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The Clerk
Justice and Electoral Committee
Parliament House
WELLINGTON

Legal Services Bill

1. I write this submission on behalf of myself. In addition I referred the submissions to the Criminal Law Committee of the Wellington Branch of the New Zealand Law Society which has recently been formed, the Committee has given its support to these submissions.

2. I wish to be heard orally in addition to presenting these written submissions.

3. Concerns are expressed about the following matters:

    a. The need for reform in the way set out [explanatory note p 2];

    b. The independence of the proposed new system;

    c. The failure to address some of the more pressing needs to reform the legal aid system;

    d. The failure to provide legal aid in cases of public importance;

    e. The failure to provide aid for communications to the Untied Nations Human Rights Committee;

    f. The discriminatory provisions in relation to provision of aid for refuges/unlawful entrants to New Zealand;

4. The Bazley report upon which the Bill is premised is not the silver bullet many believe it to be.

5. The report contained many unsubstantiated and unnecessary attacks on lawyers particularly on those from Manukau and Palmerston North, which were unsupported by any meaningful evidence.

6. This exposes the legislation to what in reality is happening. There is no real effort to attack the problems within the system, just a smoke screen brought about by a desire to save money triggered by a public denunciation of lawyers' incompetence by the Bazley report.

7. Alas, when Judge Margaret Lee in Wellington a few years back complained regarding certain practitioners the Law Society barely reacted. Powers to deal with misbehavior already exist. What is not required is throwing the baby out with the bath water.

8. Adequate funding, and the ability of the Agency to use its teeth, and for the Law Society to better police standards for all lawyers' (not just legal aid lawyers are required). Legal aid lawyers should not be held up to higher standards than those providing more remunerative services to private clients; there should be one standard for all.

A—Wrong sort of Reform

9. From this phoenix arises a system where legal aid assignments for the more minor offences (Categories 1 and 2, but not 3 and 4) are to be randomly assigned across all practitioners wishing to undertake such work.

10. That according to the Agency means some 49 assignments per person for Wellington lawyers. As the Public Defender is expected to handle 33% of assignments that reduces the number to 32. As the average amount per assignment is $700 that equated to approx $22,400 per annum which is supposed to be completed with a somewhat onerous administrative system to be imposed by the Agency. I for one will not be signing up for such provisions.

11. It is with respect quite counterproductive to assign legal aid randomly rather than by preference to clients who may have a prior relationship with the client, or a particular interest, or expertise in the charge.

12. A random assignment will ensure market forces have no application and that any less than competent lawyers will now receive more not less assignments, hardly likely to fulfill the purposes of the act, which include *delivers services in the most effective and efficient manner*.

13. What is provides is a system like that provided in Russia, hardly a comparison to be proud of. In a Report from the Special Rapporteur for the Independence of Judges and Lawyers in respect of Russia:[1]

> Noting the assignment of defenders to indigent defendants, it was noted that the system "does not only affect the quality of legal defence but also the adherence to the principle of equality of arms. Furthermore, low tariffs,

[1] A/HRC/11/41/Add.223 March 2009.

difficulties and delays with payments adversely affect advocates' motivation to perform high quality work."

14. The Special Rapporteur in his 2009 report[2] noted the following:

1. International standards, norms and guidelines relevant to the role and Independence of lawyers and the legal profession

13. At the treaty level, the international standards, norms and guidelines include:
(a) Article 14 (para. 3) of the International Covenant on Civil and Political Rights;
(b) Article 6 (para. 3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(c) Article 8 (para. 2) of the American Convention on Human Rights;
(d) Article 7 (para. 1 (c)) of the African Charter on Human and Peoples' Rights;
(e) Article 16 of the Arab Charter on Human Rights.

14. At the non-treaty level, the international standards, norms and guidelines include:
(a) The Basic Principles on the Role of Lawyers (henceforth the Basic Principles);
(b) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (henceforth the African Principles);
(c) Recommendation No. R (2000) 21 of the Committee of Ministers of the Council of Europe (henceforth Recommendation No. R (2000) 21);
(d) The Standards for the Independence of the Legal Profession, adopted by the International Bar Association (henceforth the IBA Standards);
(e) Decisions by the United Nations treaty bodies and by regional courts and commissions.

2. Domestic legislation regulating the role and activities of lawyers and the Legal profession

15. In order to meet the above standards and norms, many Member States have enshrined in their constitutions or equivalent basic charters the right of all citizens to access to legal counsel of their choice. Some States have even enshrined the right to qualified legal assistance. Such legislation should specify the details of the procedural underpinnings of this right.

15. The proposed legislation removes the right to choice of counsel for clients in favour of some utilitarism system, or as some have commented some form of socialist or even marxist allocation system. This is the very opposite of the recommeded constituional enshrinement. The change will be a backward step undermining the independence of the legal profession, as well as defeating the purposes of an effectiveness and efficency.

16. Additionally the system proposed is economic *discrimination*. See the

[2] A/64/181, 28 July 2009

Special Rapporteur's 2008 report and the comments of the Inter-Amercian Court of Human Rights:[3]

> 25…Thus, in addition to free legal aid for criminal proceedings, the Basic Principles on the Role of Lawyers require Governments to ensure the provision of sufficient funding and other resources (for example legal services) to the poor and other disadvantaged persons. Article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights guarantees that anyone charged with a criminal offence shall be entitled to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment if they do not have sufficient means to pay for it. The Inter-American Court of Human Rights has found that proceedings must recognize and resolve factors of real inequality in respect of anyone brought before the courts. Furthermore, the presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests. In addition, the Court has found that any person whose economic status means that they cannot afford either the necessary legal counsel or the costs of the proceedings "is being discriminated against by reason of ... economic status and, hence, is not receiving equal protection before the law".

17. The Special Rapporteur's 2008 recommendation is adopted:

> 65. **States should pay special attention to free legal aid programmes. This is generally the only legal assistance accessible to large portions of the population, and the absence or poor design of such programmes excludes the most disadvantaged groups from the judicial system.**

18. Equal protection before the law, and individual rights have long been policies of conservative political parties worldwide, not so it seems in New Zealand.

19. This is a further problem, which is potential racist, if not actually so. Over 50% of the prison population is Maori, and Maori are disproportionately interfacing with the criminal justice system, and the need for legal aid, regardless of whether many are sent to prison on minor offences or not there are still a disproportionate number of Maori.

20. Also see the General Recommendation No. 31 of the UN Committee on the Elimination of Racial Discrimination, on the prevention of racial discrimination in the administration and functioning of the Criminal Justice System, which, in keeping with the Bangalore Principles of Judicial Conduct, calls upon States to "guarantee the right of every person ... to an effective remedy against ... acts of racial discrimination" and "ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law".

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[3] A/HRC/8/4, 13 May 2008.

21. It should also be noted that 2008 Optional Protocol to the to the International Covenant on Economic, Social and Cultural Rights has 32 signatures[4] New Zealand being notably absent. The Optional Protocol

[4]

Argentina	24 Sep 2009
Armenia	29 Sep 2009
Azerbaijan	25 Sep 2009
Belgium	24 Sep 2009
Bolivia (Plurinational State of)	12 Feb 2010
Bosnia and Herzegovina	12 Jul 2010
Chile	24 Sep 2009
Congo	25 Sep 2009
Democratic Republic of the Congo	23 Sep 2010
Ecuador	24 Sep 2009
El Salvador	25 Sep 2009
Finland	24 Sep 2009
Gabon	24 Sep 2009
Ghana	24 Sep 2009
Guatemala	24 Sep 2009
Guinea-Bissau	25 Sep 2009
Italy	28 Sep 2009
Kazakhstan	23 Sep 2010
Luxembourg	24 Sep 2009
Madagascar	25 Sep 2009
Mali	24 Sep 2009
Mongolia	23 Dec 2009
Montenegro	24 Sep 2009
Netherlands	24 Sep 2009
Paraguay	6 Oct 2009
Portugal	24 Sep 2009
Senegal	24 Sep 2009
Slovakia	24 Sep 2009
Slovenia	24 Sep 2009
Solomon Islands	24 Sep 2009
Spain	24 Sep 2009
Timor-Leste	28 Sep 2009

allows individual complaints of breaches of rights under the principal treaty (The International Covenant on Economic, Social and Cultural Rights).

22. Lawyers providing excellence service to clients will now be replaced by random assignments. If a client has built up a relationship with a client, s/he may be able for example to say “don’t be silly” you have no defence plead guilty.

23. The ability to complain about incompetent lawyers will be enhanced under this new system, which will inevitably mean more appeals. Many dissatisfied appellants may simply complain because they were assigned some inexperienced lawyer.

24. If the proposition is to enhance “customer service”, this is the wrong sort of reform, it replaces lawyer of choice, is racist, economic discrimination and will in many a case decrease “customer service”.

B—Independence of the Proposed System

25. The Legal Services Agency was a stand-alone Agency not responsible to the Minister. The proposed Legal Services Commissioner who is supposedly independent from the Minister, but a Ministry employee, is a retrograde step.

26. The Bill requires under clause 71(2) for the Commisioner to act independently when performing any function. The structure of the Act impinges upon that as the functions of Minster and Commisioner are interwoven.

27. The State here is too close to organising the system, policing it, and disciplining lawyers. The latter are functions for a Law Society or Bar Association.

28. Having proposed a Commissioner to ensure independence, it is then bizarre to then empower the Secreatry of Justice with ownership of the system rather than the Commissioner, why?

29. Having the Commisisoner run the system would be a step closer to independence, and a far more principled approach.

Togo	25 Sep 2009
Ukraine	24 Sep 2009
Uruguay	24 Sep 2009

30. As the Attorney-General, Christopher Finlayson is reported as saying in LawTalk:[5]

> Nothing should limit or be perceived to limit, the independence of lawyers…"It is the duty of the barrister to stand between the subject and the Crown, the rich and the poor, the powerful and the weak. So it is essential for the barrister to be completely independent. He or she must owe allegiance to no one. The barrister can make a greater contribution to justice than the judge."

31. Owing allegiance to the Legal Services Agency howsoever named and located in, or out, of the Ministry of Justice does nothing for the independence of the bar.

32. Mr Finlayson was correct when he said:

> 'Perhaps the real issue is whet courts are prepared to deal to with those who consistently fail to live up to appropriate standards.

33. No superficial tinkering with legal aid is going to fix a problem that the Courts have not dealt with.

C—The failure to address some of the more pressing needs to reform the legal aid system?

34. Apart from the significant Maori issues those persons with intellectual disabilities or mental health problems also get a raw deal from the criminal justice system.

35. Unlike Australian and Canadian states we have no specialist mental health courts.

36. Judges and lawyers receive inadequate, if any, training in how to deal with the special needs of these groups. Depending on which academic study one reads somewhere between 2-12% of those imprisoned have an intellectual disability. Lets assume the midpoint 7% so one in 14 persons imprisoned are affected by such disabilities, not including those long-term or temporarily mentally ill persons.

37. The Legal Services Agency has **no** proposed practice standards for the group providers for people with intellectual disablities. This is a group from which individuals are most likely not to be able to complain about proper judicial treatment, or inadequate legal representation, i.e. most in need of competent legal assistance. Different problems can arise with the mentally ill.

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[5] New Zealand Law Society magazine, S27 September 2010

38. The ability of the Agency to prescribe standards for this sector when they never had, and the wide spread delegation to regulation in the bill is worrying; there should be specific legislative requirements that recognise the vulnerability of these groups. To make any meaningful progress it would be more than unwise to leave in the hands of the Agency.

39. Any serious attempt to address an efficient system would prioritise these areas. My submissions to Ms Bazley on the topic were ignored.

40. According to the briefing to the incoming Minister in 2008, the Office for Disability Issues said:

> Current thinking on disability is reflected in two instruments that inform government policy and practice with respect to disability issues: the New Zealand Disability Strategy (the Disability Strategy) and the United Nations Convention on the Rights of Persons with Disability. These instruments recognise that disabled people have the same rights of citizenship as everyone else—including the opportunity to participate in society and to lead lives similar to those of other people ('an ordinary life').

41. The Office further says:

> New Zealand was a leader in negotiations on the Convention. We modelled the spirit of participation with disabled people through consultation on the evolving Convention text, and involvement of disability sector representatives in our delegations to the United Nations. This involvement of the disability sector has continued to be practiced by the government. We were able to use our experiences with implementing the New Zealand Disability Strategy to inform our contributions to the Convention process
>
> New Zealand signed the Convention at the United Nations on 30 March 2007, and ratified on 26 September 2008…
>
> All new legislation and policy will need to be consistent with the Convention, or New Zealand will be in breach of its obligations and subject to criticism by the United Nations Committee on the Rights of Persons with Disabilities.

42. Government priorities include both to ensure compliance with the new convention, and also to provide *access to justice*. For example the Ministerial Committee on Disability Issues has prioritised three areas for government agencies to focus their action on disability issues. These areas are further broken down into sub-priorities:

> **Contributing citizens**
>
> …
>
> equal access to justice

43. Nowhere is this reflected in the legislation, or the thinking of the Agency.

D—The failure to provide legal aid in cases of public importance

44. For criminal legal aid clause 8(2), unlike clause 10(6) for civil legal aid matters of public interest are recognised, public interest should equally be expressly recognised for criminal legal aid.

45. In clause 8(1) the threshold for legal assistance being where a maximum sentence of 6 months imprisonment is possible, should be lowered to <u>any</u> period of imprisonment.

46. The social (and economic) costs of placing someone in prison require representation; why for example should a three-month contempt of court possible sentence not require aid? In line with European human rights practice any period of imprisonment should suffice.

47. The cost of sending someone to prison for a year approaches $100,000 pa, the average cost of a legal aid assignment on categories 1 and 2 is $700. The failure to provide legal aid for those facing imprisonment is both social and economic madness.

48. The cost would be minimal, and the social effect outweighs the cost as does the principle of access to justice. See *Lloyd and others v United Kingdom*[6] *a* case involving poll tax (replacing local authority rates):

> 135. The Government have not contested that legal aid for free legal representation was not available for these applicants before 1 June 1997, when they introduced regulations to make provision for legal aid before a magistrates' court following *Benham* (see paragraph 87 above). Nor is it contested that what was at stake for them and the complexity of the issues before the magistrates, as in *Benham*, required that in order to receive a fair hearing these applicants ought to have benefited from free legal representation during the proceedings before the magistrates which led to their committal to prison.

[6] (Applications nos. 29798/96, 30395/96, 34327/96, 34341/96, 35445/97 36267/97, 36367/97, 37551/97, 37706/97, 38261/97, 39378/98, 41590/98, 41593/98, 42040/98, 42097/98, 45420/99, 45844/99, 46326/99, 47144/99, 53062/99, 53111/99, 54969/00, 54973/00, 54997/00, 55046/00, 55068/00, 55071/00, 56109/00, 56231/00, 56232/00, 56233/00, 56429/00, 56441/00, 2460/03, 2482/03, 2483/03, 2484/03 and 2490/03) 6 July 2005.

> 136. There has, accordingly, been a violation of Article 6 §§ 1 and 3(c) of the Convention in these cases.

Article 6 equates to s 25(a) New Zealand Bill of Rights Act.("NZBORA")

Election Petitions

49. A further restriction on matters of public importance is the prohibition on funding for electoral petitions and local elections equivalent contained in Clauses 7(5) (b) and (c).

50. Section 12 of the NZBORA, and Article 25 of the International Covenant on Civil and Political Rights are to the same effect; the NZBORA provides:

> The right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by select ballot

51. If indigent voters have to rely on the political parties, or the rich to challenge whether the elections were "genuine" or by "equal suffrage" or were "secret" that is the removal of a major and important democratic right, and shameful in a free and democratic society. As General Comment 25 of the United Nations Human Rights Committee says:

> …Article 25 lies at the core of the democratic government based on the consent of the people and in conformity with the principles of the Covenant.

52. Likewise the same must apply to the NZBORA.

53. There can be no rational reason why citizens are denied the right to legal aid for election petitions. Indeed it would seem to breach Article 25's right to participate in public affairs.

54. Clauses 7(5)(b) and (c) should be removed as without supporting access to courts to ensure that this right can be enforced, New Zealand's commitment to the holding of genuine democratic elections is an empty promise.

E—The failure to provide aid for communications to the United Nations Human Rights Committee ("UNHRC") and United Nations Committee Against Torture ("UNCAT").

55. The UNHRC and UNCAT are two leading human rights bodies comparable to the European Court of Human Rights where New

Zealand allows complaints to be made once domestic remedies have been exhausted. (i.e. a failed leave appeal, or appeal to the Supreme Court).

56. Both the present and past Ministers of Justice and Attorneys-General have acknowledged that New Zealand takes its international obligations seriously, yet only about 30 cases have been lodged by New Zealand to the UNHRC since individual communications were allowed in 1989.

57. The author of these submissions has been responsible for the only three successful cases. Most applicants are put off by the absence of any legal aid. Extending aid would not be expensive, and would actually give positive meaning to respecting our international obligations.

58. We take part in international cases in a wide variety of ways be it in apples to Australia, deaths on ships boarded by Israelis, or deaths caused by French agents. New Zealand should welcome funding human rights cases to the UNHRC, or Committee against Torture, and take its place more fully on the international stage.

F—The discriminatory provisions in relation to provision of aid for refugees/unlawful entrants to New Zealand

59. The Special Rapporteur's 2008 report also said:

> 3. **Stateless persons, refugees, migrants and victims of racial discrimination**
>
> 52. It is commonplace for such persons to be deprived of access to the courts, owing to their administrative situation. This vulnerability is particularly distressing for asylum-seekers, for whom access to justice is crucial if they are to avoid irreversible prejudice such as a violation of the principle of non-refoulement. It is reasonable and mandatory to provide not only free legal aid, but also interpretation, and at times forensic psychological or medical, services. However, according to recent research, access to justice free of charge is made subject to conditions that make it unattainable in practice.

60. General Comment 32/9 of the UN Human Rights Committee provides that:

> The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find

themselves in the territory or subject to the jurisdiction of the State party.

61. Accordingly the discriminatory and internationally unlawful provisions of sections 7(5)(f) and (g) appeals to the Residence Review Board, and section 12(1) persons unlawfully in New Zealand, or on temporary or limited permits, or not holding a returning residents permit, should be removed from the Bill.

Conclusion

62. I conclude by endorsing the Special Rapporteur's 2008 concluding comments:

> 58. As a fundamental human right, access to justice is the individual's gateway to the various institutional channels provided by States to resolve disputes. Thus, in addition to refraining from violating that right, States are also bound by a positive obligation to remove obstacles that block or limit the individual's access to justice. As a means of claiming the enjoyment or restoration of other rights (civil, political, economic, social and cultural), access to justice is not limited to ensuring admission to a court but applies to the entire process, which must be conducted in conformity with the principles of the rule of law (fair trial, procedural guarantees, etc.), right through to execution of the sentence. Thus the principle of equality and the conditions of accessibility and effectiveness that must characterize any mechanism established to deal with disputes must be observed not only at the start of settlement proceedings, but throughout. The absence of suitable means of access to justice ultimately deprives persons of the "right to a right" by denying them the actual means of exercising their rights in practice.

63. This Bill should not reinforce the discriminations inherent in the system for Maori and the intellectually disabled; a proper and just system of access to justice is required, not the introduction of a new gladiatorial sport—lawyer bashing.

Tony Ellis
5 October 2010