legal materials that is available represents only a small fraction of a far larger database of knowledge and opinion about law, much of which proceeds from the basis that connections between gender and the law are not important matters of inquiry beyond the most obvious areas of law in which women are commonly involved as parties. University law teachers, in particular, are subject to very few prescriptions as to what they teach, even in the compulsory subject areas of the law degree.

Accordingly they can select, to support or challenge their own understandings of law, as little or as much as they wish from the large database of international and local knowledge and opinion. In short, if they have not previously been disposed to search for commentaries and analyses which seek to uncover what has been called “the hidden gender of law”, the large majority of those sources might have been overlooked.

- 859 Second, the “freedom” to incorporate gender-based analysis into law courses is inevitably qualified to the extent that such an approach is inconsistent with the understandings of law which have prevailed in key decisions taken about law teaching. For example, decisions about the courses which should be taught in the law degree, how they should be taught and what subject matter they should cover may all constrain the scope for initiatives to extend the focus on law and gender. Certainly, sustained analyses of law and gender do not fit neatly with the way the legal world is divided into the subject areas commonly taught in New Zealand law schools.
- 860 For example, in their book *The Hidden Gender of Law* (Federation Press, 1990), Australian academics Professor Graycar and Associate Professor Morgan present their discussion of substantive law under three major headings: Women and Economic (In)dependence, Women and Connection: A Motherhood Issue?, and Injuries to Women. Under those headings is presented material which could, in the present New Zealand law degree structure, be lifted out, made specific to New Zealand conditions, and presented as part of any course in employment law, family law, taxation law, social welfare law, tort law, contract law, criminal law, public law, trust law, law and medicine, and media law. The point is, however, that after such a process, the sum of the parts may be unrecognisable. Accordingly, a teacher of any one of those courses who wished to offer an in-depth critique from women’s experiences and perspectives of the assumptions underlying the law and its connection to the socio-economic distinctions between women and men, may be constrained by the boundaries which mark off that law course from others.
- 861 From the consultation that has been conducted, it is apparent that some law teachers find the course structure at their law schools to be an impediment to their efforts to incorporate gender specific information and analysis in the most effective manner. It seems plain, however, that other teachers have yet to test the scope that already exists for introducing information which highlights connections between law and gender in the courses they teach. It is acknowledged that courses such as Law and Societies (taught only at Waikato), Jurisprudence and Feminist Legal Theory offer scope for an examination of some of those issues, unconstrained by the divisions which exist between other substantive law subjects. It is acknowledged too that, although not one of the compulsory courses prescribed by the Council of Legal Education for the law degree, Jurisprudence is compulsory at three of the five New Zealand law schools, and each of those courses includes some focus on feminist legal theory.
- 862 The result is, however, that across the five law schools which provide New Zealand’s future lawyers with their grounding in legal knowledge and the analytical tools to undertake legal work, there is considerable variation in the opportunities provided to students to consider the relevance of gender to law. Further, most law schools have no discernible policy which guides the provision of gender-related information in their law degrees.

## INCREASING THE ATTENTION TO GENDER IN THE LAW CURRICULUM

### Teaching resources for the compulsory courses

- 863 In Australia, where 11 subjects make up the compulsory “core” curriculum of the law degree, the Commonwealth Department of Employment, Education and Training (DEET) decided in 1993 that rising concern in the community about gender bias in the law (which had been the subject of several Australian inquiries and considerable media attention by that time) should be responded to by making available to all law teachers a set of written resources focused on the relevance of gender to law. Two “key decisions” were made about those resources by DEET, in consultation with the Office of the Status of Women and the Attorney-General’s Department, and with legal academics:
- first, that the main focus of attention must be the core (generally compulsory) curriculum (rather than in the optional areas, where one tends to “preach to the converted”), and
  - secondly, that the structure of the project should be based around themes or issues, rather than traditional subject categories. (*Including Gender Issues in the Core Law Curriculum, Introduction, 2*)
- 864 The key themes decided upon were work, violence and citizenship, and the Commonwealth government provided \$300 000 for three projects to be undertaken in those areas. The resulting three binders of teaching materials, produced by leading Australian academics, have been made available to all Australian universities, and are on the internet at (<http://uniserve.edu.au/law>). There is no compulsion attached to the use of the materials by law teachers, and their use is not being monitored. The benefit which DEET saw in making available the thematically presented information and critiques is explained in these words:
- Incorporating materials about gender across the law curriculum, by way of specified themes or issues, serves two important functions. First, it will assist law students (future lawyers and judges) to think laterally about these issues. For example, it will help them to understand how violence might be relevant to a legal dispute, for example, over property (by explaining how “undue influence” can be exercised), and not just relevant to the criminal law. Or it might lead students to think about how women’s work in the home could (or should) be valued a different way in the context of a claim against a deceased person’s estate (and thus that women’s work is relevant in, say, a succession or wills course, and not just in labour law). More broadly, the materials will make women and women’s concerns more visible to law students and to those teaching them. (DEET, 1996, *Introduction, 3*)
- 865 In *The Education and Training of Law Students and Lawyers*, attention was drawn to the existence of this substantial resource and it was asked whether a similar project should be undertaken in New Zealand and, if so, at whose initiative. There was broad agreement among those who answered this question, including community groups, women lawyers’ groups, university academics and other legal educators, that the production of a New Zealand resource of this type was desirable. Indeed only one submission, from a district law society, opposed the idea. The academics cautioned that the materials should be made available as guidelines only, rather than as a prescribed part of any course.
- 866 This idea has been pursued by the project team with a number of legal educators from the universities, the IPLS and the New Zealand Law Society. It appears

that there is substantial support for the production of local materials which all could use, as they consider best, in courses at each stage of lawyers' formal education.

- 867 Another initiative is already being pursued by two members of Victoria University's law faculty. Their proposal, which has received partial funding from the VUW Foundation, is to produce a series of low-cost booklets containing materials and commentary on gender issues relevant to each of the six courses which are compulsory at all law schools. It is envisaged that each booklet would be co-authored by academics from different New Zealand law schools and reviewed, before publication, by a wider group of academics teaching in the relevant areas. While the proposal departs from the thematic focus considered essential by the Australian DEET, it appears to be a pragmatic initiative in the local climate and it is to be hoped that all law schools and other legal educators will support it.
- 868 It was made clear in the meetings with legal educators that it is far easier for them to provide "moral support" for such initiatives than direct financial support. If production of the proposed booklets will require costs beyond the capacity of present university research budgets, legal educators' moral support for the production of that resource would be made plain by their endorsement of applications for other funding to that end. In this, as with all groundbreaking initiatives, it would be of invaluable assistance for that support to be given by those who head the law schools, the IPLS and the continuing legal education programme of the New Zealand Law Society. On the basis of the discussions held, it appears that such support would be readily forthcoming.

### **Teaching the teachers**

- 869 There are numerous other initiatives which legal educators can adopt now to demonstrate their commitment to enhancing their awareness of the relevance of gender to the law. Again, these will be most effective if they are led or actively supported by the most senior among their number. For example:
- the existence of the DEET materials could be better publicised to academics, with hard copies being made available in each of the staff and student libraries;
  - plenary sessions of the annual Australasian law teachers conference could be used in future to provide a forum for teachers who use gender analysis in their courses to speak about their teaching and to lead discussions about the issues raised;
  - that conference could be publicised to IPLS teachers and those responsible for continuing legal education in New Zealand to maximise its benefits across the three levels of lawyers' education;
  - a forum for legal educators who are familiar with the DEET materials could be convened to consider the value of a New Zealand version of the materials to the three stages of lawyers' education and ways in which the production and distribution of a local version could best be achieved;
  - staff and student seminars at law schools could be used as a forum in which a range of speakers, including community workers, practising lawyers and policy makers, speak about their understandings of the relevance of gender to their work;
  - legal educators could make greater use of the internet to establish "interest



- groups” of university and IPLS teachers and those who administer continuing legal education programmes, in order to share ideas and resources and establish databases of sources relevant to gender analysis in their courses;
- law school library purchasing policies could be framed so as to increase the stock of relevant books and journals available to staff and students;
  - the curricula of the three Legal Ethics and Professional Responsibility courses/seminars (to be taught at all New Zealand universities and the IPLS from July 2000 as well as by means of continuing legal education) could be the subject of collaborative study by the law schools, the IPLS and continuing legal educators, to consider the extent to which each should examine the concerns which New Zealand women have raised (as discussed in this study) about the quality of lawyers’ service.
- 870 In order to demonstrate their commitment to enhancing legal educators’ awareness of the relevance of gender to law, each of the institutions that is responsible for formal legal education could devise its own plan of the measures it intends to use to pursue that commitment and the means that will be used to monitor progress. Plainly, it would be particularly important that the initial focus of such plans be on developing legal educators’ knowledge of the extensive jurisprudential base from which gender-related critiques of legal rules and processes have been made.
- 871 It has already been mentioned that a number of the academics who attended the consultation meetings considered that it is not sufficient to merely encourage legal educators to devise a plan by which they will enhance their understanding of and focus on gender in their teaching. Their view was that some system of monitoring educators’ efforts in this regard is needed, both to step up the pace of change and ensure that the plan by which it occurs addresses all areas of concern. Their comments highlighted the difficulties that “minority groups” so often encounter in seeking to achieve change in any institution when those within the institution who most desire it are less numerous and less senior than others and those outside the institution who also want change do not have an influential voice in the institution’s decisions.
- 872 The idea of achieving curriculum reform through the leadership of bodies with authority in relation to law schools is a theme of overseas reports which have considered the difficulties of adding and integrating courses that address gender and other “minority” issues. In Canada, for example, the 1993 report *Touchstones for Change: Equality, Diversity and Accountability*, written by a Task Force of the Canadian Bar Association which was chaired by the Hon Justice Bertha Wilson, directed a number of its key recommendations to the Canadian Council of Law Deans. Among those recommendations were that the Council should:
- conduct a study of race and gender bias in law schools’ curricula;
  - act as a clearinghouse for curriculum development so that law faculties can exchange material;
  - facilitate the preparation and dissemination of model course materials that focus directly on gender and minority issues, as well as integrate these issues into traditional areas of teaching; and
  - develop videotape materials and seminars to illustrate the challenges experienced by faculty members who teach material involving gender and minority issues, with the purpose of exploring student and faculty responses as well as remedial strategies. (*Touchstones for Change*, 31, 171; see further NZLC MP11, 40–41)

## The Council of Legal Education

873 At the meetings with New Zealand legal educators, the Council of Legal Education was thought by many to be the most appropriate body to monitor the efforts of the law schools and the IPLS. The council is the only body with statutory functions which span those two pre-admission stages of legal education. Funded by the Law Foundation, it meets at least twice a year for one-day meetings. In between those meetings, its business is conducted by correspondence between members, facilitated by the council's full-time secretary.

874 The council is made up of a maximum of 17 members:

- two High Court judges nominated by the Chief Justice;
- one District Court judge nominated by the Chief District Court Judge;
- the five law school deans;
- two members nominated by the New Zealand Law Students' Association;
- five members nominated by the New Zealand Law Society;
- one nominee (not a lawyer or student) of the Minister of Justice; and
- no more than one nominee of the council itself. (s 31 Law Practitioners Act 1982)

The council has never nominated anyone to fill that last place, for reasons which include its already substantial size. Of the 16 current members of the council, four are women: one is a law school dean, one is a nominee of the Law Students' Association, one is a Law Society nominee and one is the Minister of Justice's nominee.

875 The Law Practitioners Act 1982 (s38) defines the council's functions and powers. Of primary relevance here is s38(1)(a)(i), which states that its functions and powers shall be:

- (a) Subject to this Act, to define and prescribe, from time to time and as it thinks fit, the courses of study for –
  - (i) The examinations in general knowledge and law, and the other qualifications (if any), additional to those prescribed by this Act, required by candidates for admission as barristers and solicitors of the Court (including qualifications as to practical training and experience); . . .

876 On its face, the power conferred by that provision with regard to the content of the law degree would appear to be very broad. But in practice, the history of the council, including the relationships between the judiciary, legal profession and university law schools which are represented on it, means that it exercises its powers in a manner that accords the law schools (and the universities of which they are part) a considerable level of autonomy in the regulation of their curricula. By contrast, the council exercises far greater control over the curriculum and the activities of the IPLS, the institute it established to deliver professional legal training.

877 In relation to university legal education, the council prescribes the duration of the law degree courses offered at the five law schools and monitors their content in two main ways. The six courses which are compulsory in all law schools' degrees, and which are the subject of the council's brief written prescriptions, are monitored by the council's appointment of moderators. Their functions include approving the content of the examinations in those subjects. Second, the content of each law school's degree, including every variation in it, must be submitted to and approved by the council.

878 The delicate balance of interests that exists in the regulation of the content of the university law schools' curricula poses considerable difficulties for any attempts to lead and co-ordinate change. As a result, it is questionable whether the Council of Legal Education would consider it appropriate to seek to influence the law schools in any matter outside the boundaries of the compulsory courses, and perhaps even within those boundaries, in the way that was suggested at the consultation meetings. If that is so, the only way by which the law schools could be held accountable for their development of and delivery of a plan to enhance the focus of their teaching on any matter that was considered to be within the bounds of the universities' academic freedom to determine would be by means of the universities' own procedures. It may be noted in this regard that the council has power to "tender advice to the Council of any University on any matter relating to legal education". (Law Practitioners Act, s 38(1)(e))

879 One thing that is plainly within the council's powers to do is to require further compulsory courses to be taught as part of the law degree. Of most relevance here is the Jurisprudence course, which has already been made compulsory at all but two of the law schools by means of their own procedures. If the council were to do that, and if the course prescription included reference to the need for feminist jurisprudence to be explored, that would inject a measure of accountability for that course's gender-specific content. As the earlier discussion has indicated, however, the result would represent only a very small advance on the current situation.

880 Although it would be novel for the council to use its powers to encourage law schools to adopt a planned approach to the integration of gender specific information and analyses across their curricula, this may be possible if goodwill, energy and resources were devoted to the task. For example, the council has power, under s 38(1)(g) of the Law Practitioners Act 1982:

Subject to this Act and any other Act, to do whatever it considers necessary or expedient in order that it may best accomplish the purposes for which it exists.

Further, s 40 of the Act empowers the council to appoint standing or special committees and:

refer to any such committee any matters for consideration or inquiry or management.

881 It may be that the judicious use of those powers could effectuate an outcome whereby each of the law schools submitted for the consideration and advice of a suitably skilled standing committee of the council, an annual plan of its goals relating to the inclusion of gender analysis in its courses and a report on the progress made against it. That committee could assist the IPLS in the same way. Because the council's jurisdiction is limited to matters concerning pre-admission legal education and training, however, the New Zealand Law Society's relationship with such a committee, and so its utility with respect to continuing legal education, would be a matter requiring further negotiation.

## CO-ORDINATION OF THE THREE STAGES OF LEGAL EDUCATION

882 This raises a final matter for discussion: the limited degree of co-ordination that is to be found across the three stages of formal legal education as a result of the various interests and administrative structures of those involved.

- 883 It has already been noted that the jurisdiction of the Council of Legal Education does not extend beyond the two pre-admission stages of formal legal education. Yet with its membership including the deans of the five university law schools, five New Zealand Law Society nominees and three judges, and with its responsibility to oversee the IPLS, the council would seem to be equipped to facilitate some degree of co-ordination across the three stages of formal legal education in New Zealand. Several factors militate against the council assuming that role, however, including its size, its limited administrative resources, the university law schools' competitiveness with one another, and the independence of the universities from the legal profession. Further, the law society nominees on the council are appointees in their own rights. They are not representative of the society, and there is no requirement for them to represent the views of the society to the council. And the IPLS is not represented on the council.
- 884 In the meetings held with legal educators from the three stages of formal legal education, it was observed that the result of the existing degree of separation of their functions is that there is no clearly discernible plan of the objectives which each strives to achieve, and of how, separately and together, they contribute to the production of lawyers competent to serve diverse New Zealanders. Indeed, it was observed that there is no discernible shared idea of what makes a competent lawyer. This degree of division between legal educators, and the lack of transparency in their aims and achievements, cannot be conducive to having matters of common concern identified, debated and resolved or for challenges to the status quo to be fully considered. It would seem that this works against the promotion of informed debate about the incorporation of material in lawyers' education which explores the connections between gender and law. Another result, made plain in the meetings with and submissions from women, is that the credibility of lawyers' education among the diverse members of the New Zealand public who need lawyers' services is threatened.
- 885 Although few comparisons can be drawn between the institutions of formal legal education in New Zealand and those in England and Wales, it is pertinent that the current reforms to the justice system there, which include the introduction of quality standards for all state-funded legal service providers, also include measures by which the government will strengthen its links with those who provide legal education and training. To this end, it is intended to disband the Lord Chancellor's Advisory Committee on Legal Education and Conduct and replace it with a Legal Services Consultative Panel, "a smaller and more effective body", which will provide independent advice to the Lord Chancellor. Explaining these proposals in *Modernising Justice, the Government's plans for reforming legal services and the courts*, the Lord Chancellor's Department states:
- Effective education and training is essential to the success of the proposals for modernisation set out in this White Paper; to the smooth operation of the courts; and to consumers of legal services generally. This education and training is provided by a variety of bodies outside government, and it is not part of Government's role to prescribe the detail of the education and training which they make available. But the Government retains an active interest in this field. So we intend to strengthen our links with providers of legal education and training, in order to assist them by providing a forum where common problems can be considered. The Legal Services Consultative Panel will play an important part in this process, and will have the duty of helping to maintain and develop standards in the education and

training of those offering legal services. The Lord Chancellor will be obliged to consider any recommendations it makes. In addition, we will help providers by informing them of our policies and discussing any training needs which may flow from these. In this way, we will be able to continue the useful role previously played by ACLEC. We are consulting widely on the extent and nature of the new arrangements. (*Modernising Justice*, December 1998, 21)

### **The difficulties of co-ordination: training in ethics and professional responsibility**

- 886 A recent example of the difficulties inherent in attempts to co-ordinate change across the three stages of formal legal education in New Zealand is supplied by the process by which it has been agreed that an increased focus on ethics and professional responsibility should occur at all three stages.

#### *The Cotter and Roper report*

- 887 In 1993, the issue of the most appropriate approach to the teaching of legal ethics and professional responsibility was identified as requiring a joint approach from the Council of Legal Education and the Council of the New Zealand Law Society. Accordingly, the councils jointly sought, and received, funding from the Law Foundation for a research project designed to recommend a comprehensive and cohesive programme for training law students, IPLS trainees and practising lawyers in those matters. The resulting report (the Cotter and Roper report of 1996) identified seven objectives of instruction in professional responsibility, and proposed that these be achieved by compulsory tuition at each stage of lawyers' education. A plan to allocate responsibility for each of the objectives, or aspects of them, to the law schools, the IPLS programme and to continuing legal education was included in the report. (Cotter and Roper, 17–28)
- 888 The report anticipated that its proposal for an integrated, compulsory programme in professional responsibility might founder because of the New Zealand Law Society's inability to commit itself to mandatory education for lawyers. In that event, it recommended that the Council of Legal Education direct the implementation of an "integrated program" for law school and IPLS students, and that the law society do all it can to ensure all lawyers participate in it. (Cotter and Roper, 29)

#### *Response by the Council of Legal Education*

- 889 Within the Council of Legal Education there was lengthy debate over the Cotter and Roper report's recommendation of compulsory ethics education at university level. In the result, the council resolved in 1997 that, from July 2000, law students who intend to practise law must complete a (24-hour minimum) university course in ethics and professional responsibility. It also resolved to expand the professional conduct component of the standardised IPLS programme, also to take effect in the year 2000.

#### *Response by the New Zealand Law Society*

- 890 The New Zealand Law Society supports the concept of an integrated approach to the teaching of professional responsibility across the three stages of lawyers'

education, but it considers, as the Cotter and Roper report predicted, that it needs explicit statutory power to impose mandatory instruction upon the profession. Further, the society has not reached a position on the desirability or otherwise of compulsory continuing legal education for New Zealand lawyers. In meetings with the project team, it has explained that, although some law societies or equivalent bodies in comparable overseas jurisdictions (in particular the United States) and some other professional associations in New Zealand and overseas have adopted some mandatory training, many have minimum requirements which leave open to question whether their purpose and effect is more a public relations exercise than a genuine attempt at further education. Also, there have been no studies which establish a link between mandatory continuing legal education and increased competency and there are arguments against its effectiveness as an adult learning model. Certainly the arguments for and against mandatory continuing legal education, whether in relation to the matter of professional responsibility or more generally, have not yet been widely debated within our legal profession.

- 891 Accordingly, the New Zealand Law Society's commitment to the implementation of an integrated training programme in professional responsibility is qualified by its current inability to guarantee that its involvement will be by means of compulsory training for practising lawyers. It prefers in the first instance to take all possible steps to persuade its members to be involved in the programme on a voluntary basis. If these efforts are not successful, the New Zealand Law Society council has endorsed the recommendations contained in the Cotter and Roper report and, presumably, would be willing to consider seeking authority to mandate legal ethics instructions for its members.
- 892 Some recent initiatives are relevant to the law society's dilemma in this regard. First, the 1997 *Poll of Lawyers* found that:
- 66 percent of New Zealand lawyers supported compulsory continuing legal education for lawyers in their first three years of practice;
  - 50 percent supported compulsory continuing education for all lawyers;
  - 90 percent thought it important that there be improved training in ethics and professional responsibility for lawyers in their first three years of practice; and
  - 94 percent thought it important that lawyers in their first three years of practice receive improved practical legal training. (*Poll of Lawyers*, 116–117)
- 893 Second, an amendment to the Law Practitioners Act has recently been introduced in Parliament which, if enacted, would give the New Zealand Law Society power to impose mandatory training on lawyers. The amendment was inspired by the society's wish to impose training in relation to the management of trust accounts but the power is a general one.
- 894 Third, a very likely outcome of the current review of the profession's structure is that membership of law societies will be voluntary in future. If that occurs, there would be no doubt that those who choose to be members could be required to undertake continuing legal education.
- 895 Fourth, some indication of professional attitudes towards continuing legal education may be gleaned from the recent introduction by the Auckland District Law Society, the largest in New Zealand, of a certificate for issue to practitioners who attend, in any 12-month period, any six of the 30 or more

seminars which the society offers each year. Publicity about the certificate describes it as “suitable for display” and “a useful marketing tool for practitioners who choose to use them in that way”. (*Northern Law News*, Issue 19, May 29, 1998, 7)

### *Planning for the integrated programme*

- 896 Despite the lack of uniformity in the positions of the Council of Legal Education (with regard to pre-admission training in ethics, professional responsibility and conduct) and the New Zealand Law Society (with regard to post-admission training), considerable efforts have been made to develop an integrated programme for the future. In endorsing the Cotter and Roper report’s recommendations, the New Zealand Law Society Council also agreed to support the concept of a joint ways and means group to investigate the feasibility of an ethics institute or national centre for legal ethics to take responsibility for designing and implementing all parts of the professional responsibility curriculum. An initial meeting of such a group was held, but the Council of Legal Education then withdrew from the concept of both the group and an ethics institute (at least in the meantime). Instead, it resolved that “all students that complete their degree after 31 July 2000 will be required for admission to have passed a university course in ethics and professional responsibility prescribed and moderated by the Council of Legal Education”. (Council resolution, 24 October 1997)
- 897 To replace the joint ways and means committee, the Council of Legal Education established “a working party for the purpose of providing liaison, coordination and support in implementation by the law schools of the university and later, by the Institute of Professional Legal Studies and the education directorate of the New Zealand Law Society of the integrated curriculum recommended in the Cotter/Roper Report”. It also “[invited] the deans to produce for consideration at the next (April 1998) meeting a proposed ethics prescription for the ethics and professional responsibility course and in so doing to confer with the working party and whomsoever they thought to see fit”. (Council resolution, 24 October 1997)
- 898 The university prescription was duly submitted and adopted by the council. Like the prescriptions for the other compulsory admission courses, it is worded generally and allows considerable scope for variation in content and emphasis in each of the five law schools, and indeed between one teacher and another. More recently, some of the law schools have submitted the contents of their Legal Ethics courses to the council, and have had them endorsed. During 1999, all the law schools’ Legal Ethics courses are to go to the moderator appointed by the council. It seems likely that the moderator will consider the relationship of each course to the Cotter and Roper objectives.
- 899 Meantime, the IPLS has developed, and had approved by the council, a detailed prescription for a professional conduct “seminar” based on the objectives set out in the Cotter and Roper report. The New Zealand Law Society Council has also approved a statement of aims and objectives for post-admission education in ethics and professional responsibility which is likewise based on the Cotter and Roper objectives.
- 900 Finally, the university law schools, the IPLS and the New Zealand Law Society have submitted separate, but linked, proposals to the Law Foundation for

funding to develop the materials which each will use in their future teaching of professional responsibility. Those proposals have been successful in securing Law Foundation funding. During 1999, the materials which will act as the basis for the new focus on professional responsibility across the three stages of formal legal education will be developed. Consistent with the universities' freedom of approach, the materials will be a guide to the content of individual courses in ethics and professional responsibility. The level of uniformity and the standard of the courses will, as indicated earlier, be monitored by the Council of Legal Education by the appointment of a moderator.

- 901 Discussions with some of the university teachers who are involved in the preparations for incorporating the compulsory course in ethics from the year 2000 indicate that there will be considerable diversity in the way it will be taught in each school. Plans for incorporating the course in the various schools' degrees vary, from creating or retaining a stand-alone course of more than the minimum 24 hours, to inserting a 24-hour professional responsibility component into an existing compulsory course in Jurisprudence.
- 902 Apart from the Council of Legal Education working party, there appears to be no mechanism in place to co-ordinate the overall curriculum, although it is understood the IPLS and the New Zealand Law Society have agreed informally to co-ordinate their efforts. Given that they are both based on the Cotter and Roper objectives, this should be a comparatively straightforward process.

### **Effects of limited co-ordination on the inclusion of gender in legal education**

- 903 At the meetings held with legal educators, the difficulties which beset attempts to co-ordinate initiatives across all three stages of formal legal education were raised in the context of discussions about whether and how a consistent policy on gender-related issues might be reached. Although those present at the meetings made it plain that they were not speaking for all legal educators, they readily acknowledged, and many regretted, the paucity of opportunities available to them to discuss issues of common interest or to raise for consideration matters which might require more widespread attention – such as the matters under discussion at the meetings.
- 904 In sum, the criticisms were that, wherever the educators were placed on the law school/professional training/continuing education “continuum”, they did not have sufficient certainty about each other's objectives to be confident about how their own teaching related to the earlier or later formal education that lawyers receive. Some teachers at university level, for example, believe that a mandatory continuing legal education programme, at least for newly admitted lawyers, would enable the law schools to make better-informed decisions about the aims of their own courses. Some at the professional training and continuing education levels believe that it would be invaluable if a statement of objectives for all three levels could be agreed upon so that courses at those levels can be planned with more certainty of what has been taught at university.
- 905 The desirability of co-ordination of effort across the three stages of formal legal education has been raised in a recent preliminary report to the Council of Legal Education which proposes to review and develop the IPLS course materials to promote trainee lawyers' awareness and skills in relation to the Treaty of Waitangi, Māori cultural issues and wider cross-cultural communication issues.



The report notes that this subject matter may be apt for a co-ordinated approach in the same way as the Cotter and Roper report recommended for the teaching of legal ethics and professional responsibility:

... assuming it is considered important for lawyers to be knowledgeable about and able to apply Treaty principles and cross-cultural skills, then there is also an argument that the law schools, the Institute and the New Zealand Law Society should develop a co-ordinated approach to ensure thorough and consistent coverage. (Blake, *Treaty of Waitangi and Cross-Cultural Issues: Preliminary Report*, 10)

- 906 The current restructuring of the New Zealand legal profession provides a vital opportunity for reflection on, and change to the future administration of the three stages of lawyers' education. However, the publicity that has been given to date about the New Zealand Law Society's approach to the restructuring suggests that this is not a matter of high priority for the profession.
- 907 The recently announced government proposals for change in the tertiary education sector may be relevant to the university law schools' approach to their future relationship with the other two stages of lawyers' formal education and training. (*Tertiary Education in New Zealand: Policy Directions for the 21st Century, White Paper*, November 1998) It may be, for example, that the changes will encourage the law schools to articulate more precisely the "building blocks" of "quality knowledge", skills and values which successful students must accumulate during their degrees. In turn, that may have beneficial effects for educators at the next two stages, at least in providing them with greater certainty about the level of knowledge, skills and values which the law schools have developed in their graduates and which, according to their own views of what makes a competent lawyer, require further development through the IPLS and continuing legal education programmes.

## CONCLUSION AND RECOMMENDATIONS

- 908 The importance of lawyers' education to the public of New Zealand, and not least to disadvantaged client groups, surely requires all who are involved in it to consider their collective task and to articulate on a regular basis, in a manner which is transparent and reasoned, the objectives which are to be attained at each stage of the formal legal educational process. It is vital that academics, students, lawyers and clients be fully involved in the process by which that plan is arrived at and reviewed, although inevitably some smaller group will need to take responsibility for its design, adoption and revision.
- 909 At present, there is no single body empowered to perform that task. Perhaps it is naïve to believe that a single body could perform it. Even so, there would appear to be considerable room for improvement in the manner by which those responsible for formal legal education in New Zealand are accountable to their various stakeholders including, in particular, the clients of practising lawyers. Accordingly, it is considered that this matter needs to be pursued by all who are involved with and otherwise interested in legal education in New Zealand.
- 910 There is also a need for the maximum benefit to be obtained, nation-wide, from initiatives to incorporate gender specific analysis in each of the three stages of formal legal education. The "reinvention of wheels" in any area which is in need of attention slows the pace of change by being wasteful of the expertise that is to be found outside any one institution's four walls, even if it promotes the autonomy and competitiveness of the inventors. In light of the discussion

in this chapter, it is considered that three main strategies are needed to overcome the impediments to the enhancement of gender-related education for law students, trainee lawyers and practitioners:

- the development of specific proposals for gender-related legal education, the outcomes of which are measurable;
- the development of skills and expertise among legal educators; and
- co-ordination of initiatives across the three stages of formal legal education.

Accordingly, it is **recommended** that:

- each law school develop a plan to enhance its teaching of law with regard to the effects of gender, including measures for monitoring and reporting on progress (including, for example, evidence in the form of student assessments, course appraisals, relevant seminars attended by staff, qualifications of new staff, performance reviews of all staff by colleagues based on clear performance measures, and EEO measures);
- the initial focus of law schools' plans be on developing academics' knowledge of the extensive jurisprudential base from which gender-related critiques of legal rules and processes have been made;
- legal educators support universities' efforts to produce new materials to assist in law school education on gender-related issues, including the provision of funding where appropriate;
- the IPLS develop a plan to enhance its training with regard to the effects of gender, including measures for monitoring and reporting on progress;
- the New Zealand Law Society develop a plan to enhance the continuing legal education programme's regard for the effects of gender, including measures for monitoring and reporting on progress;
- the Council of Legal Education consider all steps by which it may lawfully require or encourage the university law schools and the IPLS to develop, monitor and report on progress against the recommended plans;
- the Council of Legal Education and New Zealand Law Society, in consultation with all "stakeholders" in formal legal education, review the statutory scheme of regulation of formal legal education for the purpose of achieving better co-ordination of education measures at all three of its stages.

- 911 Part 4 of this study (chapters 8 to 11) has examined and made recommendations for reform in a variety of areas relating to the regulation and delivery of legal services by private lawyers. The final chapter discusses some areas of the justice system which have not been examined in depth in this study, but which, on the information gathered, appear to be prime candidates for reform in order to "promote the just treatment of women". Following that is a statement of all the recommendations made in this study.

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## 12

### Ideas for further change

#### INTRODUCTION

- 912 **T**HIS STUDY OF WOMEN'S ACCESS to legal services represents part of a far wider inquiry that could be made into the responsiveness of the law and justice system processes to the circumstances of women. Certainly, the women who were consulted were critical of a wider range of features of the justice system's operation. The breadth and depth of Māori women's concerns, which spanned the criminal and civil justice systems, pose large questions about the direction of future reform efforts. (See *Justice: The Experiences of Māori Women*, *Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53))
- 913 There have already been calls for a broad "first principles" review of the criminal justice system. For example, in the context of the various current research initiatives (including the Law Commission's work on criminal prosecution and alternatives to prosecution, criminal evidence, trial by jury, and "battered women's syndrome"), Judith Ablett-Kerr QC has commented:
- I do not necessarily quarrel with all of these changes but draw them to your attention because I suggest that they demonstrate that we practise law at a time when not only are there questions of significance to be asked about our fundamental system of justice but at a time when there is taking place significant but piecemeal changes to the legal system itself. I suggest that now is the appropriate time to stop and look, not merely at each individual change but at the wider picture of what it is society wants from its criminal justice system, to decide if it is getting what it wants and, if not, then what should be done about it. A company strategy is not planned by looking only at the small picture and an effective system of justice that retains the confidence of society cannot be maintained without from time to time stopping and reviewing the broader picture. (Ablett-Kerr, 1998 14)
- 914 Attention to the broader picture has led to the substantial package of reforms that is now being introduced to the justice system of England and Wales. Directed primarily at the civil justice system, the reforms of court procedures that are being implemented are the product of more than six years' research and consultation. The complete overhaul of the civil and criminal legal aid schemes is the result of the expansion of the reform agenda in 1997, when the Labour government came to power. The impetus for the reforms has been the unwavering view of successive governments that only radical change to the civil justice system will provide the conditions in which all citizens can obtain access to it, at a cost that is sustainable for both the state and individual users. Among the changes most relevant to family dispute resolution are those which emphasise mediation outside the courts as an alternative, sometimes compulsory, to litigation. For example, the Lord Chancellor has explained that in most

family cases (except care and protection, adoption and domestic violence cases), applicants for state-funded financial assistance “will not be granted representation by a lawyer, unless they can show that their case is unsuitable for mediation”. (*Modernising Justice* 1998, 37)

- 915 The condition of the mediation services that will be available to meet the large demands which are to be transferred to them from the English and Welsh courts has been the subject of attention by the Legal Aid Board over the last two years, as the likely direction of the reforms has become evident. Writing in 1997, the director of the Legal Action Group praised the board’s “can do’ style” in overhauling legal aid administration in the last decade but added, with reference to the “well-worn dangers of too much haste”, that it:

is now carrying an enormous weight of expectation. Single-handedly, the Board is being expected to come up with the answer to quality control of legal aid and mediation services; service delivery by lawyers and lay advisers; and the development from scratch of a nationally operating series of matrimonial mediation services. Each one of these raises major methodological questions which are in danger of being left unanswered in the intemperate rush for immediate results. (Smith 1997, 35)

- 916 In June 1997, the Legal Aid Board reported that it had signed contracts with groups offering mediation for matrimonial disputes to enable pilot studies of their services to be conducted, and that several more were to be signed over the next few months. It explained:

The pilot allows for a number of different models for mediation to be tested. The current mediation profession is thinly spread and a number of different approaches have been developed reflecting the background and qualifications of those offering the mediation service. For example, the Family Mediators Association offers twin mediators, one legally qualified and one not, providing all issues mediation while the National Family Mediation provides a single mediator, non legally qualified, dealing with children only issues. There has been a significant growth in the number of solicitors qualifying as mediators but one of the major difficulties we face is the very small number of cases proceeding through mediation. (International Legal Aid Conference, Session 4: Living with a Capped Budget, “Contracting – The English Proposals”, Legal Aid Board, 1)

- 917 A related initiative, reported in *The Times* of 28 January 1999, is the introduction by the English Law Society of a scheme to help people find specialist family lawyers. The society is publishing a list of 4000 law firms which have been vetted by the society and found to “have a track record in family law and [to be] committed to encouraging couples to resolve matrimonial disputes peacefully”. The list of firms will be publicised in telephone directories and Yellow Pages, as well as by agencies such as citizens advice bureaux. Law firms on the list will display a Family Lawyers logo. *The Times* also noted that most of the 164 000 people who filed for divorce in England in 1997 had had no previous contact with a solicitor.

- 918 During the course of this study, suggestions have been made by women, lawyers and judges that the procedures for family dispute resolution in New Zealand should be reviewed to determine whether the just treatment of women would be promoted by more radical changes than have already been implemented in recent years, or which are imminent or likely to be introduced in future. New Zealand’s specialist Family Court was created in response to the recommendations made by the 1978 Royal Commission on the Courts, which recognised the need for a unique approach to the resolution of family disputes which are, by their nature, generally distressing to all involved, sometimes

highly complex and always of central importance to the future security (material, physical and emotional) of the men, women and children involved. Among its unique features, the Family Court provides counselling services and utilises judge-led mediation. It also depends on the services of counsel for the child and of specialists (primarily social workers and psychologists) who provide reports on the circumstances of those involved in proceedings. Much of the cost of those professionals is borne by the state. As has been seen, the lion's share of civil legal aid expenditure is also dedicated to family proceedings.

- 919 A number of the submissions to this study have highlighted the fact that it is nearly 20 years since the Family Court was established, and have suggested that the time is ripe for close examination of the benefits and disadvantages of greater reliance on non-litigious family dispute resolution processes conducted by suitably trained and skilled professionals. Some believe that greater reliance on such processes would achieve substantial savings in the costs of family dispute resolution, not only to the parties involved but also to the state. From the information gathered in the study, this chapter offers comment on this and a number of other matters of particular relevance to women, and which are considered to be appropriate subjects for further attention.

## FAMILY COURT PROCEDURES

- 920 The concerns women voiced about their access to the civil justice system had a heavy emphasis on their need to resolve family disputes. A frequent complaint was that current family dispute resolution procedures are particularly damaging to the welfare of women and their children when undue time and cost, and increased acrimony within the family, result from the procedures being dragged out. Those concerns were summarised in the consultation paper *Lawyers' Costs in Family Law Disputes* (NZLC MP 10). Consistent with the study's focus on legal services, that paper emphasised the importance of family lawyers acting in accordance with their professional duties, both to the court and to clients, and in full awareness of the social context which surrounds family law work. Attention was also drawn to the Family Court's limited ability to control or censure abusive tactics employed by parties, and its practice in awarding costs. These had been the subject of frequent criticism by women clients and by lawyers.
- 921 A selection of quotations from the consultation paper indicates the matters raised for comment:

"If particular lawyers are on the other side, I push on very quickly with little or no negotiation because they've burned me and my clients before. There are lawyers who breach their duty to the Family Court by not promoting conciliation – small town, you know who they are." – *Submission 319 (lawyer)*

"My fees were nearly \$30 000 because of the stonewalling of the other side." – *Submission 422*

"As a Family Court lawyer of in excess of 20 years experience, I can tell you that one of the greatest injustices is that of the inability of women to obtain realistic costs against men who fail to give information or who argue and fight for no reason up to the courthouse door." – *Submission 467 (lawyer)*

“My then husband proved to be very difficult in respect of access for approximately 18 months, and it took me 15 months, three affidavits and a visit to court, and thousands of dollars, to obtain my share of the matrimonial property.” – *Submission 261*

“[M]y ex-husband’s first solicitor refused to continue acting on his behalf . . . [He] found another solicitor who was willing to play games and proceeded to do so. My solicitor took no action to manage the situation and I ended up with huge legal bills.” – *Submission 43*

“Lower standards are a product of the economic structure of the profession. Firms have downsized and young untrained practitioners losing their jobs are setting up in sole practices. Family law is an area where it is difficult to be effective without a lot of experience . . . Women, because they tend to be less well off than men, may end up with the inexperienced lawyer.” – *Submission 68 (lawyer)*

“It has taken me 2 years to reach an agreement settlement [at a cost of] \$14 000 on legal aid for me. I gave in to many things over those 2 years, some that the children now do without, some that I need to replace for the general running of the house. Every time I did there was a new list drawn up of further items my husband wanted that I would have to go through. It took a year for him to accept the valuation of both the house and his superannuation. Last December I took this issue to court to attempt to have the judge rule and dictate an end to the process but we were simply told to go back to the drawing board! Eventually in March an agreement was signed. I released what I had to but my husband refused to release the house, my life insurance, my vehicle or the substantial money he owed me. Costs escalated again. Once again we returned to court and this time it was dealt with properly. The issues raised here are this. It was evident by the constant new lists and refusal to accept or release what had been agreed to that the hold-up was with my husband. And yet I have this horrendous bill hanging over my head. If I had stopped proceedings I would have forfeited my home and what was security for my children. I would never have been free to get on with my new life.” – *Submission 390*

“The plain facts are that in most circumstances attempts by husbands to try to obtain custody of children or to have access to children on unreasonable terms are usually an attempt either to inconvenience the wife, keep control of her, or for the man to go on the benefit . . . If we could go to court and point out to the judge that the husband had been arguing unreasonably for many months, incurring substantial costs; and had then forced the parties into court again by virtue of his refusal to pay those costs; and the judge was not only then to award the costs up to the hearing but also for the hearing itself, we would have a lot more matrimonial property cases settling early.” – *Submission 467 (lawyer)*

“It seems very unfair that those who choose to prolong these issues do not have an obligation to pay any percentage of the subsequent bill of the other party. Why couldn’t an agreement be enforced without redress to the court? Why should a judge send us away when it was painfully obvious a decision could not be made between us?” – *Submission 390*

- 922 The consultation paper caused a high degree of concern among the family lawyers and Family Court judges who responded to it. At several meetings with groups of senior family lawyers and judges, a variety of views was expressed on the causes and incidence of the problems identified, and on how they might be remedied. Many considered that the recent and planned reforms to the Family Court's procedures will deliver greatly improved services for those involved in family disputes. Among the reforms referred to were:
- the introduction of case management, with its promise of firmer judicial control of parties' conduct in future;
  - the current development (based on recent research conducted for the purpose) of best practice guidelines for, and systems for appointing and accrediting, counsel for the child and professional report writers; and
  - the imminent piloting of parental education services to assist separating couples and families to focus on the interests of the children in Guardianship Act matters.

Also relevant are the new instructions to district subcommittees from the Legal Services Board concerning the recovery of all or part of the costs of legally aided litigation.

- 923 At the meetings, there was frequent mention, particularly by lawyers, of the court being under-resourced to do what it is otherwise well geared to do. Many referred to the Family Court's difficult and uniquely forward-looking purpose: to achieve positive outcomes for families, and especially for children, from situations of human crisis. The message was that the "cost drivers" in these situations, and the appropriate responses to them, cannot be compared with those in other kinds of disputes.
- 924 Overall, there was a strong defence made of the Family Court's structure and procedures, but this was coupled with an acknowledgement that there is a range of factors which contribute to the difficulties women had identified. Most commonly mentioned contributing causes included:
- backlogs in the courts, especially to obtain early interventions in disputes in which the parties are unlikely to reach their own settlements;
  - inexperienced lawyers being delegated family work without adequate supervision;
  - overly adversarial tactics by lawyers more accustomed to other jurisdictions;
  - inadequate regard by some lawyers of the value of counselling as a means to narrow the issues in dispute between their clients and opposing parties;
  - the inappropriateness in some situations of the style of (judge-led) mediation that is used by the court;
  - the greater volume these days (compared to 20 years ago) of difficult cases involving seriously dysfunctional families and allegations of abuse and violence;
  - the court's lack of control before proceedings are commenced, meaning that the style and duration of lawyers' attempts to obtain settlements beforehand cannot be monitored;
  - the court's lack of power to stay repeat applications (especially for custody) which the court considers to be groundless;
  - the court's lack of power to punish for contempt outside the courtroom; and
  - the difficulties for judges in determining the cause of unreasonable delays in order to make costs awards which penalise that behaviour.

- 925 While views differed on the extent of the problems caused by each of these factors, all those at the meetings were concerned to make the point that the task of family dispute resolution is particularly complex (if not always legally, then invariably in human terms) and vitally important, not merely for the members of each family whose interests are directly involved but for the welfare of society more generally. Further, all agreed that the weight of those interests, coupled with the social and economic imbalance in women's and men's circumstances, demands that particular care be taken in the development of reforms that are intended to promote the just treatment of women. In particular, it was emphasised that informal (non-judicial) processes of family dispute resolution can leave women insufficiently equipped to discover and assert their rights against domineering ex-partners. And, it was observed, informal processes are generally inappropriate in proceedings which involve domestic violence and child abuse.
- 926 Lawyers and judges also emphasised that the great majority of family disputes are resolved without recourse to the court's judicial powers.<sup>30</sup> The conclusion drawn from this was that only a small proportion of family cases involve substantial costs to the state or parties, and that the great majority of cases are being handled effectively and efficiently. As has been noted, many believed that the problems posed by the very nature of the most difficult cases, and by any shortcomings in the service received by parties in more straightforward cases, will be remedied by firmer judicial control, coupled with the benefits of other measures now being developed or already recognised as being needed.
- 927 Despite the range of views among the family lawyers and judges consulted on the causes and incidence of unsatisfactory service to clients and, therefore, of the strategies that might improve the system of family dispute resolution, there was reasonably widespread support for further investigation by means of a process which pays full attention to women's circumstances and needs. In this regard, two studies were referred to as providing useful insights into matters which could benefit from further investigation: *A Review of the Family Court* (Boshier et al, 1993), and the Department of Justice's 1994 Discussion Paper *Family Court Custody and Research Report 8* (Hall and Lee, 1994).
- 928 The Boshier report was commissioned by the Principal Family Court Judge in December 1992. Among the tasks set for the committee ("the Boshier committee") which conducted the review were that it consider:
- whether the conciliation process could and should be reinforced, restored or extended; and
  - whether the inquisitorial role of the Court could and should be strengthened. (Boshier et al 1993, 28)

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<sup>30</sup> Although there is a lack of comprehensive data on this matter, recent research commissioned by the Department for Courts is helpful. The research included a sample study of 250 Family Court files in five areas, 165 being cases brought under the Guardianship Act 1968, and 85 being cases brought under the Children, Young Persons, and Their Families Act 1989 (CYPF Act). Defended hearings were held in 12 percent of the Guardianship Act cases and in 8 percent of the CYPF Act cases. (Gray and Martin, *The Role of Counsel for the Child; Research Report*, 1998, 2, 50) All cases in the study involved the appointment of counsel for the child and therefore were among the most likely to result in defended hearings.



929 The report went further than recommending changes within the existing Family Court structure. A number of its recommendations have been influential in subsequent reforms: for example, to domestic violence proceedings and legal aid administration. But its recommendations for structural change to the Family Court have not been pursued. The Department for Courts has advised that all of the Boshier report's recommendations, including their costs, were considered by the (then) Department of Justice. Further, in the foreword to the 1994 Hall and Lee Discussion paper, the Minister of Justice recorded his request that the department examine the Boshier report, the Hall and Lee paper, and the seven earlier papers arising from the department's programme of research on custody and access cases, and advise him of possible improvements that could be made to the Family Court.

930 The Boshier committee's principal recommendations for change in the Family Court's structure would involve the establishment of a Family Conciliation Service as a service of the court, but separate and distinct from its judicial function. This aspect of its recommendations was described as being in many respects a return to the "wisdom of the original proposal" of the 1978 Royal Commission on the Courts which had led to the establishment of the Family Court. (Boshier et al 1993, 51) The Boshier committee envisaged the Family Conciliation Service being equipped to receive and resolve most applications under the Guardianship Act relating to custody and access. It would offer short-term therapeutic counselling to parties who requested it, and mandatory mediation provided by trained and accredited mediators. Mediation was described as involving:

the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party, who has no authoritative decision power, to assist contending parties to voluntarily reach their own mutually acceptable settlement of issues in dispute. (Boshier et al 1993, 52)

Counselling co-ordinators were envisaged to have a key role in the service by being responsible for early classification and referral of cases, and public education. (Boshier et al 1993, 51–62)

931 The Boshier committee envisaged the judicial function of the Family Court being invoked only when cases presented "urgent serious welfare issues requiring the immediate intervention of the Court" (such as cases involving domestic violence or child abuse), or when "there is failure to reach agreement" through mediation. (Boshier et al 1993, 52) It acknowledged, however, that for many cultural groups, "the concept of conciliation of a dispute in private, between two parties with equal rights, will not be appropriate". The efforts made, by 1993, to recruit counsellors from a variety of cultures and to encourage culturally appropriate approaches to family problems were described as being "only minor adjustments to a structure which remains overwhelmingly monocultural and is based on pakeha ethics and values". Accordingly, the committee called for further information to be gathered about alternative family dispute resolution services required by Māori and other ethnic communities in New Zealand. (Boshier et al 1993, 49–50) The Department for Courts has advised that it has not done work in this area.

932 Among the reasons for the committee's recommendation to establish a Family Conciliation Service were that:

- the counselling function of the Court is regarded by many clients and lawyers as being preliminary to Court proceedings rather than a genuine alternative dispute resolution method;

- there is no real incentive for parties to settle by conciliation: there are no barriers to prevent them from continuing the dispute through the Court system as far as their financial resources (or the State's by means of legal aid) will allow; and
- large amounts of State funding are currently resourcing the litigation branch of the Family Court whereas resources spent on strengthening the conciliation branch would result in more cases being resolved earlier and at less cost. (Boshier et al 1993, 50)

933 As has been indicated earlier, costs to the state from family dispute resolution processes are incurred in a number of areas apart from legal aid. These include the salaries of judges and court staff, the costs of counselling services, and the proportion of the costs of expert witnesses and counsel for the child which is not recovered from parties. Obviously, it is not only the state which bears the costs of family proceedings: privately paying clients of lawyers and legally aided clients from whom recoveries are made also bear the costs. Obviously, too, the interests at stake in family proceedings extend far beyond the economic interests of all involved.

934 The 1994 Hall and Lee discussion paper represents the culmination of seven years of research on custody and access cases by the Department of Justice. The views of more than 800 people (including parents, counselling co-ordinators, specialist report writers, lawyers and judges) were canvassed in that process. While many of the paper's observations and suggestions have been influential in Family Court reform and research efforts in the last few years, again its furthest-reaching suggestions relating to the use of non-judicial dispute resolution processes have not been implemented (see Hall and Lee, 1994, especially chapters 6 and 7). The nature of the concerns which led to Hall and Lee's proposal of a family dispute resolution system with a greater emphasis on non-judicial processes may be gleaned from these summary statements made in chapter 6 of the discussion paper:

Consideration needs to be given to clarifying what is the main purpose of Family Court counselling: is it supposed to be therapeutic or is it supposed to assist parents to resolve issues which are in dispute? If it is accepted that this last purpose is the main purpose then counselling may not be the best or only technique that could be used. Other techniques could include mediation, negotiation and conciliation. A name change for this part of the process to something such as Dispute Resolution Services would be required.

It would seem that custody disputes are not actually resolved at mediation conferences particularly often. It should therefore be asked whether mediation conferences can be made more effective . . .

It would appear that many judges frequently use their influence and authority in mediation conferences to persuade parents to agree to certain custody and access arrangements. As this practice is at variance with the orthodox definition of "mediation", it is suggested that the role of the judge in mediation conferences be re-examined and clarified. If it is concluded that it is appropriate for judges to take a "positive directional approach", then consideration should be given to renaming the conferences Family Dispute Settlement Conferences or something similar . . .

The majority of all surveyed groups believed that the whanau or extended family is more involved in child-raising and making decisions about custody and access among Māori than Pakeha. Most research participants took the middle ground when questioned about the extent to which the Family Court should reflect Māori values . . . Perhaps judges could be encouraged to allow whanau to participate more often in Family Court conciliation procedures, and consideration could be given to examining ways in which whanau involvement could be formalised . . .

It is suggested that potentially difficult cases be identified early where possible and fast-tracked, ie given priority for Family Court services and procedures such as counselling, mediation conferences, counsel for the child, specialist or DSW reports and defended fixtures. (Hall and Lee 1994, 112–121)

- 935 The model proposed differs from that of the Boshier report largely because the Hall and Lee paper envisages “dispute resolution sessions” in custody and access cases to involve a range of techniques (negotiation or mediation or conciliation) which would be utilised only where both parents agree to participate. As a result, the Hall and Lee paper favours the Family Court retaining a larger and more flexible role in the dispute resolution process. Further, it envisages the Court being assisted by a key person (a Specialist Services Co-ordinator/Case Manager) who would make initial assessments of cases and refer them to the appropriate next step (including a fast track), and who would also take part in the second assessments conducted by a Case Management Team (headed by a Family Court judge and also involving the Court Registrar). The present judge-led mediation conference is seen to have a continuing role, but renamed as a Family Dispute Settlement Conference to better reflect its style and purpose. (Hall and Lee 1994, chapter 7)

### **Further attention to non-judicial methods of family dispute resolution**

- 936 There have in recent years been considerable changes in the institutional context within which the Family Court operates: in the law which the Family Court upholds; in the administrative systems of the court; in the legal profession (for example, with the emergence of the Family Law Section and the current move to restructure law societies); and in the administration of legal aid. The full effects of all of those changes, let alone those which are still in development, have yet to be felt.
- 937 In these circumstances, it would appear that the major questions raised by the Boshier report and Hall and Lee discussion paper, and which are yet to be more widely considered, are:
- Should New Zealand’s family dispute resolution processes incorporate an increased emphasis on resolution by means other than those presently employed by the Family Court?
  - If so, what kind or kinds of alternative means are most suited to the variety of family disputes and the diversity of those who may be involved in them?
  - Who are suitably trained and skilled people to conduct those processes; to what extent are they available to handle the volume of cases that may be expected each year; and, if they are not already available, what is needed to develop a pool of people with the necessary skills?
  - How is an increased emphasis on the alternative means of resolving family disputes to be achieved?
  - How are particular disputes to be identified as being suitable for particular forms of resolution?
- 938 Those are all large questions and, as this study has shown, answers to them cannot be reached without close attention to the differences between women’s and men’s lives, and among the lives of different groups of women and men. The Boshier committee acknowledged that it did not conduct the type of review which could provide those answers. Its consultation programme, although as

extensive as could be managed in the time available, was conducted within a period of some four months. (See Boshier et al 1993, 30) Further, the committee clearly felt impeded in its task by the paucity of data on a number of matters about which it wanted to obtain information, namely: the total number of applications filed in the Family Court in a given period; the subject category of applications; the repeat nature of such applications; and the cost of disposition particularly relating to the provision of legal aid. (Boshier et al 1993, 29) Had the committee sought data on the sex and ethnicity of Court users, the stage of family dispute resolution proceedings at which parties reach settlement, and why they do so, or whether, and if so why, some groups of New Zealanders are under-represented among Court users, it would have been equally disappointed. A contemporary study of the Court would have readier access to some of the information sought by the Boshier committee, as well as other relevant data, but further efforts would be needed to establish sources of information relevant to all the matters mentioned above. Inevitably, this affects the weight which can be placed on the observations and suggestions made in the Hall and Lee discussion paper.

- 939 It is beyond the scope of the present study, with its focus on women's access to legal services, to attempt an appraisal of whether and if so how family dispute resolution processes might be changed to better promote the just treatment of women. However, the information it has collected provides a basis for the view that further consideration should be given to the questions listed above and, in particular, that it should involve (among other analytical tools) the process of gender analysis that has been identified as being essential to all efforts to promote the just treatment of women by the justice system. Further, it may be that the policy of the Legal Services Board, as revealed in its new charging instructions to district subcommittees (which are effective from 1 May 1999), has hastened the need, and provided part of the opportunity, for that kind of consideration of those questions.
- 940 The board's new charging instructions provide legally aided parties with financial incentives to use mediation, and disincentives for unreasonably refusing opposing parties' offers to mediate. They apply only when aid recipients are involved in proceedings in which mediation costs are already permitted as a disbursement covered by legal aid. By earlier instructions, issued in 1996, the Legal Services Board permitted mediation costs as disbursements except in "proceedings or parts of proceedings where mediation or a mediation conference was or might have been available in either the Family Court or any employment or other tribunal". (Civil Legal Aid Remuneration Instructions 1996, Amendment No.1 cl 13(1))
- 941 The commentary to that clause explains that a mediation conference is available in the Family Court (and so mediation costs will not be covered by legal aid) for matters involving separation, custody, maintenance and related domestic issues. It continues:
- a statutory mediation conference is not, however, available for matrimonial property, family protection, testamentary promises and protection of personal property rights matters. All of these types of cases may well benefit from the use of mediation as a disbursement under these instructions so it is available accordingly.

Recent communication with the board suggests that it may yet be prepared to extend the situations in which mediation costs can be covered by legal aid, so

that other family proceedings (in which there is a statutory mediation conference available in the Family Court, which would include custody and access cases) are also included.

- 942 The financial incentives for mediation that are provided by the new instructions arise from the statement that the board would generally expect district subcommittees to impose a discretionary charge (at least in part) in a number of circumstances, including where:

The aided person refused unreasonably to allow the matter to be mediated with the assistance of legal aid as a disbursement when the other party (whether a legally aided person or not) had been willing to mediate.

Conversely, the instructions provide that the board would not generally expect a discretionary charge to be imposed where:

The aided person made a written offer to mediate but the other party unreasonably refused that offer. (Civil Legal Aid Charges Instructions, 1999, 5–6)

- 943 The effect of those instructions will be to require district subcommittees to provide their own answers to some of the questions identified in para 937 as requiring in-depth consideration by means of a process which includes gender analysis. For example, a subcommittee will need to determine, after 1 May 1999, when it is “reasonable” for a legally aided party in a matrimonial property dispute to refuse to offer to mediate, or to refuse an offer to mediate that has been made by the other party. One of the matters relevant to that determination will be whether there are “suitably trained and skilled mediators” available for particular cases. On this matter, the board has explained, in the 1996 instructions which introduced mediation costs as a disbursement covered by legal aid, that:

there is no requirement that the mediator be a law practitioner provided that the district subcommittee is satisfied that the person is qualified to assist in bringing about an effectual outcome. (The Board well recognises though that many law practitioners are now well suited both through their special training and experience to carry out mediations.)

Further, the 1996 instructions require a district subcommittee, before approving any amounts for mediation, to have before it a certificate from the aided person’s lawyer which states that the lawyer believes the mediator is competent to assist in resolving the issues to be referred to mediation, and the grounds for that belief. (Civil Legal Aid Remuneration Instructions 1996 – Amendment 1, cl 13(3)(a))

- 944 It is plain that the board is seeking to encourage the use of quality mediation in suitable cases in which at least one party is legally aided, in order to reduce the issues in dispute and therefore the amount of legal aid that is required to resolve those cases. However, in a context in which it may be contestable whether particular cases are suitable for mediation, and whether particular mediators are suitable, the effects of the board’s policy will require close monitoring. That monitoring of the effects of the policy on the limited range of cases in which legally aided parties are now being encouraged to consider mediation will, of course, inform the answers to be given to the questions identified in para 937 as being candidates for further study.
- 945 While objections can be raised to the Legal Services Board’s initiative, there are also arguments in support of it. Those arguments would be strengthened if further efforts were made to inject consistency into the various subcommittees’

determinations about the suitability of particular cases for mediation and the skills required by mediators in different types of cases. But that is a difficult task, because mediation in those types of cases has been little used since 1996. (See, for example, Justice and Law Reform Committee, 1997) The board has plainly chosen to take the risk of learning how to assist subcommittees by monitoring their performance in a relatively uncharted territory, rather than continuing to watch legally aided clients and their lawyers exercise complete freedom to choose or reject mediation as a suitable dispute resolution process. In those circumstances, if the effects of its policy are closely monitored (with particular attention to the differences between New Zealanders, and between litigation of different types), the board's initiative could be regarded as establishing a pilot project in an area which may well hold promise for promoting the just treatment of women by the justice system.

### The availability and use of sanctions in the Family Court

"The woman is unaware that her partner has taken this action. All of a sudden her status as a mother is put into question and she has to defend the accusations. But she doesn't know this is happening until she gets the notice from the court or whoever. It's totally unfair." – *Transcript of hui with Māori women, Rohe 7*

"That's where the courts should have stood there and said 'You know he's obviously being a pig about it. It's obvious that he is saying no to everything. We will make rulings and you have to abide by them mister'." – *Submission 65*

- 946 On the basis of the information gathered in this study, there are two reforms to Family Court procedures which could be implemented by statutory amendment after a far less intensive process of consultation and research than would be involved in examining the questions outlined in the preceding section.
- 947 The first concerns the inability of Family Court judges to stay, for specified periods of time, repeat applications for orders under the Guardianship Act (relating to custody or access) which the court considers to be groundless. This matter was the subject of attention by the Boshier committee (see Boshier et al 1993, chapter 6, especially 65–66 and 74–78), but its recommendations in this regard have not been adopted. In brief, the committee recommended that:
- the law should be clarified to restrict the ability of an applicant to apply on successive occasions for orders pursuant to sections 11, 15 and 17 of the Guardianship Act 1968 and to provide that such applications may only be brought upon leave being obtained from a Family Court judge; and
  - if, after assessing a repeat application, the Court considers no reasonable grounds are disclosed for the bringing of it, leave should be refused, with a right of appeal to the High Court.
- 948 Extending the Family Court's powers as the report recommended would appear to be an effective response to the concerns women raised about the expense and upset caused by abuse of the right to apply for orders relating to custody and access "from time to time".
- 949 The second matter concerns the Family Court's limited powers to impose sanctions on parties who fail to comply with its orders; and, in particular, its

inability to punish for contempt of its procedures conduct which occurs outside the courtroom. This limitation arises from the fact that the court, being a division of the District Court, lacks inherent jurisdiction to compel compliance with its procedures. Again on the basis of the information provided by those consulted in this study, it would appear to be particularly necessary for the Family Court, of all courts, to be empowered to punish for contempt parties whose conduct plainly flouts its orders.

950 There are, however, larger questions about the Family Court's use of sanctions which do not appear to be amenable to such rapidly achievable "cures". In particular, two sets of circumstances impede the court's ability to prevent unnecessary costs from being incurred and to make orders to redress the inequitable effects suffered by some parties. They arise from:

- the difficulties which the court can face in establishing the cause of breaches of its procedures with sufficient certainty to support the imposition of sanctions; and
- its lack of control over the conduct of attempted negotiations before proceedings are filed.

951 The consultation paper *Lawyers' Costs in Family Law Disputes* highlighted criticisms of the court's practice in awarding costs in circumstances where, in the clear view of opposing lawyers and clients, the other parties and/or their lawyers had caused unreasonable delays and added costs. Since the publication of that paper, the Principal Family Court Judge has advised that the range of issues to be considered by judges in connection with the award of costs is being addressed by means of a judicial education programme. It is considered that this is an appropriate response, at least in the shorter term, especially if the changes which may be expected in the court's practices are well publicised to the profession and to clients. The effects of that response should, however, be closely monitored.

952 Granted that the Family Court can have difficulty establishing the causes of delays in proceedings, one element of the Legal Services Board's instructions to district subcommittees can be expected to pose considerable difficulties in that regard too. The instructions state that the board would generally expect a discretionary charge to be imposed (at least in part) where:

The attitude and conduct of the aided person was such that the length of the litigation was prolonged both significantly and unnecessarily. (Civil Legal Aid Charges Instructions, 1999, 5)

As with a number of other elements of the new instructions, it may be argued that the board's need to ensure as much consistency and equity as is possible among different subcommittees' decisions is effectively compelling subcommittees to assume a role that they are not well equipped to perform. The availability of appeals from their decisions guarantees that subcommittees will be cautious in exercising their discretions in these areas. However, it leaves open the question of whether there is a more reliable way of assessing whether legally aided parties' conduct is the cause of undue litigation.

953 Greater attention by the Family Court to costs practices will not assist in addressing the causes of undue expense incurred to parties through futile attempts to settle disputes before proceedings are commenced. This study has gathered evidence of such situations, the most dramatic example of which was

quoted in *Lawyers' Costs in Family Law Disputes*. It is repeated here to illustrate the point. The two quotations set out below are taken from letters written one year apart by a client to her lawyer. The result of the litigation was that the client was awarded by the court the amount she had originally proposed by way of settlement.

"I suggested that a final 'take it or leave it' offer . . . be made and that failure to accept it ought to close the door to further negotiations and precipitate litigation. My chief concern was a very real fear of winning a Pyrrhic victory. Since then . . . I believe that you have – no doubt in good faith – been pursuing the settlement avenue with [the opposing lawyer] and his client long past the point when such a course, given the clear lack of good faith on their part, ought to have been abandoned. As a client I have of course to rely on the good judgment of my legal representatives. In this case I believe you erred, with all due respect. . . ."

[One year later] "This letter is to advise you that I have no further need of your services. With the court case finally over I am taking stock of the costs to me in financial terms. At this point I can show legal fees and court costs of \$73 760.89 which, I hope you will agree, is astounding, given the straightforwardness of the issues involved and the final award of \$84 947.30. I have to say that I am devastated by the whole experience and my attitude toward the justice system is extremely negative, to say the least." – *Submission 507*

- 954 That client was not legally aided. However, related to this issue is the fact that the new instructions issued by the Legal Services Board, effective from 1 May 1999, contain financial incentives for legally aided parties to settle disputes, and disincentives for refusing unreasonably to settle. Like the new instructions about legally aided parties' approach to mediation (see para 942), it is stated that the board would generally expect a discretionary charge to be imposed by a district subcommittee (at least in part) where:

The aided person refused a reasonable settlement offer and the case proceeded to an adjudication, the outcome of which was not significantly better than that of the proposed outcome.

Conversely, the board would not expect a discretionary charge to be imposed where:

The other party refused a reasonable settlement offered by the aided party and did not achieve, in an adjudication, an outcome that was significantly better than that offered in settlement. (Civil Legal Aid Charges Instructions, 1999, 5–6)

- 955 It would appear desirable for research to be designed to investigate the extent to which, and why, lengthy delays occur after lawyers are engaged but before proceedings are commenced, especially (but not only) when those proceedings then prove to require considerable attention from the Family Court. If it is known to be problematic that delays are occurring and legal costs are mounting at that stage, when the Court cannot exert influence over the situation, an argument can be made for more effective and efficient early "diagnoses" of the suitability of individual cases for judicial or other dispute resolution processes. Such research would, therefore, be relevant to the inquiry into whether greater use should be made of non-litigious methods of family dispute resolution.



## AREAS OF THE SUBSTANTIVE LAW

- 956 It is plain from this study that two areas of substantive law, one specific and one more general, are of particular concern to many women, and will continue to blight their opinions of and experiences with the justice system for as long as their criticisms remain unmet.

### **Property division on marriage or de facto relationship breakdown**

- 957 The more specific area is the law regulating property division on marriage or de facto relationship breakdown. Correspondence during the latter stages of this study from various women's groups and individual women strongly suggests that the reforms that have now been introduced in Parliament do not meet the widespread criticism that the law does not produce equitable outcomes between women and men who suffer failed marriages or other domestic relationships. This study did not focus on that area of law for the reason that reform was already anticipated, under the leadership of the Ministry of Justice, at the time its boundaries were defined. The criticisms made in the consultation programme were, however, passed on to that Ministry.
- 958 Very often, the criticisms made of the inequity between women and men of the social and economic outcomes of the law's approach to property division between ex-partners were bound up with criticisms of the kind outlined earlier in this chapter: of the compounding effects of protracted processes of family dispute resolution. This confirms the vital importance of processes in any consideration of how to promote the just treatment of women by the justice system. It seems plain that continuing public concern about the inequity of the substantive law governing property division on relationship breakdown would be ameliorated by action, of the kinds suggested earlier, directed at improving the processes of family dispute resolution.

### **Law reform to implement anti-discrimination commitments**

- 959 In the meetings with groups of New Zealand women identified by their minority ethnicity, lesbianism or disability, there was considerable concern about the fitness of particular substantive laws for giving practical effect to their human rights. The following examples are from the *Report on the Consultation with Lesbians*.

"... when straight people get married they accumulate ... distinct additional rights as part of getting married, you know property and next of kin stuff and some are really small but they build up. The thing that bugs me is that I have to choose each one of those and go and get a lawyer to draw up the legal documents each time." (7)

"It's like there's no rules for us – we always have to fit ourselves into the het world. Hets can have this fantasy of the happy ever after because if it all falls over there's something there for them. There's nothing for us." (19)

"It's erratic ... like in some hospitals you can go in and say I am the next of kin and they'll accept it, but you can't rely on it. People are relying on the

hospital to be lesbian friendly, but it's not as good as having the right to nominate who the next of kin should be." (20)

"The definitions of family in the law are really insufficient. They are insufficient for whanau and for lesbians and gay families." (22)

"Me and my partner's issue is that I'm trying to get residency here and we're going into partnership and there's discrimination there because we have to be four years in a relationship where a heterosexual couple if they are married can apply to get it right away and [for] de factos it's two years. It's been very hard on us because we have to travel back and forth and we're in debt and it's been very hard on us as a family." (25)

"I went to a lawyer regarding a will and property and stuff and I had to go through the process with her trying to establish was I in a 'real' relationship, you know "how long have you been together?" and that was awful, you know like she was saying "is this really a relationship?" and I was having to pay for this time to educate my lawyer." (43)

"My separation was three years of legal wrangling, you know, people saying because I was a lesbian I couldn't see my kids. I was told on the one hand it's not relevant but on the other hand I couldn't have my partner to stay if the kids were there and I couldn't hug her or be affectionate and if I didn't consent I didn't get to see the kids. Nobody asked him what sort of sex he was having . . ." (32)

"I want to know how to sue a school. Legally I reckon we could take a school to the cleaners for harassing young lesbians. We've got a situation at the moment where legally, under the Human Rights Act, you know, and the Ministry of Education guidelines, I reckon we could do this school, but it's trying to find the money and someone who would be prepared to take it on." (27)

- 960 More generally, women considered that the mechanisms on which the justice system relies for monitoring and reviewing the effects of substantive law on women are insufficiently proactive. It was noted in chapter 6 that one function that community law centres are uniquely well placed to perform is to identify systemic bias, in the laws and procedures of the justice system, against people who make up communities of interest. That is a public-interest function which many other jurisdictions promote by means of public-interest litigation schemes that are more developed than is the case in New Zealand.

#### *Facilitating public-interest litigation*

- 961 During this study, information was gathered about the public-interest litigation processes employed in New Zealand, Australia, Canada and the United States. Public-interest litigation is well established in those other jurisdictions, in part because the courts there have power to strike down legislation that is inconsistent with the constitutions of those nations. Specialised funding schemes have developed, as well as schemes which rely on the discounted or free representation services of lawyers, so that groups whose constitutional rights may be threatened by statute can afford to be heard in cases in which the validity or the interpretation of legislation is in issue.

- 962 New Zealand courts do not have the power to strike down legislation, but there is still a need for them to receive arguments focused on the wider public interest in the issues raised by particular cases (see Richardson, 1995, 11). The most obvious example is where the interpretation of legislation is in question and arguments which detail the effects of possible interpretations on groups protected by the Bill of Rights and Human Rights Acts may not otherwise be made.
- 963 In that regard, it is notable that the civil justice reform package being introduced in England and Wales prioritises three categories of cases for state-funded legal representation. For information, all three are set out here, but it is the third category of case which is relevant:
- social welfare cases, which help people to avoid, or climb out of, social exclusion; for example, cases about people's basic entitlements, like a roof over their heads and the correct social security benefits.
  - other cases of fundamental importance to the people affected. This covers cases involving major issues in children's lives (like care and adoption proceedings); and cases concerned with protecting people from violence.
  - cases involving a wider public interest. This category includes two types of case: those likely to produce real benefits for a significant number of other people, or which raise an important new legal issue; and those challenging the actions, or failure to act, of public bodies (including cases under the Human Rights Act) or alleging that public servants have abused their position or power. (*Modernising Justice*, 28)
- 964 The information gathered in this study reveals that there is considerable uncertainty in New Zealand about both the grounds for appointment and the funding of counsel (*amici curiae* or friends of court) to present arguments focused on the public interest in particular cases. In light of the strong call by women generally, and by particular groups of women, for the promotion of means by which their human rights can be better protected by law, it is considered that part of the required response is the development of clear and well-publicised guidelines for the use and funding of counsel to assist New Zealand courts in cases which raise public-interest issues.

## RECOMMENDATIONS

- 965 From the discussion so far in the chapter, it is **recommended** that the Ministers of Justice, Courts and Women's Affairs consider:
- commissioning research which employs gender analysis to determine whether, and if so how, the justice system can promote the just treatment of women by an increased emphasis in family dispute resolution processes on non-judicial methods of dispute resolution conducted by suitably trained and skilled professionals;
  - amending the Guardianship Act to empower the Family Court to stay repeat applications for custody and access which the court considers to be groundless;
  - increasing, by statutory change, the Family Court's power to punish for contempt of its procedures; and
  - authorising the development of clear and well-publicised guidelines for the use and funding of counsel to assist New Zealand courts in cases which raise public-interest issues.

## CONCLUSION AND FINAL RECOMMENDATION

- 966 The focus of this study has been on New Zealand women's access to the legal information, advice and representation services which are needed to invoke the protection of the law. The results demonstrate that women experience substantial barriers in their efforts to obtain legal services responsive to their needs. Some of the barriers arise because, as women in a society in which gender counts (and as is reflected in such matters as employment levels, employment status, caregiving responsibilities, income levels and subjection to violence), they are unable to find services which take due account of those facts. Other barriers arise because women are diverse in their circumstances and needs (in such matters as their ethnic backgrounds and cultural values, languages, geographic location, disabilities and sexuality), yet the legal services on offer to the public do not take due account of those facts. Accordingly, the study provides insights to the nature of the barriers to legal services which may be experienced by New Zealanders from the full range of groups that make up our society.
- 967 From all the work undertaken in this study, a set of six principles has been distilled to guide policy makers and lawmakers in their efforts to promote the just treatment of women by the justice system. They are the principles of:
- **Diversity** – diverse responses must be made to meet the diversity of needs;
  - **User focus** – services must be responsive to users' needs;
  - **Informed participation** – users of the justice system must be kept informed about the application of the system to their circumstances;
  - **Community participation** – the laws, procedures and services of the justice system must be developed with community involvement;
  - **Co-ordination** – the range of justice system services must be co-ordinated; and
  - **Accountability** – justice system procedures and services must be regularly monitored, evaluated and reviewed.
- 968 A statement of principles is of limited value unless the means and the manner by which those principles can be given practical effect are transparent. Therefore, the process for their application is of critical importance in achieving the desired outcome. The process of gender analysis identified by this study flows directly from the principle of accountability. Each of its four component parts is essential if the principles are to be brought to bear in such a way as to achieve the outcome of women's just treatment by the justice system. The process involves:
- the use of an analysis which recognises, in the identification and definition of problems, the differences between the lives of women and men, and among the lives of different groups of women and men;
  - appropriate consultation throughout the process of policy development with women, community groups and other relevant organisations;
  - the development of proposals designed to meet the problems identified and the diverse needs of women, the outcomes of which are measurable; and
  - the creation of systems to monitor, evaluate and review the effectiveness of policies and laws in meeting the diverse needs of women.
- 969 Throughout this study, the six principles and the process of gender analysis have been brought to bear in the examination of women's access to legal services and in the recommendations that have been made. The terms of reference for

the study make plain that the principles and the process should be employed in all future examinations of the justice system. Accordingly, it is **recommended** that:

- to ensure the just treatment of women is promoted by the justice system, all future studies of its operations be conducted in the light of the six principles and by means of the four-part process identified by this study.
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## Summary of recommendations

### **Chapter 6: Choice – between community-based and private lawyers’ services**

It is **recommended** that:

- the government review the funding provision for community-based legal services (including but not limited to those under Part VIA of the Law Practitioners Act and s 95 of the Legal Services Act), to ensure that a long-term funding base is available for meeting all community legal needs;
- the Legal Services Act be amended to create a further category for the funding of community legal services, in addition to those listed in s 95(1) of the Act (for community law centres, law-related education, research and pilot schemes);
- the Legal Services Board’s administration budget be reviewed, having regard to its strategic, research and oversight roles in respect of legal services;
- a new procedure be adopted for appointing non-lawyer members of district legal services committees, to enable consultation with, and nominations to be made by, interested people and groups in each legal services district;
- the Legal Services Act be amended to enable the Legal Services Board to review the legal needs of communities of interest whose members reside in more than one legal services district, and to empower the board to establish and fund measures to meet those needs;
- section 154 of the Legal Services Act be amended to allow greater flexibility in the response to unmet legal needs identified under the section, so as to enable district committees (with the agreement of the board) to
  - fund the activities of citizens advice bureaux, and
  - fund other specialist groups and legal practitioners who can demonstrate their ability to satisfy unmet legal needs,and to impose on district committees an ongoing responsibility to review legal needs irrespective of whether a community law centre exists in the district;
- section 6 (and its companion provision s 55(8)(b)) of the Law Practitioners Act be repealed and replaced by a section which
  - enables a community law centre established or operated under the Legal Services Act to employ practitioners, and
  - entitles a practitioner employed by a law centre to hold a practising certificate subject to the power of the district law society to impose such conditions as it thinks are necessary to ensure the adequate supervision of a practitioner who is not otherwise qualified to practise on his or her own account.

## Chapter 7: Cost of legal services: civil legal aid

It is **recommended** that:

- the current financial criteria for eligibility for civil legal aid be revised upwards and tied to an appropriate index to maintain their value over time;
- the current general requirement for an initial contribution from legal aid recipients be reviewed to assess whether it is warranted and, if so, to ensure that its level and manner of application ensures equitable results for aid recipients;
- the options for simplified application procedures be investigated urgently;
- the New Zealand Law Society and the Legal Services Board publicise more extensively the availability of free and low-cost legal services other than those provided through the legal aid scheme;
- the Legal Services Act be amended to achieve a more equitable recovery (charging and further contribution) system for all categories of applicants;
- the Legal Services Board in the meantime investigate whether inequity results from the capital test's focus on the kind, rather than the value, of property which may be deducted, and develop measures to reduce any such inequity;
- the Legal Services Board ensure that all legal aid recipients receive a simply worded statement which sets out the conditions on which aid is made available and contextual information which indicates the incidence and value of the recoveries that are required from aid recipients, and which advises recipients to ask their lawyers or other appropriate contact people for clarification of any points about which they are uncertain;
- the Legal Services Board monitor the effects of its new charging instructions;
- the Legal Services Board take all possible steps (including publicity among lawyers) to ensure consistency and equity in the manner by which the initial contribution is required to be paid or exempted by district subcommittees;
- the Legal Services Board and New Zealand Law Society explore the feasibility of accreditation schemes as a means of assuring the service quality of civil legal aid lawyers;
- the Legal Services Act be amended to enable the board to fund the piloting and establishment of alternative means of delivering legally aided services which include quality assurance measures;
- the Legal Services Board develop a more comprehensive programme of public education about civil legal aid;
- the New Zealand Law Society and the Legal Services Board co-ordinate and increase their efforts to inform the profession about the use and operation of the civil legal aid scheme in New Zealand.

## Chapter 8: Choice among private lawyers

It is **recommended** that:

- district legal services committees ensure that regularly updated information about family and legal aid lawyers is available to women, especially through community groups likely to be approached by women for referrals;
- law firms which offer services in areas known or likely to be of particular relevance to women, including family and legal aid work, consult with community groups which are likely to refer women clients in order to improve the quality and effectiveness of their referrals;
- the Family Law Section of the New Zealand Law Society promote members' efforts to publicise their professional and personal knowledge and skills;

- the Legal Services Board continue its efforts to establish a well-publicised 0800 specialist legal information service, one function of which would be to make appropriate referrals to prospective women clients;
- in the meantime, the Legal Services Board and district legal services committees consider providing relevant information, and operational and advertising funding, to existing 0800 telephone information services so that women can obtain appropriate referrals to lawyers from those services;
- the Legal Services Board and district legal services committees, the New Zealand and district law societies and the Department for Courts co-ordinate their efforts to publicise the availability of referral services, in consultation with the providers of those services;
- law societies pursue the introduction of accreditation programmes which include training in gender and cultural issues to ensure accredited lawyers have, and maintain, the skills necessary to meet the needs of diverse women clients;
- law schools at which Māori and/or Pacific Islands students are under-represented review their initiatives in consultation with Māori and Pacific Islands people in their communities;
- those law schools develop new initiatives in order to attract Māori and/or Pacific Islands students, utilising all relevant sources of information, advice and assistance, including community sources, to help in the support of those students;
- the New Zealand Law Society, together with the district law societies, collect information about the effects of discrimination on minority and ethnic groups;
- the New Zealand Law Society and district law societies work collaboratively to develop a coherent and comprehensive policy for the implementation, development and monitoring of EEO in the legal profession;
- the EEO policy incorporate targets for change so that progress can be monitored;
- the New Zealand Law Society consider appointing an EEO resource person to promote and monitor the progress of the profession towards the attainment of its planned targets;
- law firms demonstrate compliance with the EEO policy and employer obligations by the development and implementation of written EEO policies.

## **Chapter 9: Diversity of service provision by private lawyers**

It is **recommended** that:

- funders, producers and distributors of legal information re-evaluate the effectiveness of pamphlets and other written sources as the primary means of communicating information;
- funders and producers develop alternative and supplementary media for the provision of legal information to women;
- funders and producers consider the development of legal information in media that will meet the specific needs of women with disabilities;
- all organisations involved in the provision or distribution of legal information to women consider the following when developing a communication strategy:
  - what information the target audience needs,
  - how people in the target audience are feeling when they seek information,



- whether other barriers to effective communication with the target audience exist – ie, literacy, culture, socio-economic status,
- the respective roles of the provider and receiver of information, ie, does the provider have an enforcement role which may discourage users of information to seek it from that provider;
- the Institute of Professional Legal Studies and New Zealand Law Society work together to develop educational strategies to promote better understanding among law students and lawyers of the needs of people with limited fluency in English, and the needs of deaf people;
- the Legal Services Board and Department for Courts foster the co-ordinated efforts of state and community agencies responsible for providing services to New Zealanders from non-English and non-Māori speaking backgrounds, to develop programmes for the training, career development and use of interpreters in the justice system;
- funders and producers of legal information develop and implement policies for the translation of written and other forms of information (for example, videotapes) in consultation with the groups of women most likely to use them;
- law firms extend their efforts to promote the caregiver-friendly nature of their facilities and services, and the availability of home visits to clients who find it difficult to attend appointments at the firms' offices;
- law firms review the caregiver-friendly nature of their facilities and services (through the use of client surveys, for example) and consult with women and community groups about ways to improve them;
- the New Zealand Law Society, its Family Law Section and district law societies publicise lawyers' obligations under the Human Rights Act and co-ordinate the promotion of practices to overcome the access barriers currently faced by women who are responsible for the care of children;
- the Department for Courts review its courthouse design standards with regard to the provision of play areas in courts, and develop options to allow sufficient flexibility in meeting the needs of court clients in each area of the country;
- all law firms carry out a disability audit of law firm premises to identify existing physical access barriers;
- the Legal Services Board and district legal services committees promote the development of new and increased disability-friendly services options by lawyers, including increased publicity of those services among community groups;
- the New Zealand Law Society educate law firms about the requirements of the Building and Human Rights Acts to assist firms to meet the requirements of the current law;
- the Legal Services Board establish a capital works fund for law centre premises which need to be made accessible to people with disabilities;
- the Legal Services Board and community law centres work together to develop guidelines to ensure accessible community law centre services to people with disabilities;
- the Institute of Professional Legal Studies provide in its courses information about, and teach techniques to overcome, the barriers to communication that diverse clients experience when seeking information from a lawyer;
- the New Zealand Law Society continue to include wherever possible in its

- continuing legal education programme material on interpersonal communication skills;
- the proposed Code of Client Service emphasise the vital importance of high-quality, plain-language communication between lawyers and their clients;
- lawyers and law firms review their current familiarity with social services that are relevant to the needs of their women clients;
- lawyers and law firms explore the development of new and diverse ways to link with relevant social services in their areas (such as through the employment of a community worker);
- district law societies explore the development of resources (in consultation with local communities) that would assist lawyers and law firms to contact social services relevant to their women clients in their area.

## **Chapter 10: Accountability to clients for the quality of lawyers' services**

It is **recommended** that:

- the New Zealand Law Society act urgently to introduce a Code of Client Service, the content of which pays particular attention to the information needs and circumstances of women clients;
- the Code be supported by an accessible means of resolving clients' complaints about service, consistent with the best practice principles identified by the New South Wales Law Reform Commission;
- the Code and the complaints process be promoted to the public in the context of a publicity campaign designed to raise public awareness of the services provided by lawyers.

## **Chapter 11: Communication: understanding law in its social context**

It is **recommended** that:

- each law school develop a plan to enhance its teaching of law with regard to the effects of gender, including measures for monitoring and reporting on progress (including, for example, evidence in the form of student assessments, course appraisals, relevant seminars attended by staff, qualifications of new staff, performance reviews of all staff by colleagues based on clear performance measures, and EEO measures);
- the initial focus of law schools' plans be on developing academics' knowledge of the extensive jurisprudential base from which gender-related critiques of legal rules and processes have been made;
- legal educators support universities' efforts to produce new materials to assist in law school education on gender-related issues, including the provision of funding where appropriate;
- the IPLS develop a plan to enhance its training with regard to the effects of gender, including measures for monitoring and reporting on progress;
- the New Zealand Law Society develop a plan to enhance the continuing legal education programme's regard for the effects of gender, including measures for monitoring and reporting on progress;
- the Council of Legal Education consider all steps by which it may lawfully require or encourage the university law schools and the IPLS to develop, monitor and report on progress against the recommended plans;

- the Council of Legal Education and New Zealand Law Society, in consultation with all “stakeholders” in formal legal education, review the statutory scheme of regulation of formal legal education for the purpose of achieving better co-ordination of education measures at all three of its stages.

## Chapter 12: Ideas for further change

It is **recommended** that the Ministers of Justice, Courts and Women’s Affairs consider:

- commissioning research which employs gender analysis to determine whether and if so how the justice system can promote the just treatment of women by an increased emphasis in family dispute resolution processes on non-judicial methods of dispute resolution conducted by suitably trained and skilled professionals;
- amending the Guardianship Act to empower the Family Court to stay repeat applications for custody and access which the Court considers to be groundless;
- increasing, by statutory change, the Family Court’s power to punish for contempt of its procedures; and
- authorising the development of clear and well publicised guidelines for the use and funding of counsel to assist New Zealand courts in cases which raise public interest issues.

It is **recommended** that:

- to ensure the just treatment of women is promoted by the justice system, all future studies of its operations be conducted in the light of the six principles and by means of the four part process identified by this study.

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## Appendix

### The methodology used in the study

- A1 **T**HIS APPENDIX SUPPLEMENTS the information provided in chapter 2 about the steps that were involved in the Law Commission project team's study. It begins with an explanation of qualitative research and then provides further details about the consultative processes that were employed and those who were consulted.

#### QUALITATIVE RESEARCH METHODOLOGIES<sup>31</sup>

- A2 In the last 15 years, there has been a very substantial rise of interest in, and use of, qualitative research methodologies, particularly in measuring the social context for public policy. Qualitative methods are very much respondent-driven and their strength lies in the flexible process by which knowledge is generated. Where quantitative methods (such as surveys) aim to achieve statistically valid generalisations, qualitative methods have as their aim attention to particularities, to difference as much as sameness, and to development of a fuller appreciation of particular social processes and their intersections across personal, policy and practice domains.
- A3 The value of qualitative methodologies is that they are able to draw on respondents' "situated knowledge". Tapping into respondents' experience and knowledge is undertaken by a researcher who moves into the field not with a predetermined set of questions, but with a relatively unstructured "consultation guide" which defines the broad areas of research inquiry. The aim of qualitatively driven consultation is to allow the respondent to produce a detailed account of their experiences. In the course of the consultation, the researcher is able to ask for development of issues, including those raised by respondents which the researcher had not previously known about. These issues and responses can then be built into the consultation guide to inform subsequent consultations or discussions. Equally, the process of talking through an issue may well result in respondents revising their positions and their appreciation of the issues.
- A4 A qualitative researcher may well not work through the consultation guide in an identical fashion in each discussion or consultation. Rather, each discussion will be structured to expand on the respondents' knowledge and perspectives, so that the research findings are grounded in the respondents' experiences.

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<sup>31</sup> The assistance of Dr Anne Opie (Research Manager, Legal Services Board), particularly with the theoretical dimensions of this explanation, is gratefully acknowledged.

Significantly, these accounts of lives and circumstances are contextualised rather than removed from their context: the different and often complex factors informing the respondents' experiences are able to be indicated in the analysis and research findings. That context is important, as it indicates how apparently similar experiences may have different outcomes and effects. The researcher, then, is interested in more than "the typical" or statistically valid experience. Further, a process which enables respondents to elaborate on and refine their answers has significant consequences for the development of the analysis and research findings. Respondents' accounts frequently highlight qualifications to initial assertions and attest to the contradictoriness of experiences. In this way they provide researchers with richly textured data with which to develop the analysis and research conclusions.

- A5 Current epistemological discussions highlight the subjectivity of knowledge. They insist that all knowledge, including knowledge generated by what have in the past been seen as "objective" methods, is structured by key factors such as gender, socio-economic status, education, ethnicity and geography. It is now widely recognised that these factors determine, for example, what is understood as important and how findings are presented. As a result, neither qualitative nor quantitative research is "objective".
- A6 Qualitative research opens up well-argued, different and, possibly, not entirely welcome perspectives on our society. In a situation where no knowledge is neutral or truly "objective" (because it is impossible for any researcher or reader to stand outside of or beyond their particular society), research which acknowledges how it has been structured, what its policy location is, and the inevitable partiality of its accounts, has more credibility than that which does not acknowledge where it is based and how it has been structured by researchers' or institutional interests.
- A7 Criticisms are sometimes made of qualitative research methodologies because their purpose and the partiality of all research, are not fully understood. The first criticism is that research results should be "representative" of the views of the entire population who might have been consulted. A related criticism is that qualitative methods are vulnerable to capturing too narrow a range of views. With respect to the project team's consultation with 3000 New Zealand women, for example, some who work in and near the justice system have asked such questions as "who were these women, and can their accounts be trusted?" Criticisms have been made that the concerns of the women consulted "really" related only to particular parts of the justice system or were voiced only by women from particular parts of the country or of the population.
- A8 Questions and criticisms such as those tend to reveal an assumption that there is a single position from which an event can be "truly" experienced or that those with socially endorsed power (as agents of the justice system, for example) have greater insight into events connected with the system than others who occupy less powerful positions. Accordingly, there is a very real risk that such questions and criticisms are raised in order to cast doubt on the validity of respondents' assertions. In fact, the concerns raised in this project were not peculiar to women in specific localities, or to specific types of cases, or to specific parts of the justice system. And while it could be argued that the 3000 women who participated in the consultation programme constitute a tiny proportion of the total female population, it should be noted that very few quantitative surveys either elicit or attempt to elicit such a high number of respondents.

Accordingly, the findings of quantitative studies are generally arrived at on the basis of far fewer responses than those in the project team's research.

- A9 Qualitative methods are also criticised on the related grounds that those participating may be motivated by bias. They may be seen, for example, to form part of a so-called "disgruntled minority" with regard to the issues being researched. However, as the objective of a qualitative research methodology is not generally to affirm a predetermined general proposition (positive or negative), such criticisms are somewhat circular. In relation to this project, it is notable that many of the women making submissions did not wish to discuss whether they had "won" their cases in the strict legal sense. Rather, their criticisms of access to justice were focused on their experiences of the legal processes occurring in the course of their interactions with the justice system. In addition, not all the women were critical of their interactions with the system.
- A10 Further, a significant value of qualitative research is that when researchers bring a critical approach to the reading of the data they are able to make more than a summary of the data's content or a recapitulation of existing knowledge. High-quality qualitative research allows implications for policy and practice to be explored, and new policies to be developed. The perceived value of the project team's research may to some extent be gauged by the use made by many in the justice system of the findings that were published while the project was in progress.
- A11 Finally, qualitative methods may be criticised as being too narrow in focus. It is for this reason that many qualitative researchers use the valuable tool of "triangulation" in order to ensure the area of investigation is viewed from a variety of perspectives. "Triangulation" involves collecting data from a range of different sources. In the course of this project, for example, three different types of triangulation were used:
- "within-method" triangulation – the use of different strategies for collecting data (such as face-to-face interviews with individuals, consultation with community groups, telephone submissions, written submissions, and the other methods set out below);
  - "data triangulation" – collection of data from different times and from different places, and the use of international literature; and
  - "investigator triangulation" – the use of more than one researcher in the study.

## THE SIX STEPS IN THE STUDY

- A12 The qualitative research methodology used had six steps:
- (a) the gathering and reading of relevant local and international literature (with an emphasis on literature from countries such as Australia and Canada which have a not dissimilar cultural and social context);
  - (b) the development of a consultation guide setting out the broad areas of inquiry (based on the literature review);
  - (c) a preliminary consultation to test the broad areas of inquiry and more precisely define appropriate areas for the terms of reference;
  - (d) the development and approval of the terms of reference;
  - (e) more extensive consultation and presentation of findings; and
  - (f) further consultation, summary, analysis and preparation of the two publications.

The focus in the remainder of this Appendix is on the consultative processes involved in steps (c), (e) and (f).

## PRELIMINARY CONSULTATION

- A13 Between September 1994 and September 1995, the preliminary consultation process involved a series of meetings with women, government agencies and women lawyers and a number of in-depth interviews with lawyers and women clients.

### Public meetings with women

- A14 The 26 meetings held in and around Wellington, Auckland, Christchurch, Gisborne, Dunedin and Hamilton were attended by 536 women, both individual users of legal services and representatives of community groups.

- A15 Among the community groups represented at these meetings were:

Awhina Wahine,	Housing for Women Trust,
Barnardos,	Hutt Valley Violence Prevention
Birthright,	Network,
Bishopdale Community Centre,	IHC,
Catholic Social Services,	Kokone Nga Kau,
Catholic Women's League,	Law Victims Assn Inc.,
Christchurch Citizen's Advice	Lower Hutt Women's Centre,
Bureau,	Lower Hutt Women's Refuge Inc.,
Christchurch Community Law	Māori Women's Welfare League,
Centre,	Mental Health Consumers Union,
Christchurch Safer Community	Mothers Alone,
Council,	National Collective of Independent
The Collective Wellington Women's	Women's Refuges,
Refuges,	National Council of Women,
Cook Island Family Support,	Newtown Community Centre,
Destini,	New Zealand Association of Citizens
Disabled Persons' Assembly,	Advice Bureau Inc.,
Domestic Purposes Benefit Action	New Zealand Multiple Birth
Group,	Association,
Downtown Ministry,	New Zealand Prostitutes Collective,
Dunedin Community Child Care	Nga Kaiwhakamarama i nga Ture/
Association,	Māori Legal Service,
Dunedin Community Law Centre,	Pacifica,
Elmo Centre,	Pacific Island Aids Trust,
Federation of University Women	Pacific Island Budget Service,
(Lower Hutt),	Pacific Island Women's Project,
Federation of Voluntary Welfare	People's Resource Centre,
Organisations,	Plunket,
He Parekereke Te Matawhanui,	Porirua Law Centre,
Hospice NZ,	

Prisoners' Aid and Rehabilitation Society,	Wellington Fijian Community Inc Society,
Rape and Incest Survivors Support Group,	Wellington Māori Legal Service,
Rape Counselling Network,	Wellington Peoples Resource Centre,
Rape Crisis,	Wellington Sexual Abuse Help Foundation,
Relationship Services,	Wellington South Community Law Centre,
Solo Parents Support Group,	West Christchurch Women's Refuge,
Tenants' Protection Association,	Women as Family Court Consumers,
Te Puawai Tapu,	Women for Justice for Women,
Te Reo Whanaunga,	Women's Division of the Federated Farmer (National Office),
Te Whare Roki Roki Collective,	Women's Electoral Lobby,
Tongan Support Services,	The Women's Loan Fund,
Tu Akina Social Services,	Working Women's Resource Centre,
Violence Intervention Programme,	Youth Law Project (Inc.),
Wellington Community Law Reform Network,	YWCA.

### **Meetings with government agencies**

- A16 The 16 government agencies whose representatives attended meetings to discuss their understanding of issues relevant to women's access to justice were:

Ministry of Women's Affairs,	New Zealand Police,
Te Puni Kokiri,	Department of Inland Revenue,
Pacific Island Affairs,	Accident Rehabilitation and Compensation Insurance Corporation,
Department of Labour,	Ministry of Consumer Affairs,
Statistics NZ,	Crime Prevention Unit of the Department of the Prime Minister and Cabinet,
Human Rights Commission,	Department of Social Welfare,
Crown Law Office,	Department of Justice.
Legal Services Board,	
Commissioner for Children,	

### **Meetings with women lawyers**

- A17 The seven women lawyers' groups with whom members of the project team met are:

New Zealand Law Society Women's Consultative Group,	Hamilton Women Lawyers,
Auckland Women Lawyers' Association,	Otago Women Lawyers' Association,
Canterbury Women Lawyers' Association,	Wellington Māori Women Lawyers,
	Wellington Women Lawyers' Association.



## Canterbury lawyers and clients

Ms Beth Cobden-Cox, a Christchurch lawyer, was engaged to conduct further consultation in Canterbury. She interviewed a total of 16 lawyers and clients and held further meetings with representatives of community groups.

## In-depth interviews

Ms Judith Fyfe and Ms Trina Dyall undertook a series of 14 in-depth interviews with lawyers and their clients in Wellington. Among that number were four Māori lawyers and three Māori women clients.

## CONSULTATION AND PRESENTATION OF FINDINGS

- A18 After the project's terms of reference were approved by the Minister of Justice in September 1995, the consultation programme was extended. The three major consultative strategies used were:
- public meetings;
  - a public submissions process; and
  - a series of targeted consultation processes.
- A19 Each of those strategies, discussed in turn below, was used to some extent in each of the six components of this step of the study, namely:
- consultation with individual women and specific groups of women,
  - consultation with community groups,
  - consultation with members of the legal profession and judiciary and with government agencies,
  - the provision of feedback on the consultation process,
  - the use of other research to contextualise the concerns voiced about women's access to justice, and
  - the publication of the six papers as the basis for further discussion and comment.

## Public meetings

- A20 564 women, including representatives from over 85 community groups, attended the further public meetings (ie meetings which were not targeted at specific groups of women) that were held in:

Auckland,	Invercargill,
Christchurch,	Lower Hutt,
Hamilton,	Nelson,
Hastings,	Otautau (Southland),
Hawkes Bay,	Palmerston North,
Hokitika,	Rotorua,
	Wellington.

A21 Representatives from the following community groups were among those who attended:

Age Concern (Napier and Central Hawkes Bay),	Hastings Age Concern,
Altrusa International,	Hastings Pacifica,
Anglican Social Services,	Hastings Probus Club,
Awhina Wahine,	Hastings Women's Refuge,
Barnados,	Havelock North Lioness Club,
Beneficiaries Advocacy and Protection Society,	Hawkes Bay Health Centre,
Birthright,	Hawkes Bay Polytechnic Students Association,
Budget Advice,	Hawkes Bay Regional Age Concern,
Cam Care Tawhara Community Trust,	HELP (Wellington),
Cancer Society,	Heretaunga Māori Warden's Association,
Catholic Women's League,	Heretaunga Women's Centre,
Central Hawkes Bay Business and Professional Women's Club,	Information Provider Network,
Central Hawkes Bay Federation	IHC (Hastings),
Country Women's Institute,	Kura 2000,
Central Hawkes Bay Support Centre,	Legal Resources Trust,
Christian Lovelink,	Maatua Whangai,
Citizens Advice Bureau (national and regional offices),	Mangere Law Centre,
Community Corrections,	Māori Advisory Committee,
Community Employment Group,	Māori Women's Resource Centre,
Cook Island Community Centre,	Māori Women's Welfare League,
Cranfield Hospice,	Meatworkers Union of Aotearoa,
Deaf Association (National and Women's Section Palmerston North),	Napier Women's Health Centre,
Disability Information Trust (Hawkes Bay),	National Advisory Council on Employment of Women,
Disability Resource Centre,	National Collective of Women's Refuge,
Disabled Persons Association (Central Hawkes Bay & Napier),	National Council of Women of New Zealand (Inc.),
Divorce Equity,	National Distribution Union (Napier),
Enterprise Centre (Hastings),	New Zealand Workers' Union,
Family Care Hawkes Bay Inc.,	Nga Pou Ote Kupenga Ote Rangimarie,
Family Planning Association,	NIJ and non-governmental workers,
Flaxmere Law Centre,	Pacific Island Resource Centre,
Girl Guides Association,	Parentline Hawkes' Bay Inc.,
Hamilton Abuse Intervention Pilot Programme,	PEETO,
	Plunket,
	Prisoners' Aid,

Public Services Association,	Tangata Piringa,
PSS,	Tomoana Resource Centre,
Purena Koa Rehua,	Tough Love,
Rape Crisis,	United Food Beverage and General
REAP,	Workers Union,
Refugee and Migrant Centre,	Wellington South Community Law
Returned Services Association	Centre,
Women's Section,	Wellington Women's Centre,
Royal NZ Foundation for the Blind –	Women's Division Federated
VIEW,	Farmers,
Service Centre for the Disabled,	Workbridge,
Service Workers Union (Napier),	YWCA,
Special Education Services,	Zonta.

### **Public submissions process**

- A22 The public submissions process was launched in September 1995 and was extensively publicised by means of:
- pamphlets and posters (which included a schedule of meetings) distributed through community groups and government agencies around the country,
  - articles in the newsletters of numerous community groups
  - advertisements in 65 community newspapers around the country;
  - a press release to all national newspapers detailing the submission process;
  - project team members speaking to community groups, including at national conferences;
  - interviews of project team members on a number of radio stations.
- A23 To encourage as many women as possible to participate in the submission process, a free phone and free postal address were set up. Face to face interviews were also conducted by project team members.
- A24 518 submissions were received during the seven month submission period, including 75 that were made by telephone. Of the 518 submissions:
- 252 were from individual users of the justice system;
  - 217 were from lawyers;
  - 42 were from community groups;
  - 5 were from judges; and
  - 2 were from government agencies.

### **Targeted consultation processes: women users of the justice system**

- A25 To ensure a diverse range of women's views were obtained, specific processes were used to reach particular groups. A particular focus was the nation-wide consultation process held with Māori women. Pacific women, lesbians, rural women, refugees and migrant women, disabled women and women prisoners were also the subject of specific consultation processes as is explained below.

### *Māori women*

- A26 A planning group, Te Roopu Uho, was established in early 1995 to advise on and help organise the targeted consultation with Māori women. The late Mrs Hepora Young was kaiarahi/leader of this group. Its members were Ms Ria Earp, Ms Ina Edwardson, Ms Monique Leef, Ms Ripeka Evans, Ms Charmaine Ross, Ms Tereasa Olsen and (from the Commission) Ms Philippa McDonald and, later, Ms Makere Papuni. Administrative assistance to the group was provided by Ms Trina Dyall and Ms Michelle Vaughan (project manager).
- A27 As a result of the group's work, 48 hui attended by over 900 Māori women were held throughout New Zealand between February and August 1996. Most of the hui were arranged with substantial assistance from Te Puni Kokiri regional offices as well as from the Women's Refuge Collective and the Māori Women's Welfare League. The hui were facilitated by Ms Makere Papuni together with members of Te Roopu Uho and an additional panel of Māori women including Ms Pania Tyson, Ms Marguerita Harris, Ms Gay Andrews, Ms Sharlene Gardiner, Ms Rahui Katene, and Ms Melanie Baker.
- A28 The 48 hui were held in a range of venues (including Te Puni Kokiri regional offices, marae, community halls, urban Māori authorities' rooms, church halls and trust board rooms) in the following centres:
- |               |               |               |
|---------------|---------------|---------------|
| Gisborne,     | Hawera,       | Blenheim,     |
| Ruatoria,     | Whanganui,    | Nelson,       |
| Paeroa,       | Taumarunui,   | Hastings,     |
| Hamilton,     | Whakatane,    | Mt Maunganui, |
| Te Kuiti,     | Waihau Bay,   | Tauranga,     |
| Whangarei,    | Opotiki,      | Te Puke,      |
| Moerewa,      | Rotorua,      | Turangi,      |
| Kaitaia,      | Hokitika,     | Auckland,     |
| New Plymouth, | Christchurch, | Porirua,      |
| Waitara,      | Temuka,       | Wellington,   |
| Opunake,      | Dunedin,      | Otaki.        |
| Patea,        | Timaru,       |               |
- A29 The hui were audiotaped and transcribed by the researcher who had facilitated them. Throughout the process by which the six consultation papers were prepared, the Māori women involved in the planning and conduct of the hui were consulted, at regular meetings, about the papers' content, including their use of the transcript of the hui.

### *Pacific Islands women*

- A30 Public meetings were held with Pacific Islands women with the aid of the late Louisa Crawley, from the Ministry of Pacific Island Affairs. These were held in Wellington, Auckland and Christchurch and were attended by 118 women.
- A31 A Pacific Islands women's advisory group, with representatives from Samoa, Tonga, Tokelau, Fiji and the Cook Islands, was also brought together to provide additional information and guidance. Members of the group were Ms Aseta Redican, Ms Francis Gifford, Ms Jane Poa, Ms Makerita Auta, Ms Ane Hunkin,

Ms Jean Mitaera, Ms Petesa Faraimo, Ms Anna Pasikale, Ms Mele Piukala, and Ms Mai Malaulau. (Ms Brenda Heather, now Attorney-General of Samoa, was also a member of the group for a short time.) The group met three times with the project team to advise on the content of drafts of the six consultation papers.

- A32 In addition, two Pacific Islands women lawyers were appointed to obtain further information from Pacific Islands women users of the legal system. Individual interviews and meetings with 60 Pacific Islands women living in Auckland were held. The results of this consultation were written up by the two lawyers, for use by the project team, in a report entitled *Report on Consultation with Pacific Islands Women*. The advisory group assisted the project team in its use of that information in the six consultation papers.

### *Lesbians*

- A33 A planning group was established in 1996 to assist in the development of a consultation programme aimed at obtaining the views of lesbians. Members of the group included Ms Linda Evans, Ms Angela Lee, Ms Barbara Lewis, Ms Belinda Rynhart, Ms Joy Liddicoat and Ms Charmaine Ross. As a result of their work, six meetings were held with lesbians in Lower Hutt, Christchurch, Nelson, Napier and Auckland.
- A34 The meetings, facilitated by two members of the planning group (a lawyer and community worker), were held in both rural and urban areas and were advertised in lesbian and gay media and through community groups. The meetings were well attended and a report on the consultation process, produced by the two members of the planning group, was provided to the project team. Entitled *Report to the Law Commission on Consultation with Lesbians for the Women's Access to Justice: He Putanga Mō Ngā Wāhine ki te Tika*, the report outlined both the issues raised and the solutions suggested in the six meetings.

### *Rural women*

- A35 Rural women were involved throughout the consultation process. Links with rural organisations such as the Women's Division of Federated Farmers and REAP were established early in the project. Meetings were held in Waikato, Southland, Hawkes Bay, Gisborne, Hastings, Hokitika and Nelson.

### *Disabled women*

- A36 Women with disabilities were also consulted. With the assistance of consultant Ms Robyn Hunt, meetings were held (in Auckland, Palmerston North and Wellington) with deaf women, women with visual impairments, women with physical disabilities and women with intellectual handicaps and their caregivers. In addition, Ms Hunt undertook further discussions with women with disabilities and made submissions on the six consultation papers.

### *Refugees and migrants*

- A37 Two public meetings were held with refugee and migrant women in Auckland and Christchurch. Continuing input to the project, including submissions on the consultation papers, was also secured from women who work to assist new immigrants.

### *Women prisoners*

- A38 Three meetings were held with women prisoners, two at Arohata Women's Prison and one at Mount Eden Prison.

## **Targeted consultation processes: justice system personnel**

### *Lawyers*

- A39 Meetings were held, to discuss the issues emerging from the programme of consultation with women users of the justice system, with three New Zealand Law Society committees: the Women's Consultative Group, Legal Services Committee and Family Law Committee.
- A40 Further meetings were held with groups of lawyers in Auckland, Christchurch, Wellington, Hamilton, Hawkes Bay, Rotorua, Nelson and Invercargill.
- A41 Meetings were also held with regional Women Lawyers' Associations in Auckland, Wellington, Dunedin and Hamilton.
- A42 Lawyers' participation in the submission process was encouraged by the distribution of a questionnaire asking for comments on a range of issues relating to lawyers' training and practice that had been raised in the consultations with women. Over 200 lawyers completed the questionnaires.
- A43 Drafts of a number of the consultation papers were discussed with senior staff of the New Zealand Law Society.

### *Judges*

- A44 Meetings were held with judges from the Family, Employment, District and High Courts. Several judges also responded individually to the submission process.

### *Law in Schools*

- A45 In order to gain an understanding of the current law-based programmes being taught in schools, project team members met with Gill Palmer, Curriculum Officer and Owen Sanders, National Manager, Police Youth Education Service from the Police Law in Schools programme and with Ms Jocelyn Brace, the New Zealand Law Society Director of Education.

## **Presentation of findings**

- A46 The next component of the consultation process involved the publication of the six consultation papers. Each paper presented women's concerns about the subjects canvassed, raised questions for discussion and invited submissions in response.

The papers published were *Information About Lawyers' Fees* (NZLC MP3), *Women's Access to Legal Information* (NZLC MP4), *Women's Access to Civil Legal Aid* (NZLC MP8), *Women's Access to Legal Advice and Representation* (NZLC MP9), *Lawyers' Costs in Family Law Disputes* (NZLC MP10) and *The Education and Training of Law Students and Lawyers* (NZLC MP11).

A47 A total of 164 submissions were received in response to the six papers. They included:

- 37 submissions from individual women and men;
- 3 from academics;
- 9 from lawyers;
- 7 from judges;
- 4 from women lawyers' associations;
- 12 from New Zealand Law Society Committees; and
- 3 from District Law Societies.

The other 89 submissions were from the government agencies and community groups listed below.

22 submissions were from government agencies:	Ministry of Consumer Affairs,
Chief Human Rights Commissioner,	Ministry of Justice (2),
Community Funding Agency,	Ministry of Women's Affairs (6),
Department for Courts,	New Zealand Police,
Department of Corrections,	Retirement Commissioner,
Health and Disability Commissioner,	Te Puni Kokiri – Ministry of Māori Development (2),
Legal Services Board – Te Poari Ratonga Ture (3),	NZ Community Funding Agency.
67 submissions were from community groups:	National Collective of Rape Crisis (3),
Baha'i Faith, Office for the Advancement of Women,	National Council of Women, Christchurch,
Barnardos,	National Council of Women, Manawatu,
Christchurch Community Law Centre,	National Council of Women of New Zealand (2),
Divorce Equity (4),	National Council of Women of NZ, Court Consumers,
Family Advocacy and Information Resource Centre, Barnardos,	National Council of Women of NZ, Hutt Valley,
Far North United Council of Women,	National Council of Women of New Zealand Inc, National Office (4),
Federation of University Women (Tauranga),	Nelson Women's House,
Grey Lynn Neighbourhood Law Office,	New Zealand Association of Citizens Advice Bureaux (3),
Hamilton District Community Law Centre,	National Council of Women, Wanganui,
Huakina Development Trust,	New Zealand Council of Social Services,
IHC NZ Inc (3),	NZ Federation of Business and Professional Women's Clubs,
Legal Resource Staff, Christchurch Community Law Centre,	NZ Federation of University Women, Auckland Branch,
Mana Social Services,	
Mokoia Community Association Inc.,	

Nga Kaiwhakamarama I Nga Ture (Wellington Māori Legal Service Inc),	Women as Family Court Consumers (3),
Patients Rights Advocacy Waikato Inc (2),	Woman's Accommodation with Care Trust,
Relationship Services,	Women's Branch, Dunedin North Labour Party,
Royal New Zealand Plunket Society,	Women's Electoral Lobby, Hamilton,
Soroptimist International of Lower Hutt,	Women's Electoral Lobby, (Waikato Branch) (2),
Standing Committee on the Child and Family,	Women's Division Federated Farmers of New Zealand (5),
Wednesday Night VIP Women's Group,	YWCA of Aotearoa – New Zealand,
Whitireia Community Law Centre (2),	Zonta International, (Wanganui Branch), Status of Women Committee.

- A48 Meetings were held with academic staff from each law school, the Institute of Professional Legal Studies and the New Zealand Law Society Director of Education to discuss aspects of NZLC MP11. Meetings with law students were also held, both in relation to the project more generally and on aspects of NZLC MP11.
- A49 Meetings were held with senior family lawyers and with Family Court judges to discuss aspects of NZLC MP10, including whether and how further work on family dispute resolution processes should be conducted.
- A50 Earlier drafts of this document were circulated for comment to the 12 member Review Group established for that purpose. The members were the Hon Justice Dame Silvia Cartwright, the Hon Justice Elias (now the Rt Hon Chief Justice Dame Sian Elias), the Hon Sir John Wallace QC, His Hon Judge R L Young (Chief District Court Judge), His Hon Judge P D Mahony (Principal Family Court Judge), Professor Margaret Wilson, Ms Christine Grice, Mr Dave Smith, Ms Margaret Stewart, Ms Joy Liddicoat, Mr Robert Buchanan and Ms Michelle Vaughan. Three meetings with members of the group were held between November 1998 and February 1999 and several members made further comments by letter, fax, email and telephone.



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