

Miscellaneous Paper 10

Women's Access to Justice: He Putanga Mo Nga Wahine ki te Tika

LAWYERS' COSTS IN FAMILY LAW DISPUTES

A consultation paper

The Law Commission

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Law Commission Miscellaneous Paper 10

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WOMEN'S ACCESS TO JUSTICE: HE PUTANGA MO NGA WAHINE KI TE TIKA

The scope of this project has been determined after extensive consultation with New Zealand women. At meetings and hui all around the country and in written and telephoned submissions, thousands of women have described to the Commission their experiences with the law and identified the ways in which their expectations or needs have and have not been met. It has been made clear that for a great many New Zealand women "access to justice" means ready access to quality legal services and procedures. That quality is measured to a significant extent by the responsiveness of legal services to clients' social and economic situations and cultural backgrounds.

The project team is focusing on four major areas in its report to the Minister of Justice which is due early in 1998. These areas are:

- access to legal information,
- the cost of legal services,
- access to legal advice and representation, and
- the education of lawyers.

The consultation papers which have already been published in the project are: *Information About Lawyers' Fees* (NZLC MP3), *Women's Access to Legal Information* (NZLC MP4), *Women's Access to Civil Legal Aid* (NZLC MP8), and *Women's Access to Legal Advice and Representation* (NZLC MP9).

Two further consultation papers will be published shortly: one focuses on lawyers' education; the other on Maori Women's Access to Justice. The latter paper presents in a cultural and historical context the range of concerns voiced at 48 hui held around the country with Maori women.

This paper has been prepared by the project team for the purposes of consultation. It does not contain Law Commission policy nor does it necessarily reflect the views of the Law Commission. The Commissioner responsible for this project is Joanne Morris.

Please contact Michelle Vaughan if you would like further information about the project – Freephone 0800 88 3453, email mvaughan@lawcom.govt.nz or write to Freepost 56452, Law Commission, PO Box 2590, Wellington.

We would like responses to this paper by **Friday 25th July 1997**, please. If you have problems meeting this deadline, please let us know.

SOME EXPERIENCES

“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*

“I ended up with a bill and that’s about it.” – *Submission 504 (telephoned)*

“It is my honest opinion that even if the judge makes a final decision [my ex-husband] will again contest the decision by way of a further appeal on who knows what grounds. I feel that the sole purpose of all these “holdups” on [my ex-husband’s] part is to delay any and all monetary payments to me for as long as he can. . . . I am no longer entitled to legal aid. My solicitor is working for me and charging legal aid rates. My legal aid costs are up to \$20 000 and growing due to all the court appearances for access-holidays etc. It amazes me how with the amount I spent on a solicitor my former partner represents himself and gets exactly what he wants. Because the court system is so sick and tired of this case and appear to be afraid to cross Mr [X] in any way they become exasperated and want him out of their faces.” –

Submission 51

“As a Family Court lawyer of in excess of 20 years experience, I can tell you now 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)*

“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. . . . [I]t was as if to them ‘Oh you can always start again’. Well you can’t. Those things are you know . . . that’s my net that I keep around me. . . .” – *Report on Consultation with Pacific Islands Women, 18*

“We were charged hourly, why weren’t we charged for the job?” – *Report on Consultation with Lesbian Women, 44*

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

INTRODUCTION

We must ever remember that though truth and justice are the aim and end of all courts, still they must not be sought through the aid of too expensive machinery. The true principle is, not to adopt that system which, in special cases, may best arrive at the truth, regardless of delay and expense, but to choose that course which on the whole, will best administer justice with a due regard to the means of those who seek it.¹

1 Many women have talked to the Commission about their experiences with legal disputes arising from family breakdowns involving property, children or violence, often in combination. One of the major issues confronting women dealing with these family law disputes is the high financial cost of doing so.² Women have told the Commission of matrimonial property settlements spent on the costs of pursuing them, and of frustration at watching legal bills rise as their former spouses deliberately delay matters. Because of the costs, many women have commented that they wonder whether it was worth pursuing their legal rights.³

2 The overwhelming message the Commission has received is of women's negative experiences of the costs of family law disputes. Such negative findings may seem at odds with the findings of the recent New Zealand Law Society *Poll of the Public*.⁴ While cost was identified in the *Poll* as an important issue, most New Zealanders had a very positive perception of the lawyers whose services they had engaged. In particular: 93% of the public agreed that their own lawyer was professional, 90% found their lawyer to be reliable, 84% said their lawyer understood their situation, 79% agreed that their lawyer explained things well, and 89% agreed that their lawyer was competent in the job that they did.⁵ By contrast, in the Commission's submissions, the high costs of family law disputes was invariably attributed to the role played, or behaviour, by lawyers.

3 There are two significant reasons for this difference. First, the Commission heard from women predominantly in relation to family law disputes,⁶ whereas the *Poll* reveals that the three

¹ Dr Lushington in "The Resultatet" (1853) 17 Jur 353, 354. Cited by the Honourable Justice Linda Dessau, "Trial Management – Balancing the Competing Interests of Justice. Trial Management in the Family Court of Australia" in *Relationships, Rights and Responsibilities, 7th National Family Law Conference* (Canberra, 13-18 October 1996).

² Women have also talked about many of the issues in this paper, in terms of emotional and other costs. Because this paper focuses on lawyers' costs in family law disputes, it deals with the issue of cost predominantly in financial terms.

³ This paper focuses on the possibilities for improvement within the court system. There have, however, been calls for alternatives to that system. Many women who spoke to the Commission made it clear that they were making suggestions in relation to the court system on the basis that improvements should be made in the short-term but that, in the long-term, the court system was not the most appropriate process. In the recent NZLS *Poll of the Public* also, the majority of New Zealanders, when imagining themselves involved in a serious dispute with another person, stated a preference for mediation (54%) or arbitration (30%) over litigation (14%), 33. Some have called, particularly in the family law context, for a variation on arbitrations or court hearings, in which parties receive a prediction of a likely result as an aid to settlement. A review of the adversarial system and of alternative dispute resolution (ADR) processes is beyond the scope of the present Women's Access to Justice project. A number of other organisations are currently investigating this area, including the Ministry of Justice and the Courts Consultative Committee. The Australian Law Reform Commission is currently looking at the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings.

⁴ MRL Research Group, Wellington, 1997.

⁵ 14–15.

⁶ The reasons for this are discussed in paras 43–44.

most common matters for members of the public to consult lawyers about are property transactions, making a will and borrowing money/arranging finance. Only 4% of adult New Zealanders had ever consulted a lawyer in relation to family violence, 16% in matrimonial matters, and 10% in custody and access matters.⁷ Second, the *Poll* was conducted with a representative sample of 500 randomly selected members of the public. By contrast, the Commission's consultations attracted a large number of women whose experiences with the legal system led them to believe they had been unfairly treated by the law or its processes and agents.

4 Part 1 of this paper looks at what women have said about the conduct of the other party and the other party's lawyer, the expensive and often poor service they felt they received from their own lawyers, and their perceptions of the role played by the Family Court. Part 2 sets up the model of a 'ladder' to explore ways in which costs in family law disputes might be reduced. In Part 3, the first 'rung' of this ladder is explored, namely, the context in which law operates. The second 'rung', discussed in Part 4, comprises the content of relevant legal rules, in this instance the substantive and procedural rules relating to charging and delays. Part 5 looks at the third 'rung', the skills needed to reflect and convey understanding of context and content at the point at which women come into contact with the legal system. The paper concludes by examining ways in which a call for cost reduction in this area might be justified.

5 The purpose of the paper is to seek comments on the issues raised. We recognise that many of the ideas contained in this paper may be seen as controversial and welcome debate on the issues. We would very much appreciate comments on any aspect of this paper or on related issues that are not raised.

This paper is based on the comments made to the Commission by thousands of New Zealand women users and potential users of legal services. In some places, comments made in response to earlier consultation papers are included. The Commission would be very grateful for responses to those comments and/or answers to all or any of the questions asked in the paper about which you have particular knowledge, interest or views. Alternatively, we would be very grateful for a more general submission based on some of the ideas in this paper.

Please return these responses to the **Women's Access to Justice: He Putanga mo nga Wahine ki te Tika Project, Freepost 56452, Law Commission, PO Box 2590, Wellington**. Alternatively, if you would like to make a submission by telephone, please call **Brigit Laidler** toll-free on **0800 88 3453**. If you would like to make a submission by e-mail, please send it to **blaidler@lawcom.govt.nz**.

We would like responses by **Friday 25th July 1997**, please. If you have problems meeting this deadline, please let us know.

PART 1 – PROBLEMS WOMEN AND LAWYERS HAVE DESCRIBED

6 Overwhelmingly, women have commented critically about the cost of their family law disputes and the ways in which proceedings have been conducted, which have contributed to cost. Women have talked about the conduct of the other party and the other party’s lawyer, about the expensive and often poor service they felt they received from their own lawyers, and about their perceptions of the role played by the Family Court.

THE PARTY AND LAWYER ON THE OTHER SIDE

7 Women have described their former spouses and partners deliberately delaying matters, stonewalling progress and bringing issues before the courts time and time again. Often this behaviour was attributed to a desire on the part of the former spouse or partner to control the woman, and often too, his lawyer was seen to play an active part in the resulting delay.

“Throughout the last 3½–4 years I have continually found it a struggle to survive financially and the court has never taken into consideration how all this procrastination of any payment to me, has left my life in limbo. I feel that [my ex-husband] knows that once I have been paid my share of the property he will no longer have ‘control’ of my life as he effectively does at the present time.”

– *Submission 51*

“According to my solicitor he and his solicitor are doing their level best to delay providing information etc claiming things they know the court when our case eventually gets there will not allow etc. My solicitor tells me he has applied on different occasions for a date to be set. Each time he gets a different judge who sees things differently and directs different actions to be taken. Meanwhile my life is on hold and I am still struggling financially and emotionally with no assets.”

- *Submission 275*

“The plain facts are that in most circumstances attempts by husbands to try and 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.” – *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*

8 Both women and lawyers have told the Commission that aggressive, adversarial approaches are still adopted in the Family Court.

“If particular lawyers are on the other side, I push on very quickly with little or no negotiation because they’ve burnt 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)*

9 There was some indication that such aggressive behaviour may be by inexperienced lawyers, or lawyers who are not used to practising family law.

“I don’t think [the use of tactics] is as bad in Family Court, as generally family practitioners have better attitudes. The problem is aggressive civil litigators branching out into the Family Court.” – *Submission 203 (lawyer)*

10 When speaking of their frustration at watching their own legal bills rise as a direct result of such tactics on the other side, some women have given the amounts of their resulting legal bills or legal aid charges over their homes. Many women have complained that there is no effective liability on the other party for the delays.

“My fees were nearly \$30 000 because of the stonewalling of the other side.”
– *Submission 422*

“It has taken 2 years to reach an agreement settlement. \$14 000 later 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*

“One situation . . . involved a woman who had left a violent relationship and bought a very cheap house. . . . She had her children with her. Her husband 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 that the house was an asset that she could use to keep a roof over her children’s heads. The house, like most in the town, is worth about \$20 000.” – *Meeting with rural community workers, June 1996*

11 The result for some women was that they simply could not afford to pursue the matter. Some said they got partway through the legal process and had to walk away.

“I was frustrated that I couldn't afford to pursue the matrimonial property settlement any further but I would have agreed to anything in the end to get the whole process over with.” – *Submission 115 (telephoned)*

“I spent 4½ years in court. In the end I told the judge where to get off and never walked back in the court. Is that a normal time period 4½ years? You give up in the end and walk away because there's no way the system will support you. This is 4½ years of just trying to settle an access order. . . . Every 3 months he was allowed to say there was new circumstances – he wanted to go back to court again and they said he has to have his day in court.” – *Submission 65*

12 Many women said they were unaware that there was anywhere they could complain to about the problems they encountered. One woman, who was aware that she could make a complaint through her local Law Society, described her experience when she complained about the behaviour of the lawyer of her former partner.

“[H]e deliberately caused delays in the process, engaged in aggressive tactics and unethical behaviour. . . . I went through the complaints procedure with the Law Society. . . . I just received a letter from them saying that they had considered the application and decided that there was no case to answer. . . . And that's it. It's all done in-house. I had no say over the procedure. Now I find out that I can appeal their decision with the lay observer. They didn't tell me that in the letter.”
– *Submission 510 (telephoned)*

WOMEN'S EXPERIENCES WITH THEIR OWN LAWYERS

13 Many women described their experiences with their own lawyers as being less than satisfactory, in terms of the amounts charged and the way proceedings were conducted, and how both of these contributed to overall cost. Issues relating to the amounts charged included: difficulties surrounding eligibility for civil legal aid; the hourly rate of lawyers; failure to adequately inform clients about fees, or to update original estimates; and failure to inform clients about the availability of a cost revision process. Issues surrounding the ways in which proceedings were conducted included: failure to control the other party's delay; assuming too much control over the outcome of disputes; perceived inexperience or incompetence; and a failure to apply for costs awards in circumstances where the other party had clearly delayed matters unreasonably.

14 Many women commented on how and what their lawyers charged. For those who were eligible for civil legal aid, there were problems identified with the scheme. Some women said that they did not know that it was available, or that they were not offered it, or that there were disincentives to applying. Women did not want a charge placed over their property, for example, or could not afford the \$50 initial contribution. Other women who were not eligible for civil legal aid said they simply could not afford a lawyer's hourly rate.⁸

⁸ These issues are discussed further in *Women's Access to Civil Legal Aid* (NZLC MP8). See 10-20 (Lack of information and Transaction costs of applying) and 20-22 (Limited Eligibility).

“Lawyers cost, what, \$150 per hour? Even if I can find a job that pays \$15 dollars 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 Lesbian Women, 42*

15 Many women commented on lawyers’ practices of explaining and estimating their fees and disbursements, and updating clients on changes to their estimates. Some said that they were not given information about fees, with the result that their lawyers’ bills came as a shock. Others, who were provided with estimates, said that the original estimates were overtaken – by substantial amounts – without prior warning. In both cases, this forced some women to give up the pursuit of their claims through the legal system.⁹ Lawyers who made submissions to the Commission described a range of practices in relation to costs information, some of which supported the tenor of the women’s criticisms.

“If not requested I don’t tend to [give an estimate of the cost of the service I intend to provide and give advice in advance of changes to the estimate] as it is ‘down time’ making less time in the day to achieve my budget of chargeable time for the day.” – *Submission 141 (lawyer)*

16 Many women indicated that they did not know of the possibility of a costs revision process and said that it would have been reassuring to know about its availability. Others said, however, that even if they had known, entering a dispute over costs would be the last thing on their minds at that time. Further, some women commented that the process was an in-house one and, in their view, unlikely to provide an objective hearing.

“[D]ealing with the legal profession is like entering a competition or raffle, it is so much the luck of the draw. I never knew to make a complaint. I had three children and was struggling to survive. That’s the last thing you’re thinking of. . . . You get kicked in the guts that many times you’re frightened to fight them over it.” – *Submission 504 (telephoned)*

“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 no use.” – *Submission 380 (telephoned)*

17 Women also often criticised the ways in which their proceedings were conducted by their lawyers. Some women expressed frustration at what they perceived to be their lawyer’s failure to control the other party’s delay.

“[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

⁹ This is discussed further in *Information about Lawyers’ Fees* (NZLC MP3).

solicitor took no action to manage the situation and again I ended up with huge legal bills.” – *Submission 43*

18 Many women said that their lawyers failed to explain things so that the women could make their own decisions.¹⁰

“I thought that 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, 26*

19 The main criticism made by other women was that their lawyers did not sufficiently understand their situations to justify the degree of control exerted by the lawyers over the outcomes, and how they were reached. Often this criticism arose in connection with disputes where the opposing party had been difficult or aggressive in response to attempts to resolve the matter. Some women reported that their lawyers continued trying to negotiate, unsuccessfully and despite protest, long past the time the women wanted to go to court.

20 One woman in this situation, who was eventually awarded the amount she had originally proposed by way of settlement, spent almost the entire award on the fees incurred by her lawyer in lengthy, and ultimately unsuccessful, attempts at negotiation. These had continued despite her instructions that they cease. This letter written to her lawyer was included as part of her submission to the Law Commission.

“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 negotiation 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 [my ex-husband’s 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”
– *Submission 507*

21 A year later, she wrote to the lawyer again:

“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 cost to me in financial terms. At this point I

¹⁰ This is discussed further in *Women’s Access to Legal Advice and Representation* (NZLC MP9).

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*

22 Another submission stated:

“As soon as any obstructive practices surface in negotiations, lawyers should advise their clients that a court hearing may be the cheaper option. We hear of many cases in which women are advised to avoid a court hearing because of the high costs – then find that years of negotiations through lawyers cost very much more in the long run.” – *Submission 9 on Women’s Access to Civil Legal Aid, (NZLC MP8)*.

23 Sometimes women described their negative experiences with their lawyers in terms of inexperience on the part of the lawyer, sometimes a lack of care, sometimes arrogance, and sometimes incompetence.

“I was having to pay for things that were obvious like substituted service. We went to court two times and the first time the judge said it was just before the election so go and check the new electoral rolls, not the old ones – and like the lawyer should have thought of that. The second time the judge asked me why we hadn’t had contact for 5 years and so we couldn’t find him. Well I had a non-molestation order, you know, so it was obvious why. I would have gone and done some things myself if I had known the process. I would have happily searched the electoral rolls but I never got told the process.” – *Report on Consultation with Lesbian Women, 44*

“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)*

24 Both women and lawyers have told the Commission that some lawyers working in the family law area lack experience and do not receive adequate training or support.

“Lawyers unable to find places in established firms are working on their own not handling cases well and causing difficulties. Those working on the fringe lack court experience and do not handle cases appropriately. . . . Dealing with the inexperienced and incompetent is much harder than working with the experienced. 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. Incompetent or inexperienced sole practitioners may be an obstacle to women’s access to justice. Women because they tend to be less well off than men may end up with the inexperienced lawyer.” – *Submission 68 (lawyer)*

“It is still common practice to ‘dump’ solicitors out of law school into family law with no training and supervision, especially in the provincial centres.” – *Submission 240 (lawyer)*

~~25 A lack of experience or training was also cited as a reason for the fact that aggressive, adversarial tactics are still used in the Family Court.~~

“Some practitioners are adversarial especially in matrimonial property proceedings.” – *Submission 471 (lawyer)*

26 Finally, women complained that their lawyers did not inform them that they could apply for costs awards in circumstances where the other party had clearly delayed matters unreasonably.

“My lawyer at the time didn’t ask for costs so I had to pay court costs and I didn’t know then that the lawyer should have made a request about costs.”
– *Submission 380 (telephoned)*

“You know, why was the situation allowed to go on for that long? It was ludicrous. I saw nine male judges and in the end it took [a female judge] to say – hey, this lesbian stuff is irrelevant, you’ve got 10 minutes to go outside and come up with a decent proposal. And after all that they did! But all the extra effort I had to pay for and I got the bill and I said to my lawyer why not send it to my ex – he should pay for this not me.” – *Report on Consultation with Lesbian Women, 43*

THE FAMILY COURT

27 Women also commented on the ways in which they felt the service they received from the Family Court contributed to the costs of family law disputes and expressed frustration at what they perceived to be judges’ failure to recognise, control, or censure lawyers’ delays or other tactics.

28 Women and lawyers have frequently commented on judges’ seeming lack of awareness of the realities of the tactics and delays used by the lawyers and parties before them.

“Judges do not see the game that is being played in front of them.” – *Meeting with a community law centre, June 1995*

“Courts are not sensitive to litigation tactics and do not try to control the delays that many barristers ask for. This is especially the case when one party is on legal aid and the other party is not. Often the latter is male and has the finances to string out the proceedings.” – *Meeting with lawyers, January 1995*

29 Women told the Commission that they looked to the courts to control the unreasonable behaviour of the other side, but found no support.

“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*

“Why is there no sanction when he defies court orders?” – *Submission 387 (telephoned)*

30 Women and lawyers also commented that judges were reluctant to award costs even in appropriate cases, and that, where awards were made, the amounts were low.

“At present there is a very unjust policy among the judiciary to state that at the end of matrimonial cases no costs should be granted since it did not really matter who had to issue the proceedings – the matter had to be heard anyway. That is simply untrue.” – *Submission 467 (lawyer)*

CONCLUSION

31 Some women summarised their general frustration with the whole costly experience: with the service they received from their own lawyer, with the treatment from the other side, and with the seeming inability of judges to do anything about it. One woman described her 3 year effort to resolve her matrimonial dispute. During this time she was raising small children and had to rent a house because the matrimonial property division had not been settled.

“The staff solicitor was new and I thought [she] was possibly given to me because it was a legal aid case. The solicitor dithered in court and I had very little confidence in her. She didn’t do her job very well. The judge was fair and they had the same judge at each hearing and he also handled the dissolution and wished me well. The judge appeared frustrated at times with [my ex-husband] and his lawyer and their deliberate blocking manoeuvres. I got legal aid to cover my expenses which totalled \$8000. I have now paid back \$3000 and have a \$5000 claim on the land which will have to be paid back if I ever sell my current house. Due to the deliberate delays of my ex-husband and his lawyer the whole matrimonial property settlement cost the taxpayers through legal aid much more than it needed to. Problems with the lawyers are half the battle; for example, they send letters back and forth which result in very little progress.” – *Submission 210 (telephoned)*

32 Many women described the whole experience of dealing with lawyers and judges as like being in another world – a foreign, aggressive, confusing, and expensive one. A number of women and lawyers described the legal system as a game.

“The legal system is like a game with its own rules – the advantage goes to the one who knows how to play the system (usually not the woman)” – *Submission 14*

“The rules are there. It is like a game of chess. They are available to each side.”
– *Submission 405 (lawyer)*

“Many female clients perceive litigation as being a system where the person who can best play the games wins. In fact even in mediation, I have experienced male solicitors taking a dominant and aggressive role where their client doesn’t even speak which is directly contrary to the aim of mediation to reach a settlement.”
– *Submission 58 (lawyer)*

“[S]ometimes women want male lawyers because they feel that they can play the game a lot better than women lawyers can.” – *Submission 240 (lawyer)*

33 Some women said they thought that ultimately the whole process was conducted for the financial benefit of the lawyers involved.

“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)*

PART 2 – THE LADDER MODEL

34 In “Educating the 21st Century Lawyer”, Robert Cumbow writes that legal education

emphasises the intellectual adventure of law to the exclusion of both the concrete human dimensions of law as actually practised and the understanding and acceptance of a value system that, alone, gives meaning to such practice. Contemporary law school is like a ladder with its upper and lower rungs missing. The middle is fine, but there is no foundation at the one end and no practical application at the other.¹¹

35 This ‘ladder model’ may be applied to women’s accounts of the causes of excessive costs in family law disputes: their own lawyers’ charges, and delays caused by both their own lawyer and the other side.¹² These experiences may be grouped in terms of:

- a lack of understanding on the part of lawyers of the realities of women’s lives and the role that lawyers play;
- a failure to recognise or reflect this context in rules relating to costs or in the way those rules are applied; and
- a lack of skills in dealing with women as clients.¹³

36 The remainder of this paper uses the ladder model, and the issues of charging and delay, to explore ways in which costs in family law disputes might be reduced. Investigation of the first rung, the “foundation at the one end”, involves recognition of the context in which women encounter family law disputes and the resulting effects of cost. It also involves recognition of the context in which lawyers work. Investigation of the second rung, informed by the first, involves consideration of the content of the substantive and procedural rules relating to charging and delays. The third rung, the “practical application”, relates to the skills needed to reflect and convey understanding of the relevant context and content at the point at which women come into contact with the legal system.

¹¹ (1996) 32 Idaho LR 407, 411.

¹² The Women’s Access to Justice project’s forthcoming consultation paper on lawyers’ education explores the ladder model in the context of in New Zealand.

¹³ In this paper, the ladder model is used solely as a framework within which to present issues relating to women’s descriptions of costs in family law disputes. The discussion of concepts such as context, for example, is therefore confined to issues which first, women have identified and second, relate directly to costs in family law matters. It is recognised that, for other purposes, the issue of context involves awareness of the wider setting – ideological, social, political, economic and other – within which law operates.

PART 3 – THE FIRST RUNG: CONTEXT

37 In this section, the issue of costs in family law disputes is discussed in the light of two elements which women have said provide an essential context: the position of women, and the position occupied by lawyers.

The position of women

“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 all this, I suffered a breakdown – it’s capitalised on by his lawyers.” – *Submission 510 (telephoned)*

“Those with children either can’t earn or have to bear the financial burden of childcare. It makes them more vulnerable to threats of custody applications, more worried about the cost of proceedings, more dependent on counsel”
– *Submission 234 (lawyer)*

38 Women have said that the effects of the costs of family law disputes must be understood within the context of the position of women in society. This context accounts for the particular effects on women of first, what their lawyers charge and second, the delays caused by the other side.

Effects of lawyers’ charges

39 Women have said that their lawyers need to understand the situation in which women come to lawyers and why and how they are affected by what their lawyers charge. This relates for the most part to women’s low economic status.

40 Both women and men experience low economic status and for some of the same reasons, such as living in an economically depressed area, or lacking necessary work skills or education. Much of women’s low economic status is due, however, to two causes which predominantly affect women because of the effects of gender: women are more likely to first, be employed in low–median income occupations and in part–time paid work, and second, take primary responsibility for child–rearing and the associated financial burden.¹⁴ Gender has been described as the social construction of male and female identity which develops over time and is so influential as to be part of a society’s culture.

¹⁴ There are, of course, many factors other than gender which are associated with socio-economic disadvantage – such as ethnicity, age, sexuality and mental and physical ability – and which affect, often profoundly, groups made up of both men and women. But those factors operate in an environment in which gender also operates, with the result that they do not have identical effects for men and women. For women, as is plain from statistics, and as has been emphasised in the Law Commission’s many meetings – especially with Maori women, Pacific Islands women, lesbians and disabled women – gender compounds other causes of disadvantage. While the uniting effects of gender on women’s life experiences underlie the Law Commission project’s focus upon Women’s Access to Justice, the project recognises that women are not a homogeneous group and emphasises the effects of women’s diversity on their access to justice.

Gender describes more than biological differences between men and women. 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.¹⁵

41 One of the effects of gender is that, within the labour market, women are over-represented in occupations with low median incomes, such as clerical and service occupations, and in part-time paid work. This is indicated by the 1991 Census figures.¹⁶ The median income from all sources for women aged 15 years and over in 1991 was \$11 278 (1996 ≈ \$12 405) compared with \$19 243 (1996 ≈ \$21 167) for men.¹⁷ The median total income for Maori women in 1991 was \$10 027 (1996 ≈ \$11 029), 88% of that of non-Maori women.¹⁸ The median total income for Pacific Islands women in 1991 was \$9 750 (1996 ≈ \$10 670).¹⁹ Women's total weekly earnings, including overtime, were on average 74% of men's at February 1993.²⁰ In 1991, women comprised 36% of the full-time labour force (defined as 30 hours or more in paid work per week) and 76% of the part-time labour force (defined as 1-29 hours in paid work per week). At all ages, women are much more likely than men to be working part-time. In 1991, 31% of employed women worked part-time compared with 8% of employed men.²¹

42 A second result of gender difference is that women take primary responsibility for children and the associated economic burden. In 1991, over 164 000 (22%) of all children lived in sole parent families. The majority of children in sole parent families (86%) lived with their mother.²² Eighty-four percent of sole parents with children were women.²³ The median income of mother-only families in 1991 was \$14 599 (1996 ≈ \$16 058), only 85% of the median income of father-only families,²⁴ and 34% of the median income of two parent families.²⁵ Sole parent households are much more likely than others to be in the poorest 20% of New Zealand households. Sole parent families are far less likely than other families to own their own house, and women sole parents are less likely than men sole parents to do so.²⁶ In 1991, sole mothers were more likely to be living in rental accommodation than sole fathers: 39% of sole mothers living in a private dwelling lived in rental accommodation, compared with 29% of similar families headed by fathers.²⁷

¹⁵ *Equality Before the Law* (ALRC, DP54, 1993), 1.

¹⁶ The results from the 1996 Census are not yet available. They will be available shortly. Statistics New Zealand advises that from 1991 until the end of 1995, the Consumer Price Index moved upwards by 10.4%. Income levels did not move upwards to that extent, however. Also, different groups within the population will have experienced different shifts in their income levels over that period. A rough indication of the current value of the 1991 income dollar figures can be achieved by multiplying the 1991 figures by 10% (see bracketed figures).

¹⁷ *All About Women in New Zealand* (Statistics New Zealand, Wellington, 1993), 109.

¹⁸ *All About Women in New Zealand*, 109.

¹⁹ *Samoan People in New Zealand* (Statistics New Zealand, Wellington, 1995), 45.

²⁰ *All About Women in New Zealand*, 112.

²¹ *All About Women in New Zealand*, 103.

²² *New Zealand Now – Children* (Statistics New Zealand, Wellington, May 1995), 22.

²³ *All About Women in New Zealand*, 111.

²⁴ The greater income of father-only families results from the greater tendency for male sole parents to be in the full-time labour force.

²⁵ The median income of couples with dependent children was \$41 947: *All About Women in New Zealand*, 111.

²⁶ *All About Women in New Zealand*, 123.

²⁷ *All About Women in New Zealand*, 126.

43 The women the Commission has heard from have indicated that the result of this economic situation is that generally women simply cannot afford to come into contact with the civil legal system.²⁸ Women have indicated that the pursuit of civil legal rights is a luxury that they generally cannot afford, and some indicated that this was true in family law matters. Maori women in particular spoke of the prohibitive cost of involving the legal system in family law matters, and referred to other methods of addressing issues.²⁹

“We don’t really have a problem with property. The only thing our couples fight over is the kids because they don’t have much property. With Pakeha families their focus is on property. With Maori whanau I have worked with, their focus is on their tamariki.”
– *Transcript of hui held with Maori women in Rohe 1*

“I work to keep it [the dispute] out of the system. I work hard to convince Maori to empower themselves, to make good decisions for their kids. They don’t need the system to do that.” – *Transcript of hui held with Maori women in Rohe 1*

44 Predominantly, however, women described family law as the one area in which they did come into contact with the civil justice system. This was often explained in terms of the fundamental nature of the issues involved, relating to children and future security, coupled with a lack of other methods by which family law matters could be resolved. Turning to lawyers and the Family Court was seen as the only option or as a last resort when resolving the issues by other means had proved impossible.

45 The fact that many women are in a weak financial situation relative to men means that when women come into contact with the legal system at the point of relationship breakdown, they are even more financially vulnerable. Research into relationship breakdown has found that women usually carry the responsibility for children of the relationship and provide primary or sole care for them.³⁰ Overseas studies indicate that women in these situations typically have either no financial resources or fewer than their male partners, and considerably less earning potential. Research in the United States showed that divorced women and their children, on average, experienced a 73% decline in standard of living after the first year of divorce, whereas their former husbands experienced a 42% rise in their standard of living.³¹ A Canadian study

²⁸ Many women have spoken to the Commission about their experiences with the criminal law, for which proceedings are instigated by the state.

²⁹ The Women’s Access to Justice project’s consultations with Maori women also raised more fundamental concerns relating to the “justice system”, broadly defined to extend beyond the activities of the justice sector but with particular reference to that sector and to the delivery of legal services. A consultation paper which presents those concerns in a cultural and historical context will be published later in 1997.

³⁰ In 1991, 82% of sole parent families were headed by women. This high proportion is partly due to the divorce rate and also due to the number of women raising children on their own. In 1991, 52% of divorces involved children. Of all sole parents in 1991, over half were divorced or separated. “The true figure for maternal custody of all the children for the total sample would probably lie somewhere between 80% and 74% at 6 months after separation, 81% and 71% at one year and 77% and 67% at 2 years after separation: *A Survey of Parents Who Have Obtained a Dissolution* (Family Court Custody and Access Research, Report 2, Department of Justice, Wellington, 1990), 44. At the time of dissolution the most usual arrangement was for the children to live with their mother (46).

³¹ See Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1982), 185. The data was collected as part of a ten year study of the social and economic effects of California’s no fault divorce reforms. The research involved the analysis of statistical random samples of 2500 court workers and in-depth face-

produced similar findings,³² as did an Australian study.³³ Some New Zealand information is contained in a 1990 study by the Department of Justice which showed that overall the income for males was higher than the income for females: 49% of males had a weekly income of more than \$350 (approximately \$18 200 net per year) compared with 20% of females. And 54% of custodial males had an income over \$350 compared to 20% of custodial females.³⁴

46 For women litigants who receive civil legal aid, the effects of family breakdown are particularly marked.³⁵ While the courts in these cases are concerned to divide any property between the parties without apportioning blame and, where children are involved, to protect the welfare of those children, the studies indicate that women almost always suffer financially after relationship breakdown. Similar data prompted Justice L'Heureux-Dubé of the Supreme Court of Canada to state that:

[T]he general economic impact of divorce on women, is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice.³⁶

47 Women have said their lawyers must understand this context in order to understand why the cost of engaging a lawyer in family law disputes is of particular concern to women. Women turn to the legal system in relation to family law disputes because of the critical nature of what is at stake. When they do so, they are worse off financially than men, both because they earn less and because they are more likely to have primary responsibility for childcare. This position is likely to be exacerbated at the point of relationship breakdown.

Effects of delay

48 Women have also talked about the context within which the effects of delays by the other party must be understood. The discussion of women's financial situation above forms part of this context. Women's economic position means that they are particularly badly affected by protracted family law proceedings which result in increased costs and sometimes, the erosion of the asset base. Women also described this disadvantage in terms of the fact that their former partner earned more than they did and was able to afford a 'better' lawyer to initiate complex and expensive proceedings.

“[T]he massive 3:1 income differential between my ex-husband and me . . . operates to his advantage. He was able to employ the highest-paid Family Court lawyer in [the city] 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

to-face interviews with over 400 attorneys, judges and divorced men and women. Kathleen Mahoney in “Gender Bias in Family Law – Deconstructing Husband Privilege” (paper presented at the NZLS Family Law Conference, 1995) commented that “[a]lthough no empirical study has been done in New Zealand, fifteen years of matrimonial case law reveals the same patterns” citing Mark Henaghan and Bill Atkin (eds), *Family Law Policy in New Zealand* (Oxford University Press, Auckland, New Zealand, 1992), 231.

³² Marnie McCall and Diane Pask, *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (Canadian Research Institute for Law and the Family, Calgary, 1989).

³³ *The Economic Consequences of Marriage Breakdown in Australia* (Australian Institute of Family Studies, Melbourne, 1985).

³⁴ *A Survey of Parents Who Have Obtained a Dissolution*, 26.

³⁵ These issues are discussed in *Women's Access to Civil Legal Aid* (NZLC MP8).

³⁶ *Moge v Moge* (1993) 99 DLR (4th) 456, 497.

unlikely – will take at least another 5 years to repay. . . .”
 – *Submission 260*

49 Many women said that there is another essential element to the context within which delay tactics must be viewed. Such tactics are seen to provide a means by which former partners may exert control over women, often as a continuation of that exerted during the relationship by financial, physical, or emotional means.

“These costs are often the result of unacceptable delays – due in part to unco-operative behaviour and non-compliance with court orders on the part of the husband – as well as through protracted custody contests. It is very easy for one partner, who has the use and control of the matrimonial property – and the financial security of good employment and thus access to expensive lawyers – to use the court system to emotionally harass and financially impoverish their ex-spouse. Delays in the disclosure of documents for example, can drag out the settlement period for years and hugely inflate the costs. This obstructive behaviour rarely attracts a penalty from the court.” – *Submission 9 on Women’s Access to Civil Legal Aid, (NZLC MP8)*.

50 Lawyers commented on this also.

“[T]he woman is in a weaker bargaining position than her ex-partner and the ex-partner who is often used to dominating the woman (whether financially, physically, mentally and/or emotionally), is able to continue to do so as he often has more experience in legal proceedings (or can afford more aggressive representation) or can afford to delay the proceedings (which frequently occurs) or initiate proceedings (no matter how weak the case) as a weapon in the whole process. The unequal bargaining power is also significant when attempting to negotiate a settlement with the man often being able to afford to hold out and therefore has the stronger position in settlement.”
 – *Submission 58 (lawyer)*

51 A disturbing number of the women who spoke to the Commission had been in violent relationships and said that the violence had been, or continued to be, used as a means by which to exert control. In 1996, police attended almost 30 000 incidents involving family violence. Over 8000 prosecutions were made. There were 12 homicides relating to family violence, and 6 of the victims were women killed by their partners. During the period 1 July 1996 to 31 December 1996, 3520 applications were made for protection orders, 93% of which were made by women.³⁷ In the 10 month period 1 July 1996 to 30 April 1997, 2647 women and 4282 children were admitted to women’s refuges, and a further 3136 women and 3761 children sought assistance from women’s refuge.³⁸

52 While there has been no nationwide study, a 1981 Hamilton study estimated that 25% of Hamilton women are physically abused by a male partner during their lifetime; a 1986 Christchurch study estimated that 2-3% of Christchurch women are abused during any one-year

³⁷ Statistics provided by P Doone, Commissioner of Police in a speech delivered at the Judicial Gender Equity Conference, May 1997.

³⁸ Statistics provided by Women’s Refuge, National Office, June 1997.

period. A 1988 study estimated that 16% of women in Otago are physically abused during their lifetime. Overseas research estimates that between 14% and 25% of women are physically abused by a male partner at some time during their life, with between 0.2% and 14.4% of women being abused in any one-year period.³⁹ One lawyer described a violent husband who used protracted proceedings in a custody dispute to wear down his wife.

“[I]n 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)*

53 Women have said that this context must be understood both by their lawyers and by judges before the meaning and effect of delays may be properly understood, and so that they may each play a role in recognising, controlling, and in some cases punishing, such conduct.

The position of lawyers

“It seems to me that you learn how to be a lawyer by yourself (by this I mean you develop your own style and set of morals/ethics . . .)” – *Submission 359 (lawyer)*

54 Many women have asked, when discussing the costs of family law disputes, whether there are any rules or standards which govern lawyers’ conduct. Lawyers in New Zealand must comply with the Law Practitioners Act 1982 and rules and regulations made under that Act,⁴⁰ including the *Rules of Professional Conduct for Barristers and Solicitors*.⁴¹ These contain rules which, along with others, provide the regulatory regime governing lawyers’ conduct in relation to both charging and delays. This regime is discussed further in Part 4.

55 The ethical framework within which lawyers work is examined in the following paragraphs. Paragraphs 56 to 64 examine notions of “the profession” and “professional responsibility”. Other elements of “professional conduct” are dealt with in paragraphs 65 to 67.

The profession and professional responsibility

56 The *Rules of Professional Conduct for Barristers and Solicitors* provide an ethical framework which overarches and informs lawyers’ conduct in relation to all matters. Rule 1.01 states that the relationship between practitioner and client is one of confidence and trust which must never be abused. Item (1) of the commentary states that the professional judgment of a practitioner should at all times be exercised within the bounds of the law solely for the benefit of the client and free of compromising influences and loyalties.

³⁹ See Julie Leibrich, Judy Paulin, and Robin Ransom, *Hitting Home: Men speak about abuse of women partners* (Department of Justice, 1995), 28 (citations omitted).

⁴⁰ Section 17(2)(d) of the Law Practitioners Act 1982 states that “the Council may make rules regulating in respect of any matters of professional practice, conduct and discipline of practitioners”.

⁴¹ 4th Edition, 1996. The *Rules* contain 11 Chapters relating to such things as conduct of practice generally, and relations with other practitioners. Within each chapter, there are a number of rules relating to that area, and each rule is then supported by a commentary.

57 Item (1) of the commentary to rule 1.02 states that “it would be improper for a practitioner to accept instructions unless the matter could be handled promptly with due competence and without undue interference by the pressure of other work or other obligations”.

58 Rule 7.04 states that a practitioner must make all reasonable efforts to ensure that legal processes are used for their proper purposes only, and that their use is not likely to cause unnecessary embarrassment, distress, or inconvenience to another person’s reputation, interests, or occupation.

59 Rule 8.01 provides that in the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client. Item (3) of the commentary states that the practitioner, while acting in accordance with these duties, must fearlessly uphold the client’s interests, without regard for personal interests or concerns.

60 In setting out the framework within which lawyers operate, it is also necessary to look beyond the *Rules*, because of their status and wording. The Introduction to the *Rules* provides:

The purpose of this publication is to provide guidance for practitioners in the practice of law in New Zealand. This is not considered to be an exhaustive code or treatise. It is rather a definition of the bounds within which a practitioner can practise the profession.

. . . Within those bounds the prime responsibility of a practitioner is his or her own sense of professional responsibility. *The preservation of the integrity and reputation of the profession is very much a matter for individual members.*⁴² [original emphasis]

61 The *Rules* serve to provide guidance, but are not an exhaustive code or treatise. The Introduction states that law is a “profession”, and lawyers are referred to notions of “professional responsibility”.⁴³ Elsewhere in the *Rules*, it is stated that lawyers must exercise “professional judgment”,⁴⁴ and uphold “proper professional standards”.⁴⁵ These concepts are not defined in the *Rules* and it is necessary to look elsewhere for their meaning.⁴⁶

62 It is often stated, and generally accepted, that law is a ‘profession’. Although no single definition of a profession has been universally accepted, three elements are often cited. The first element is special skill and learning. Traditionally, entry to the legal profession requires certain academic and practical qualifications.⁴⁷ This has meant that lawyers have a virtual monopoly on

⁴² Introduction, 2 and 4.

⁴³ Introduction, 2-4.

⁴⁴ See, for example, Rule 3.03.

⁴⁵ See, for example, Rules 4.01 and 4.03.

⁴⁶ Debate has focused in recent times on what purpose codes of conduct should serve, and therefore how they should be drafted. G MacKenzie, “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1995) 33 Alberta LR 859, discusses the tension between the ideological and regulatory functions of codes of ethics. The *Report on a Project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society* (WB Cotter QC and C Roper, 1997), concluded that the NZLS *Rules of Professional Conduct for Barristers and Solicitors*, in their present form, present a fundamental problem and recommended that the society undertake a review of them. It was said that such a review could include “a fundamental review of their philosophical underpinning in order to provide a cohesive base for the various rules, and a clarification and updating of the individual rules”. This issue is currently being looked at by the NZLS. It has been stated elsewhere that the view that “the standards for professional conduct are ill-defined and are applied in an inconsistent and disparate manner” was also partly behind moves by the NZLS to initiate debate on its current administrative structures which will be publicised in a report (the E-DEC report) reviewing these structures due to be issued in the middle of 1997 – *Lawtalk*, 2 March 1997, 14-15.

⁴⁷ See paras 148–156.

legal work, as those who do not meet the requirements are prohibited from carrying out paid legal work.⁴⁸ The second element of a profession is self-regulation or autonomy, an element which arose from the view that only members of a profession possess the requisite knowledge to ensure the maintenance of proper standards.⁴⁹ The third frequently cited element of a profession is that public service is the principal goal. This has been articulated in many ways.

[C]odes of ethics have traditionally reminded lawyers that their profession is more than just a business, and that they are quasi-public officials (“officers of the court” and “ministers of justice”) who are expected to share with judges a community-minded devotion to the law.⁵⁰

There is much more in a profession than a traditionally dignified calling. The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.⁵¹

[I]n a profession, pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.⁵²

The concept of profession requires more than possession of particular skills but also a heightened sense of responsibility, both at an individual and collective level. It involves an individual commitment to service and an aspiration to excellence.⁵³

I encourage lawyers to remind themselves that the privilege of practising law carries with it a duty to act in the public interest. If they are committed to the principle of justice, as their oath proclaims, then they must be committed to justice for all. This is not a radical or new idea. It is rather a return to our roots, and to enviable membership in a unique profession.⁵⁴

63 In the recent *Report on a Project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society* (the Cotter Report), “professional responsibility” is defined as

a critical understanding of the individual’s own values and attitudes; of the legal profession, its structure, roles and responsibilities; and the roles and responsibilities of lawyers in their provision of professional services.⁵⁵

64 Sir Alan Ward has put it as:

[T]he fulfilment of that trust and duty which is imposed by one’s calling to be morally accountable for one’s actions in the practice of that department of learning in which one professes to have special knowledge and skill.⁵⁶

⁴⁸ Law Practitioners Act 1982, ss 54, 56 and 64-67.

⁴⁹ GE Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand* (Law Book Company, Sydney, 1996), 9.

⁵⁰ “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession”, 865.

⁵¹ Roscoe Pound, quoted in GE Dal Pont *Lawyers’ Professional Responsibility in Australia and New Zealand* (Law Book Company, Sydney, 1996) 7.

⁵² Street CJ in *Re Foster* (1950) 50 SR (NSW) 149, 151.

⁵³ His Honour Judge Pethig (speech to Wellington District Law Society, September 1996).

⁵⁴ Justice Major, Supreme Court of Canada, “Lawyers’ Obligation to Provide Legal Services” (1995) 33 Alberta LR 719, 729.

⁵⁵ WB Cotter QC and C Roper, 1997, 17.

⁵⁶ “Professional Responsibility When Dealing with Parental Irresponsibility”, in Ross Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995), 131.

Other professional conduct

65 The *Rules* refer to other concepts also, the meaning of which has not been given and is not necessarily clear. Rule 8.01 refers, for example, to the “best interests of the client”. This does not address the issue of who determines what is in the client’s interests or the identification of what those interests might be. Similarly, the commentary to rule 1.02 refers to a lawyer’s duty to act with “due competence”. The meaning and content of this term may again depend on the observer. They will be fleshed out by the context provided in the surrounding rules, and by the perspective of the reader. At present, there is nothing to encourage a critical evaluation of these concepts.

66 Women have called for an examination of the role of lawyers, and for the content and application of rules relating to costs in family law disputes to be understood within that context. Women have also asked that each of these be informed by an understanding of the context within which women seek legal advice in relation to family law disputes.

67 If set within these elements of context, the meaning of “the best interests of the client” and to “fearlessly uphold the client’s interests without regard for personal interests or concerns” might be interpreted differently. The skills a lawyer requires in order to ascertain and then represent the client’s interests might also be re-evaluated. The requirement that a lawyer act “competently” might be similarly reassessed. Application of the rules relating to charging might be better informed by notions of “the administration of justice”, “public service as the principal goal” or “service beyond pure economic self-interest”. Proceedings might be more visibly conducted by both sides with reference to “proper professional standards”, a “community-minded devotion to the law”, “principles of justice”, the requirement to use legal processes for their “proper purposes only” and not cause unnecessary “distress or inconvenience to another person’s interests”, or the “trust and duty imposed by one’s calling to be morally accountable for one’s actions”.

PART 4 – THE SECOND RUNG: CONTENT

68 This Part examines the content of the regulatory regime relating to lawyers' costs in family law disputes in terms of charging and delay. The ways in which lawyers may charge their clients are regulated by rules relating to estimates, the rates and methods of charging, and the availability of a cost revision process. The ways in which delays are regulated include rules relating to lawyers' conduct of proceedings, case management, costs awards, and the availability of a complaints procedure.

69 In this section, various issues are explored relating to the ways in which costs are discussed, charged, contained, supervised, and recovered, in the context of family law disputes, although the rules discussed apply more broadly. For the purposes of this discussion, comparison is made with Australia and, in particular, with initiatives of the Australian Family Court, which has recently addressed many of the issues discussed here.

Charging

Estimates

70 Women have told the Commission that they were not given information about their lawyers' fees, with the result that their bills came as a shock. Others, who were provided with estimates, said that the original estimates were sometimes overtaken, by substantial amounts, without prior warning.

71 There are no obligations on New Zealand lawyers to provide information about fees, to give cost estimates or to stick to them. There is, however, some guidance as to recommended practice in this regard. The *Costing and Conveyancing Practice Manual* (the *Manual*) of the New Zealand Law Society (NZLS) came into force in 1984, at which time the then president of the society commented:

What we will encourage is that [clients] should discuss the fee beforehand and clearly have the right to ask for an estimate. . . . [S]olicitors should, if they don't already do so, raise the question of fees and disbursements at the first interview and should be willing to give an estimate using the Law Society's specimen form.⁵⁷

72 Part 5 of the *Manual* acknowledges that practitioners will frequently be asked to give estimates or quotes of their charges. It states that it is not always possible at the outset of a transaction to calculate a fair and reasonable charge accurately, but that generally, it should be possible to give some estimate of the likely total charge. This estimate should be on the basis of details known at the time and on the assumption that the transaction will not prove to be substantially more complex or time consuming than can reasonably be expected.

73 The *Manual* states that the wish for an estimate is readily understandable, and, in most cases, it is recommended that such information be given. Practitioners are recommended to use the standard form,⁵⁸ which is designed to serve as an aide memoire for calculations and to constitute the written estimate. Practitioners are also recommended to follow a standard practice, which includes obtaining full details of the transaction and giving a warning that the figure may have to be revised if the transaction proves to be more complex or time consuming than expected.

74 The *Manual* provides that where a practitioner has furnished an estimate of costs for a transaction, he or she should not charge a fee in excess of the estimate except first, in emergency circumstances where urgent additional work is required to protect the interests of the

⁵⁷ Bruce Slane, "Costing: reassurance for efficient profession" (1984) 206 *Lawtalk* 1.

⁵⁸ Originally a standard form was provided in the *Manual*, but this is no longer the case.

client; or second, where the practitioner has advised the client in writing, before the work causing the additional fee is undertaken, that additional work will be necessary and that the fee will exceed the estimate given. It is recommended that an estimate of the amount by which the fee is likely to exceed the original figure also be given.

75 In Australia, a scale of costs for family law matters is set out in order 38 of the *Family Court Rules*. Solicitors may ask clients to enter an agreement to pay costs different from those fixed by order 38 only if certain criteria are met. Before entering into such an agreement the solicitor must provide the client with a copy of a brochure advising the client of their rights in the event of a dispute about costs, and of the scale of costs set out in order 38. The solicitor must also advise the client of the availability of independent legal advice. Further, the costs to be charged must be set out in a written agreement between the solicitor and the client.

76 All such cost agreements then entered into must be “fair” and “reasonable”. “Fairness” has generally been held to relate to the circumstances in which such agreements are made. “Reasonableness” relates to the terms of the agreement and must be determined having regard to all the circumstances of the case. The hourly rates scale from order 38 is a starting point for determining if charges are objectively reasonable. Market forces are also relevant. Fees must then be charged according to the agreement, unless they are varied in any way permitted in the agreement. Order 38 provides a procedure for Family Court registrars to rule on a dispute between a client and a solicitor about an account of costs.

77 While on their face New Zealand “fee estimates” and Australian “cost agreements” may seem quite similar, there are two key differences. First, the New Zealand *Manual* provides a “recommended practice” rather than a compulsory regime and women have indicated that such estimates are often not given. Second, in Australia, agreements must be entered into, rather than estimates given, and will be upheld except in limited circumstances. A New Zealand lawyer’s estimate can be exceeded once the client has been advised in writing that additional work will be necessary and that the fee will exceed the estimate given.

78 These issues were discussed in *Information about Lawyers’ Fees* (NZLC MP3). All of the responses to this paper stated that fee information should be provided in the early stages of a legal matter. Individual women, community groups and some others, favoured a mandatory requirement to provide fee information.

“I would expect a lawyer as part of establishing the professional relationship with a client to deal with the question of costs at a very early stage in the relationship. In Family Court matters providing such an estimate would assist both the lawyer and the client by keeping the estimate in mind throughout the professional relationship against actual costs as they are incurred. In some Family Court proceedings it is very tempting for the client to be driven by the level of conflict which can cause a case to get out of hand, and costs to escalate.” – *Submission 4 on Information about Lawyers’ Fees, (NZLC MP3)*

“People usually get quotes from plumbers so why not other professionals like lawyers?” – *Submission 7 on Information about Lawyers’ Fees, (NZLC MP3)*

79 Lawyers and law societies generally opposed a mandatory requirement to provide fee information. They would prefer initiatives that encourage lawyers to provide information at an early stage in the matter. The reasons given for opposing a mandatory disclosure requirement were: the difficulty of estimating costs in family law issues; the difficulty of estimating costs at the first meeting, when lawyers are still gathering the relevant information; and concern that during the first meeting, clients, particularly in the family law area, can be too stressed and

anxious to absorb the information. It was felt that there has to be a balance between protection of the public and undue interference in the conduct of business affairs.

“It [should not] be mandatory for practitioners to provide fee information to clients at the outset of a legal matter as it is often difficult to estimate the likely time and costs involved in a particular matter, especially a family law matter, at the first meeting. Clients, particularly in family law matters, are often vulnerable, under stress and not in a position to take in detailed information at the time. It would be more appropriate . . . if the lawyer kept clients updated about progress and costs. . . . It is highly desirable that early on, the client is told how fees are calculated.” – *Submission 13 on Information about Lawyers’ Fees, (NZLC MP3)*

“Lawyers don’t necessarily advertise that quotes and estimates are available because they simply are not. How can one estimate the cost of a custody case?”
– *Submission 13 on Information about Lawyers’ Fees, (NZLC MP3)*

“[I]n focusing on lawyers’ costs at the outset of a matter there is a risk that costs will dictate a client’s choice of lawyer rather than the choice being on the basis of the most appropriate lawyer for the work.” – *Submission 19 on Information about Lawyers’ Fees, (NZLC MP3)*

Questions

- 1 Do you have any further comments on the issue of fee estimates?**
- 2 Should New Zealand practitioners be required to enter into cost agreements?**

Rates and methods of charging

80 Rule 3.01 of the *Rules of Professional Conduct for Barristers and Solicitors* states that: “A practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner”. The *Manual* sets out “Principles of Charging”:

1. The charges by practitioners for all professional work shall be calculated to give a fair and reasonable return for the services rendered, having regard to the interests of both client and practitioner. Such charges shall take account of all relevant factors and in particular:

- the skill, specialised knowledge and responsibility required;
- the time and labour expended;
- the value or amount of any property or money involved;
- the importance of the matter to the client and the results achieved;
- the complexity of the matter and the difficulty or novelty of the questions involved;
- the number and importance of the documents prepared or perused;
- the urgency and circumstances in which the business is transacted; and
- the reasonable costs of running a practice.

The relative importance of these factors will vary according to the particular circumstances of each transaction.

2. A practitioner shall be at liberty to charge less than an amount calculated in accordance with the principles set out in Paragraph 1.

81 Where the client is legally aided in a civil matter, the Legal Services Board (Civil Legal Aid Remuneration) Instructions 1996 provide set rates for the remuneration of practitioners. A practitioner may claim remuneration at the relevant guideline fee rate and, where there is no guideline fee, at the relevant guideline hourly rate of remuneration. In special circumstances, a fee which exceeds the guideline or hourly fee may be charged, considering the particular matter or proceedings and whether the degree of complexity or special skills required were unusual or distinctive.⁵⁹ Guideline fees are set by the Legal Services Board for various matters including several under the Family Proceedings Act 1980 and the Guardianship Act 1968, with different rates set for defended and undefended matters. The guideline hourly rates for civil proceedings provide different rates depending on a practitioner's level of experience.⁶⁰

82 In matters not involving civil legal aid, lawyers may calculate their bills how they wish having regard to the Principles of Charging. In New Zealand, it is standard practice for lawyers to use time-based charging, that is, on the basis of the time spent undertaking particular work. Most lawyers charge by the hour.

83 Time is not the only basis on which lawyers may charge, however, nor is there any set rate at which lawyers must charge. The remainder of this section explores three alternative ways in which lawyers might charge: charging for a service performed rather than time taken, charging less than current rates, and charging on the basis of contingency fees.

charging for a service performed:

84 Both women and judges have suggested that, as for conveyancing, clients in family law matters should pay a set rate for a service performed, rather than for the time taken to perform the service. 'Flat fee' or 'event-based' charging is where the charge is a set fee for the total conduct of the matter or for particular stages or events in the matter. This is seen as a means by which to encourage standardised, prearranged fees, to encourage efficiency and discourage delay tactics and prolonged, fruitless negotiation.

85 It also avoids the criticism sometimes made of hourly billing, that it rewards inefficiency:

[T]he work of lawyer A, who spends 100 hours . . . costs the client 100 times the billing rate; the work of lawyer B whom it takes 200 hours to do the same work costs the client twice as much for the same service.

. . . if the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't a great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other.⁶¹

86 Until 1984 the Council of the NZLS promoted *Scales of Professional Charges within New Zealand*.⁶² Under schedule 2 of the *Scales* lawyers could only charge clients for

⁵⁹ Clauses 4 and 9.

⁶⁰ For a practitioner with 0-2 years' experience, the hourly rate (except for travelling time) is \$100. The hourly rate for travelling time is \$55. For a practitioner with 3-5 years' experience, the hourly rate (except for travelling time) is \$125. The hourly rate for travelling time is \$65. For a practitioner with 5+ years' experience, the hourly rate (except for travelling time) is \$155. The hourly rate for travelling time is \$80. All rates are GST inclusive.

⁶¹ Chief Justice of the United States, Chief Justice Rehnquist (speech at the Commencement Ceremony of the Catholic University of America Law School, May 1996).

⁶² Approved by the Council of the NZLS on the 2nd day of October 1981 to be observed from the 19th day of November 1981.

conveyancing in accordance with ad valorem scales,⁶³ while for certain miscellaneous matters, such as adoptions, a flat fee was charged. For matters which were not included within schedule 2, schedule 1 of the *Scales* provided that charges should be fixed to give a fair and reasonable return for services rendered, having regard to the interests of both client and practitioner. Such charges took account of all relevant circumstances and in particular those factors which are now listed in the *Manual*. The *Scales* were abolished in 1984 on the grounds that they were anti-competitive and would hold fees at a higher level than the market would. Since then, there has been no scale for costs in family law matters.

87 In Australia, order 38 of the *Family Court Rules* fixes a scale of costs solicitors may charge for work done in family law proceedings. The order sets costs on the basis of the service performed as opposed to the time taken. Solicitors may ask clients to agree to pay costs different from the costs fixed by order 38 only if certain criteria are met.⁶⁴ The Australian Family Law Section has recently produced a model costs agreement which provides for costing on the basis of work done or based on hours.

Questions

3 What are the pros and cons of charging family law clients on the basis of “service provided” rather than “time taken”?

4 Could a costs scale be reintroduced for family law disputes?

5 What advantages and disadvantages would such a scale have?

charging less:

“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 Information about Lawyers’ Fees, (NZLC MP3)*

88 The Principles of Charging in the NZLS *Manual* provide a wide discretion within which lawyers may calculate their fees, and state, in any case, that a practitioner shall be at liberty to charge less than an amount calculated in accordance with those principles. The recent NZLS *Poll of the Public* found that 81% of the public perceive lawyers to be expensive to use, and one-third do not believe that, in general, lawyers offer good value for money.⁶⁵ The NZLS *Profession Report 1996* found the average median hourly charge-out rate for principals was \$190.00. For employed solicitors the average median hourly charge-out rate was \$128.95.⁶⁶

⁶³ Where a charge varies according to the value of the subject of the legal work. Conveyancing fees would, for example, increase according to the value of the property concerned.

⁶⁴ See discussion above, para 75.

⁶⁵ MRL Research Group, Wellington, February 1997, 13.

⁶⁶ School of Management Studies, University of Waikato, 1996, 6-7. This study is a self-selecting study of 197 law firms throughout New Zealand. It may not be completely representative. The median rate is the rate charged by the middle person in the group surveyed. For example, half of the principals in the firms surveyed charge less than \$190 an hour, and half charge more.

Against this background, and within the context of women's own economic status, many women have called for lawyers to provide work more cheaply.

89 This is a controversial area, however, particularly in relation to family law, where many lawyers have told the Commission that they already regularly write off time or provide discounts. Further, the Principles of Charging state that charges shall be calculated to give a fair and reasonable return for the services rendered, having regard to the interests of both client *and practitioner*. It must be recognised that lawyers' fees cover, for example, overheads such as rent, support staff, office equipment, and ACC levies, as well as earnings.

90 Concern is also often expressed with the idea of cut-price legal work. One commentator summarises some of the concerns in this regard. It is argued that there is a direct link between time devoted to legal work, and therefore incurring cost, and its quality. It is argued that consumers of legal services are, generally speaking, unable to assess whether the proposed services are value for money, which leads many consumers to make distinctions between lawyers simply by price comparison. Further, there is concern that continual price undercutting will motivate poor attitudes to professionalism. For instance, lawyers may quote a price without regard to whether the job can be carried out competently and cost effectively at that price, which in turn may force lawyers to compromise on professional standards to accommodate the low pricing regime. There is also concern that excessive competitive pressure on costs will encourage inappropriate methods of soliciting business.⁶⁷ Former NZLS president Austin Forbes QC commented recently:

It is undoubtedly the case that overall legal services are expensive. The public perception is that lawyers are expensive. In some cases, lawyers are very expensive. However, at the end of the day, the real test is whether the profession gives value for money. . . .

Lawyers are skilled professionals. The job they do is stressful and often quite complex. They are entitled to be paid a fee which reflects those attributes.⁶⁸

91 On the other hand, however, many women have said they simply cannot afford to pay at the rates lawyers charge. Some have said they have to seek alternative providers of legal advice and representation.⁶⁹

Questions

6 Should lawyers be charging less in family law disputes? If so, in what circumstances?

contingency fees:

92 The commentary to rule 3.01 of the NZLS *Rules* states that that rule is “drafted in terms which contemplate the possibility of charging a contingency fee”. Contingency fee arrangements provide for a lawyer to act on a no-win-no-fee basis. Where a person has a claim that, if upheld, would result in a monetary award, contingency fee arrangements allow the person to retain a lawyer knowing that, if unsuccessful, he or she will not need to pay the

⁶⁷ GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (Law Book Company, Sydney, 1996), 73.

⁶⁸ (1997) 473 *Lawtalk* 11-12.

⁶⁹ This issue is discussed further in *Women's Access to Legal Advice and Representation* (NZLC MP9).

lawyer's fees and that, if successful, the fees can be paid out of the amount recovered.⁷⁰ Contingency fee arrangements can take a number of forms:

- *speculative fees*: in the event of success, the lawyer charges the usual fee;
- *uplift fees*: in the event of success, the lawyer charges the usual fee plus an agreed flat amount of percentage uplift on the usual fee; and
- *percentage fees*: in the event of success, the lawyer charges an amount calculated as a percentage (which might be fixed or sliding) of the amount won.

93 Lawyers in New Zealand may enter into speculative fee arrangements, based on usual rates. Lawyers cannot, in general, accept payment which is calculated as a proportion of the sum recovered from the defendant.⁷¹

94 The ordinary method of charging, under the principles of the *Manual*, does not usually give rise to any conflict of interest. The lawyer will not have any financial interest in the outcome of litigation or settlement discussions, as the fee is payable in any event. This is said to enable the lawyer to advise dispassionately on the merits of the case and serve the client's best interests. Contingency fees, by contrast, are payable only in the event of a favourable outcome. While this may serve to create an additional incentive for the lawyer to achieve that outcome for the client, equally it may create a conflict of interest. The most obvious example is where a settlement offer would be sufficient to cover only the lawyer's fee. The lawyer may be tempted to recommend acceptance so as to avoid the time and expense of litigation without due regard to the prospects of recovering a greater sum in court. Moreover, the no-win-no-fee principle could tempt lawyers to be less than scrupulous in observing their duty to the court.

95 The principal advantage of the contingency fee arrangement for clients is that it increases access to justice for plaintiffs who have an arguable case but who cannot afford to pay their own lawyer's fees in the event that the litigation fails. The Commission has heard that many women have not pursued their matrimonial property claims due to bills received before the settlement or resolution of their claim occurred. It would seem that if contingency fee arrangements were more widely applied, and women knew of the existence of this method of charging and could negotiate such fee arrangements with their lawyers, some may choose to continue with their claims.⁷²

96 The appropriateness of contingency fees has, however, been questioned in family law matters. Recently, the Australian Access to Justice Advisory Committee (AJAC) noted that in matrimonial property cases, where property is shared between the spouses rather than obtained from a third party, it may be difficult to determine what degree of success would entitle the lawyer to the fee. Further, it was argued that contingency fees may be inappropriate because the object of family law is to enable the distribution of matrimonial property and to provide for the welfare of the children. Such fees have the effect of reducing the pool of assets available to the children.⁷³

97 There are, however, responses which may be made to these arguments. First, problems in determining whether "success" entitling the lawyer to obtain the contingency fee has been achieved can be addressed in the written agreement between a lawyer and a client setting out the terms upon which the contingency fee shall become payable. AJAC recommends written

⁷⁰ Contingency fees do not relieve the party from the risk of having to pay the costs of the unsuccessful party, should the claim be unsuccessful. Nor do they relieve liability from the payment of disbursements (expenses such as photocopying and tollcalls).

⁷¹ *Laws NZ, Law Practitioners* para 271.

⁷² Contingency fee arrangements are subject to the cost revision process under Part VII of the Law Practitioners Act 1982.

⁷³ Access to Justice Advisory Committee, *Access to Justice – An Action Plan* (Canberra, 1994), para 6.33.

arrangements for contingency fees specifying what outcome will constitute “success” for these purposes. This approach increases the client’s understanding of the services to be provided by their lawyer.

98 The second point AJAC makes is that contingency fees reduce the pool of assets available to the parties and any children. It may be argued, however, that fees calculated under any method of charging reduce this pool. Further, in the absence of contingency fees, however, and given the current constraints on legal aid, it seems that some women may simply not pursue their claims and thereby disqualify themselves from a share of the available pool of assets.

99 The issue of contingency fees, including the impact on cases where legal aid is granted, is currently on the agenda of the Ethics and Legal Services Committees of the NZLS.

Questions

7 Should lawyers use contingency fee charging in family law disputes?

8 What are the advantages and disadvantages?

conclusion:

100 In a recent article for practitioners, David Gendall concluded that finding a suitable alternative to time billing is not easy.

[T]here is no quick panacea. Costing of completed tasks is widely regarded as one of the most difficult aspects of modern legal practice. Perhaps a partial return to some form of recommended charges – dare I say “scale fees” – for common legal tasks . . . would provide certainty and consistency – if indeed those goals are seen as desirable. Greater use of contingency fees, incentive arrangements, project billing and even fees or other hybrids should be encouraged. Unquestioning adherence to strict time billing, simply because it has become the accepted norm, needs to be challenged. And in doing so, perhaps we should ask those whose voices have scarcely been heard up to now – our clients, our employed lawyers, our silent partner colleagues and our families? Go on – ask each of them – their answers may surprise.⁷⁴

Costs revision

101 Rule 3.01 of the NZLS *Rules* states that if a client expresses dissatisfaction about the amount of a fee, and continues to do so after having the matter explained, the practitioner has a duty to advise the client of their right under Part VIII of the Law Practitioners Act 1982. This right allows for the client to have the fee revised by a district law society if less than 6 months has elapsed since the date of the delivery of the bill.⁷⁵ The Professional Standards Director of the Wellington District Law Society, commented recently:

Many practitioners do not appear to do this and aggrieved clients often come to the society after receiving a notice from the court or a debt collector. Although it is likely that some clients attempt to use the cost revision process as a means of delaying payment there are some who have disputed the bill from the date of receipt but were unaware of their rights

⁷⁴ D Gendall, “Time Sheets – Panacea or Panoptic Prison” (1997) 473 *Lawtalk* 29.

⁷⁵ Legally-aided clients receive written notice of their rights to have their bills reviewed. On legal aid bills there is a statement advising the applicant of their right under s 82 of the Legal Services Act 1991 to have the fee revised by a district law society under the Law Practitioners Act 1982 or by a registrar of the High Court.

under the Act. Often it is then too late for the society to intervene without a court order (s 146). In some of those cases practitioners may have been paid more promptly if clients were aware of their right to a revision and this could well have been completed before a firm gets around to enforcing payment through the civil process.

While cost revisions remain with us, it may be helpful to view them not as a waste of time or an unwelcome intrusion, but as a beneficial way of increasing the standing of the profession in the eyes of the public. That practitioners cannot just charge what they like but, on occasion, have to justify their fees, shows that they are accountable to the public and to their peers.⁷⁶

102 Dissatisfaction has, however, been expressed with the cost revision system. As has been noted, many women indicated to the Commission that they did not know of the possibility of a costs revision process and felt that it would have been reassuring to know about its availability. Others felt that even if they had known about the option of cost revision, entering a dispute over costs would have been the last thing on their minds at that time. Further, some women commented that the process was an in-house one, unlikely to offer any satisfactorily objective hearing.

103 The recent NZLS *Poll of the Public* found that only one-third of New Zealanders are aware that the district law societies handle complaints. Where clients are dissatisfied with their lawyer, few go through the official channels of complaint. When dissatisfied, the majority of clients complain to friends and family (20%) and/or to the lawyer concerned (16%). Only three people from the sample of 500 had complained to a district law society because of dissatisfaction with their lawyer on the last consultation. However, 16 others offered negative comments relating to perceived limitations of the fidelity fund, a perceived lack of help available for those making a complaint, or perceptions of bias toward the lawyer on the part of the society when acting on a complaint.⁷⁷ In the NZLS *Poll of Lawyers*, more lawyers (41%) expressed opposition to a lawyer-funded costs revision process than supported it (33%).⁷⁸

“Since no other occupation has a statutory process similar to costs revision, the wider question should be whether Part VIII of the Law Practitioners Act should be retained. It was a system designed to replace taxation by registrars but was created at the time of very high levels of regulation, including scale charging.” – *Submission 21 on Information about Lawyers’ Fees, (NZLC MP3)*

104 If discussions engendered by the consultants preparing the E-DEC report provide any guide,⁷⁹ it appears likely that the regulatory role of law societies will be the subject of recommendation in the upcoming report.

Questions

⁷⁶ (1996) 241 *Council Brief* 1.

⁷⁷ (MRL Research Group, Wellington, February 1997) 34.

⁷⁸ 28-29.

⁷⁹ The E-DEC report is a review of the purpose, function and structures of the law societies. It is due to be issued in the middle of 1997. See, for example, “Profession’s structure number one priority” (1995) 38 *Northern Law News* 1; “What should law societies do?” (1996) 22 *Northern Law News* 1.

**9 Are practitioners performing their duty to advise the client of their right to have a fee revised by a district law society?
10 What inhibits performance of this duty?**

11 How might costs revisions best be conducted?

12 Who should conduct the cost revision process?

Delays

Lawyers' conduct of proceedings

105 In the NZLS *Poll of Lawyers*, 75% of lawyers cited unacceptable delays in the courts as one of the major issues facing the profession which need to be addressed in the next 5 years.⁸⁰ In the Commission's consultations, women cited delays caused by their own lawyers and, especially, lawyers on the other side as a major contributor to costs in family law disputes. A consistent criticism was made of the length of time it took lawyers to return calls from clients. Some women said that they did not hear from their lawyer for months at a time; others said that when they made inquiries after a reasonable time, they found that matters had not progressed at all.

106 While there are few rules which govern the conduct of proceedings in family law matters, three rules may be seen to be relevant here. Item (1) of the commentary to rule 1.02 of the NZLS *Rules*⁸¹ states that "it would be improper for a practitioner to accept instructions unless the matter could be handled promptly with due competence and without undue interference by the pressure of other work or other obligations". Item (3) of the commentary states that where the commitments of a practitioner would not allow sufficient time to be devoted to the matter, those commitments would be good cause for refusing to act.

107 Rule 6.01 states that "a practitioner must promote and maintain proper standards of professionalism in relations with other practitioners". The commentary states that a practitioner shall treat professional colleagues with courtesy and fairness at all times but consistent with the overriding duty to the client; while it is not always possible to take telephone calls from another practitioner, such calls should be returned at the earliest opportunity; practitioners should not communicate or correspond in an atmosphere of acrimony or discourtesy notwithstanding the nature of the relationship between their respective clients.

108 Finally, section 8 of the Family Proceedings Act 1980 sets out lawyers' primary duty in all matters between husband and wife under that Act or the Guardianship Act 1968, to promote reconciliation or, where this is not possible, conciliation.

Case management

109 Many women have criticised the process by which they felt they were constantly going back to court again and again, each time encountering a different judge with different views. Some women suggested that there should be a time period within which the court must finalise

⁸⁰ 15.

⁸¹ Rule 1.02 states that a practitioner as a professional person must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.

all the matters outstanding from a marriage breakdown. For many, the certainty of a decision would outweigh the risk that it may be unpalatable.

110 To some extent these problems may have been addressed in recent times by the introduction of case management in the Family Court. In 1992, a pilot scheme for case management in Family Courts was tested in the Wellington, Blenheim, and North Shore Family Courts. In the 1993 *Review of the Family Court* (the Boshier Report),⁸² and in a 1994 report of the case management supervising committee, it was recommended that all Family Courts in New Zealand should adopt the standard track method of case management through registrar's list hearings.⁸³ The then Department of Justice approved its implementation in Nelson, Blenheim, Masterton, Levin, Lower Hutt, and Wellington. Some form of case management is being used in Family Courts throughout the country. The scheme makes use of the registrar's list to monitor progress of cases. Key points of the pilot scheme were:

- all cases are assigned to case management tracks in accordance with the case management guidelines developed;
- the parties together with their counsel are given details of the track including time expectations for the various stages at the time of filing;
- a registrar's list is conducted on a regular basis for the purpose of making standard case management directions and to monitor the progress of cases in line with the standard track;
- copies of all registrars' or judges' directions are given to counsel and to the parties;
- the court co-ordinator interviews the parties as soon as proceedings are commenced, considers appropriate counselling and remains involved with the case in the registrar's list to assist resolution;
- complex cases are identified and assigned to a judge for case management;
- monthly case management meetings are held with a judge, registrar, deputy registrar, court co-ordinator and a nominee from the local law society to monitor the pilot scheme and the work of the Family Court generally;
- no cases are adjourned sine die (postponed indefinitely); and
- allowance is made for regional and local flexibility to allow for the different circumstances in each court.⁸⁴

111 As a further measure to simplify and streamline procedures, a single set of rules for the court is being developed by a joint working party set up by the Principal Family Court Judge and the Ministry of Justice.⁸⁵ The text of a practice note was settled for publication in 1997 in the form of a handbook and guide for judges, the court's administration and the legal profession.⁸⁶

112 In addition, the Department for Courts has recently circulated a paper suggesting a rationalisation of caseload standards in the various jurisdictions of New Zealand courts. Currently there are three separate standards promulgated by the Courts Consultative Committee, the Department for Courts and in various practice notes issued by the judiciary. It is thought that

⁸² *A Report for the Principal Family Court Judge*, (Auckland, 1993).

⁸³ Registrar's list hearings are hearings in front of a registrar in which proceedings are timetabled and monitored.

⁸⁴ *Trapski's Family Law* (vol VI, Brooker's, Wellington, 1995), 1–291.

⁸⁵ *Report of the New Zealand Judiciary* (1995), 32–33.

⁸⁶ *Report of the New Zealand Judiciary* (1996), 35. This practice note was due to be finalised on 14 May, and therefore should be available very shortly.

this rationalisation will result in an on-going consultation about the principles of caseflow management as they apply practically in the Family Courts.⁸⁷

Questions

13 To what extent will clients' costs be reduced by case management?

Costs awards

Costs can be an effective tool for controlling abuse of the litigation process and for reflecting the values that underlie the system. But they must be used appropriately and the amounts must be such that they can accomplish their purpose.⁸⁸

113 At the conclusion of litigation, it is possible for lawyers to apply for awards of costs against the other side in certain circumstances.⁸⁹ In family law matters, the court may make such order as to costs as it thinks fit,⁹⁰ and the general principle has developed that each party bears their own costs.⁹¹ Several rationales for the practice have been stated. In *Gerbic v Gerbic*, the High Court stated:

The rationale behind that practice is that the resolution of the disputes between the parties is something of benefit to both of them and in a sense neither should be regarded as the winner or the loser.⁹²

114 The court has the power to depart from the usual practice of not awarding costs in certain circumstances. In *Belling v Belling*, the High Court stated that the power to depart from the usual practice of not awarding costs may be exercised “when one party unnecessarily increases costs in an inappropriate way”. It was also stated:

At the end of the day the issue is whether justice requires there should be a contribution by one to the other's case.⁹³

115 The type of conduct which may lead to an exception being made in matrimonial property matters has been held to include:

- inadequate disclosure of the party's financial position;

⁸⁷ Comments by the Secretary of the NZLS Family Law Committee, (1997) 474 *Lawtalk* 5.

⁸⁸ Justice Reform Committee of British Columbia, *Access to Justice* (1988), 164.

⁸⁹ The High Court, by virtue of its inherent jurisdiction to control its own proceedings and prevent abuse of the court process, may also make awards of costs against lawyers. In *S v H* (1994) 11 FRNZ 602, it was held that although the Family Court has the inherent power to regulate its own procedure, this power is not as extensive as inherent jurisdiction, and the Family Court cannot make costs awards against lawyers in the absence of a statutory provision authorising that action. The Commission understands that the Principal Family Court Judge is currently looking at this issue.

⁹⁰ Section 40 of the Matrimonial Property Act 1976 provides that “[s]ubject to any rules of procedure made for the purposes of this Act, in any proceeding under this Act the Court may make such order as to costs as it thinks fit.” Section 171 Family Proceedings Act 1980 and s 27B Guardianship Act 1968 provide similarly for paternity and custody/access proceedings respectively. Rule 46 of the High Court Rules states that all matters relating to costs are within the discretion of the Court.

⁹¹ In *Aalders v Stevens* (1989) 5 FRNZ 198, 204, the Court of Appeal noted “the usual practice of not awarding costs in matrimonial cases”.

⁹² [1992] NZFLR 481, 504.

⁹³ (1996) 9 PRNZ 296, 298.

- delay in filing affidavits;
- dubious allegations burdening the other party with factual or legal inquiry;
- pursuit of an untenable case;
- unjustified attitude;
- unreasonable attitude; and
- failure to obtain information for other spouse's accountants when given the opportunity to do so.⁹⁴

116 The general rule as to the amount of costs to be awarded was set out in *Aalders v Stevens*, where the Court of Appeal stated:

We think it only right that if the proceedings are made unnecessarily complex and protracted because of stalling tactics or procedural ploys adopted by a party in order to delay the prompt resolution of disputes which cry out for disposal in the ultimate interests of both sides, then the party responsible should at least bear costs to the extent to which his or her conduct has added to the overall expense.⁹⁵

117 Where the party against whom costs are to be awarded is legally aided, s 86 of the Legal Services Act 1991 affects the amount of costs which may be awarded:

[L]iability is not to exceed the amount, if any, which is reasonable having regard to all the circumstances. Except in exceptional circumstances, it is not to exceed the amount of that person's contribution in terms of the legislation.⁹⁶

118 In April 1993 the Boshier Report found:

Many judges are reluctant to award costs in appropriate cases where costs are merited and/or timetable orders have been breached.

119 It recommended

that awards of costs be made by judges in suitable cases particularly where non-compliance of directions is inexcusable and adds to the cost of proceedings.⁹⁷

120 The Commission has similarly been told that it is very difficult to get costs awards made in the Family Court.

“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

⁹⁴ *Trapski's Family Law*, 1-167–1-168. Note also r 13(c) Matrimonial Property Rules 1988 which provides that a failure to comply with an order under r 12 may be taken into account by the Family Court when exercising its power under s 40 of the Matrimonial Property Act 1976 .

⁹⁵ (1989) 5 FRNZ 198, 204.

⁹⁶ *Hebberd v Hebberd (No 2)* (unreported, 9 November 1992, CA 162/88, Richardson, Casey and McKay JJ), 2.

⁹⁷ *Review of the Family Court*, 81, 84 and 101.

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*

121 In *Amer v Amer*, for example, the Family Court found that the proceedings were “oppressive and vexatious”, but declined to make an award of costs.⁹⁸ Some judges have indicated a reluctance to award costs in cases involving children on the grounds that any order for costs is seen to limit the money available for the maintenance of the children.⁹⁹ Lawyers have expressed frustration in some cases where they applied for costs at interlocutory stages. The issue of costs was often reserved and the matter subsequently settled without returning to court. If costs did not form part of the settlement, and it was not possible to return to court on the costs issue only, the opportunity was lost.

122 Women litigants have said that even when awards are made in their favour, the amounts awarded are low. *Trapski's Family Law* states:

Costs need to be ordered at a realistic level reflecting the work involved if they are to deter obstruction and delay. . . . The courts are, however, often reluctant to make telling orders for costs.¹⁰⁰

123 In *Belling v Belling*, for example, the High Court considered it “an appropriate case for an award of costs against Mr Belling for the considerable, unjustified, skirmishing associated with this appeal”.¹⁰¹ The court fixed the costs Mr Belling was required to make at \$2000, even though counsel had submitted that the cost to Mrs Belling was \$4600 (not including GST and disbursements).

124 In Australia, section 117 of the Family Law Act 1975 provides a general rule that each party bears its own costs. There is an exception to this, namely where the court thinks that there are circumstances justifying it, in which case the court may order costs. In exercising this discretion, the court has to have regard to factors listed in s 117(2A), including financial circumstances, legal aid, and conduct. Under s 118, the court may also order costs where the proceedings are held to be frivolous and vexatious.

125 In 1992, in the *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975*, it was agreed that the general principle that each party bears its own costs should remain. The committee recommended, however, that costs awards be made more often.¹⁰²

126 In its 1995 report, *Costs Shifting – Who Pays For Litigation*,¹⁰³ the Australian Law Reform Commission (ALRC) summarised some of the concerns with the current rules of costs in family law matters. The major concern was simply that the costs orders under s 117 were not being used frequently or systematically enough. Further, it is unclear how the various criteria in s 117(2A) are to be weighted against one another. The ALRC's recommendation was that the current general rule in family law proceedings, that each party bears its own costs, should remain, but that the current exceptions should be replaced with new rules designed to enhance the court's control of proceedings and to facilitate litigation in certain situations. Its

⁹⁸ [1997] NZFLR 139.

⁹⁹ See, for example, *B v C* [1990] 7 FRNZ 687.

¹⁰⁰ Para 1-168.

¹⁰¹ 299.

¹⁰² Australian Government Publishing Service, Canberra, 1992, 339.

¹⁰³ (ALRC, 75, 1995).

recommendation was that the general rule that each party to family law proceedings shall bear their own costs should be subject to:

- a disciplinary or case management costs order;
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present their case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party; and
- an order made in relation to the costs of a child's separate representative.¹⁰⁴

127 The ALRC recommended a range of disciplinary and case management orders to be used by a court or tribunal to enforce its control of the litigation process in conjunction with the general costs allocation rule is that each party bears their own costs. Disciplinary costs orders include those made to control the conduct of proceedings and to filter claims and defences. Case management costs orders are made to encourage settlement of the dispute or to control the costs of the proceedings.¹⁰⁵ The ALRC was of the view that for the court to perform its functions effectively it must be able to deal with the use of unnecessary or unduly expensive procedures; claims of defences that are unreasonable, frivolous or vexatious; and where the likely cost of the proceedings is out of proportion to the complexity or value of the issues in dispute.¹⁰⁶ The ability to order disciplinary costs is one way of encouraging parties and their legal representatives to comply with the rules and procedures.

128 The ALRC set out the grounds for a disciplinary costs order as follows: at any stage of proceedings a court or tribunal should be able to make a disciplinary costs order against a party, their legal representative or any other person involved in the litigation who, in the opinion of the court or tribunal:

- does not comply with a procedural rule or an order of the court or tribunal;
- causes unnecessary delays;
- significantly increases the costs of the matter by unreasonably pursuing one or more issues on which they fail;
- causes the other party to incur costs that were not necessary for the economic and efficient conduct of the proceedings, including costs incurred as a result of seeking leave to amend their pleadings or particulars or seeking an extension of time;
- engages in conduct that, in the opinion of the court or tribunal, hinders the efficient and just determination of the issues in dispute;
- has unreasonably refused to negotiate a settlement or participate in alternative dispute resolution; or
- otherwise abuses the processes of the court.¹⁰⁷

129 Under the ALRC proposal, the terms of a disciplinary costs order are: if the court or tribunal is satisfied that there are grounds for a disciplinary costs order, it may make such orders as to costs as it considers appropriate including an order that the party, legal representative, or other person (as the case may be) pay all or part of the costs incurred by the other party to the proceedings as a result of the breach, delay, conduct, or abuse of process.

¹⁰⁴ Recommendation 18.

¹⁰⁵ Para 11.1.

¹⁰⁶ Para 11.2.

¹⁰⁷ Para 11.3.

130 The ALRC was also concerned about situations where the solicitor is responsible for costs having been incurred improperly or without reasonable cause, or where extra costs have been incurred by undue delay, or other misconduct or default. The ALRC commented that the ability to make legal representatives responsible for costs recognises that in many cases a party has little or no control over the way their case is conducted.

131 The ALRC also considered that both the party and their representative could be ordered to pay costs incurred by the other parties to the proceedings as a result of an unreasonable claim or defence. A claim or defence will be unreasonable if, in the opinion of the court or tribunal, it

- is not well grounded in fact, or
- is not based on the existing law or on a good faith argument for the extension, modification, or reversal of the existing law.

Questions

14 What impediments are there to the widespread use of costs applications/awards?

15 Do the current rules need altering to provide more options?

Complaints

“[There should be] an accessible complaints procedure and the censuring of lawyers for incompetent practices. The 1994 Family Court Custody and Access Report draws attention to a significant proportion of delays which can be attributed to the legal profession, namely, “the procrastination, inefficiency, inexperience and incompetence of some lawyers; prolonging the case to boost legal fees; or just plain case overload”. Those delays hugely inflate the costs to the client. Practitioners should be censured for these behaviours. Is the law society taking the complaints of clients seriously? We have no evidence of this. What has been done since 1994 to raise professional standards? Lawyers should not take on clients if they cannot process their requirements within a reasonable timeframe. Taking 3 or 4 months to write a letter on behalf of a client – who then has to wait anxiously for 3 or 4 months for a reply from the other lawyer – is simply not good enough. We hear complaints about this continuously.” – *Submission 9 on Women’s Access to Civil Legal Aid, (NZLC MP8)*

132 Part VII (ss 92–138) of the Law Practitioners Act 1982 sets out disciplinary provisions which apply to all law practitioners. Disciplinary matters are normally dealt with by a council of the district law society of which the practitioner is a member. The complaint procedure is activated by a complaint by either a member of the public or by the council of the district law society itself.

133 A complaint may be initiated by a council where there is reasonable cause to suspect that a practitioner has been guilty of misconduct in a professional capacity; of conduct unbecoming a barrister or solicitor; or that the practitioner has been guilty of negligence or incompetence in their professional capacity and that it has been of such a degree or so frequent as to reflect on the fitness to practise or as to tend to bring the profession into disrepute; or where the practitioner has been convicted of an offence punishable by imprisonment. If the council finds

that the case is of sufficient gravity, it makes a charge to the district disciplinary tribunal or the New Zealand Law Practitioners Disciplinary Tribunal. The district disciplinary tribunal may then make its own ruling or, if it is of the opinion that the case is of sufficient gravity, will refer it to the New Zealand Law Practitioners Disciplinary Tribunal. Appeal of a decision of that tribunal may be made to the High Court.¹⁰⁸

134 Issues relating to lawyers' disciplinary proceedings have been the subject of debate in recent times also. The Cotter Report suggests that one of the risk factors in the emerging "amorality" in the New Zealand legal profession with regard to professional ethics is that there is no system of recording complaints of customer dissatisfaction and the decisions which follow. This is said to downplay their seriousness and suggest that ethics do not really matter as complaints are not dealt with in a transparent way. The report called for collation of precedents and statistics.¹⁰⁹

135 The findings of the NZLS *Poll of the Public* in relation to complaints are the same as those provided above in relation to costs revision: only one-third of New Zealanders are aware that the district law societies handle complaints and few go through the official channels of complaint.¹¹⁰ In the *Poll of Lawyers*, more lawyers supported (44%) than opposed (29%) a lawyer-funded complaints service directed to resolving client complaints as distinct from the costs revision process.¹¹¹ Former NZLS president Austin Forbes commented recently:

Any system which hopes to serve the public's and the profession's interests in the future must be substantially independent of the law society or any other body which regulates or represents the interest of lawyers.¹¹²

136 One commentator has stated that disciplinary proceedings have traditionally been the legal profession's principal means of self-regulation, and that the legal profession has traditionally resisted attempts at external regulation on the ground that state control could undermine the independence of the adversarial system. The commentator argued that autonomy of law societies is conferred so that they can better serve the community, and that when it is perceived that that autonomy is failing to achieve this and is in fact serving those within the profession, there is a mandate for external control. It is argued that "autonomy without accountability spells absolute power and potential corruption and leads to a lack of public confidence in those institutions".¹¹³

137 As with the issue of cost revision,¹¹⁴ it appears likely that the regulatory role of law societies will be the subject of recommendation in the upcoming E-DEC report.

Questions

16 How might improved knowledge of complaints procedures and/or improvements to the procedures themselves contribute to cost reduction?

17 Should there be an independent disciplinary body?

¹⁰⁸ *Laws NZ, Law Practitioners*, paras 177 – 183.

¹⁰⁹ 56.

¹¹⁰ See para 103.

¹¹¹ 28–29.

¹¹² (1997) 473 *Lawtalk* 11.

¹¹³ GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (Law Book Company, Sydney, 1996), 10.

¹¹⁴ See discussion above, para 104.

PART 5 – THE THIRD RUNG: SKILLS

138 Using the ladder model, we have explored, on the first rung, the context in which women experience family law disputes and the context in which lawyers work. On the second rung we considered the content of the substantive and procedural rules relating to charging and delays. The third rung, the “practical application”, relates to the skills lawyers need in order to reflect and convey their understanding of this context and content. This Part looks at lawyering skills which may help reduce the costs of family law disputes; the training lawyers receive in the area of family law; and the issue of specialisation.

Skills to reduce cost

Perhaps it is time that it was much more clearly recognised in the legal profession generally that the practice of family law requires not only an intensive knowledge of the law but also an intellectual capacity to face with reality and compassion all the various facets of human behaviour and motivation, to protect and defend the powerless, to uphold standards of what is right, and the ability to see beyond attitudes which may be no more than the expression of passing fashion.¹¹⁵

139 Many women have said that a range of problems occurs at the point of contact with their lawyers. Improved interpersonal skills were seen as a means by which many of these problems might be addressed. They were also seen as a means by which costs in family law matters might be reduced, both in terms of charging and delay.

140 At the time they enter the legal system, women are often in the midst of a life crisis, frequently victims of violence, facing huge upheaval, often trying to attend to children’s needs, and least able to attend to their own. Women talked about the ways in which this may impede communication with a lawyer. They said that they did not feel able to articulate their situation adequately, their level of confidence in their own ability to interact effectively with others was very low, and they felt they could not ask their lawyers to repeat advice they had not understood, or for an explanation of their bills. From a lawyer’s perspective, it was sometimes said that women were, at such times, least equipped to be constructive clients.

141 Against this background, women said that their lawyers did not explain things clearly, and did not keep them informed. Many also said that their lawyers did not listen well enough.

“The whole process took 2 years before it went to a hearing. [My] lawyer kept on saying ‘I hear you’ and then doing nothing.” – *Submission 354 (telephoned)*

142 Some women said that even when their lawyer seemed to understand about women’s socio-economic position generally, he or she did not listen to the specifics of their particular situation. Consequently, the lawyer did not sufficiently understand the client’s situation to justify the degree of control they exerted.

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

“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 the 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 wanna be going through this all the time. . . .”

– *Report on Consultation with Pacific Islands Women, 18*

143 ~~Women have said that improvements in these areas would help reduce the cost of family law disputes, both in terms of charging and delay. Enhanced communication would result in both the lawyer and the client explaining issues more quickly and effectively. Each would be better able to convey their respective knowledge about the situation and the law, so that the best course of action could be ascertained. Women have said this would result in lower charges, as less time would be spent covering ground which was not understood the first time, or pursuing courses which were inappropriate and costly. Women have also said that if lawyers on both sides of a proceeding adopted conciliatory, rather than aggressive approaches, issues could be resolved more quickly and cheaply.~~

144 Some overseas studies have focused on the benefits of improving lawyers’ interpersonal skills. In 1995, the Law Society of New South Wales commissioned an evaluation of their Specialist Accreditation Program. The results of the study illustrate that client satisfaction is based only in part on their expectations of the outcome of their legal matter, and that the quality of service was largely assessed in terms of how the clients felt as people about the way they were treated by their lawyers.

Practitioners are concentrating on developing their knowledge and skills to deliver better outcomes; but their clients, expecting both technical competence and results, are being disappointed by the process of getting there. 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)”.¹¹⁶

145 The results of a recent American survey to identify “valued attorney attributes” found that attributes relating to client services were rated the highest. The ability to thoroughly understand the client’s needs was considered, almost unanimously (98%), as very important. Other very important attributes were: lawyers’ responsiveness to phone calls (86%); the ability to keep the client informed of progress in a matter; the ability to show interest in or concern about the client’s problems; and the ability to explain the issues involved in understandable terms.¹¹⁷

146 It has been argued that by learning how to communicate with clients, lawyers might be more sensitive to their clients’ needs and better prepared to solve clients’ problems without

¹¹⁵ His Honour Judge Inglis QC, “The Family Lawyer”, (speech to Family Lawyers’ Forum ADLS Family Law Sub-Committee and Continuing Legal Education Programme, Auckland, December 1993).

¹¹⁶ L Armytage, “Client Satisfaction with Specialists’ Services: Lessons for Legal Educators”, 1996 APLEC materials, 357, 365.

¹¹⁷ C Laredo-Fromson, “Meeting the Challenges of Client Dissatisfaction”, (1995) 13 J of Professional Legal Education 81, 83 (citations omitted).

litigation. Moreover, they would be able to gather more information allowing them to be effective and thorough advocates. Either way, whether in or out of court, improved communication skills will improve client satisfaction while easing the burden on the judicial system.¹¹⁸

147 The client-centred approach, it is also argued, increases the likelihood of client satisfaction by incorporating the client's own values, replacing a "lawyer monologue" with discussion of the client's true goals and concerns, so as to make the client the owner of the decisions made in their legal matters.¹¹⁹

Training

148 The Family Courts were established as a division of the District Court by the Family Courts Act 1980. This legislation came into force on 1 October 1981 in response to a major recommendation of the Royal Commission on the Courts in its 1978 report. It brought together a number of ideas about how family proceedings should be conducted. There was seen to be a need for a separate court for family proceedings where a non-adversarial approach was taken.

149 The primary means of resolving family-related disputes are conciliation and mediation.¹²⁰ The Family Court has exclusive jurisdiction in several types of proceedings, including those relating to custody and access, and has concurrent jurisdiction with the High Court in others, including matrimonial property cases.

150 At present, there is very little to prepare a lawyer formally or specifically for practice in the Family Court or to maintain lawyer competence in family law.

151 The Law Practitioners Act 1982 controls who may act as a lawyer in New Zealand. It provides for a person to be "qualified for admission as a barrister and solicitor" if that person attains the age of 20 years and has either passed the prescribed examination in general knowledge and law (the LLB degree) and has all the other qualifications prescribed for admission (the Institute of Professional Legal Studies course).¹²¹

152 The study of family law is not a compulsory subject in the law degree, or a compulsory component of pre-admission legal education. Nor is study of family law a pre-requisite for practice in family law. It is offered as an optional subject by each law school.

153 The current Institute of Professional Legal Studies (IPLS) course was established in 1988 as a result of a report on the reform of professional legal training in New Zealand.¹²² It is a thirteen week full-time course which focuses on skills training. Since its inception the IPLS course has focused on three groups of general skills which are taught in the context of typical transactions: oral and written communication; analytical, problem identification and problem solving; and planning, organisational and management. While the skills taught in the IPLS course are general in nature there is little emphasis placed on their use in family law transactions. In Australia, a similar situation prompted the ALRC to note in its report *Equality Before the Law*:

¹¹⁸ "Meeting the Challenges of Client Dissatisfaction", 90.

¹¹⁹ "Meeting the Challenges of Client Dissatisfaction", 90.

¹²⁰ *Report of the New Zealand Judiciary* (1995), 32.

¹²¹ Different prerequisites apply for overseas graduates.

¹²² Neil Gold, *Report on the Reform of Professional legal Training in New Zealand for the NZ Law Society and the Council of Legal Education*, (1987).

[I]t is of concern that family law practice has been omitted from the list of skill areas to be completed in practical legal training. The inadequacy of lawyers' skills in this area, particularly in the context of domestic violence, is highlighted in submissions.¹²³

154 Once a law graduate has completed the IPLS course, the court must be satisfied that the candidate is "of good character and a fit and proper person to be admitted". Upon admission, a person has their name entered on the High Court roll of barristers and solicitors and becomes an officer of the court. In order to practise as a barrister and solicitor a practitioner must, in addition to having their name in the High Court roll, hold a current practising certificate, which the District Law Societies issue on an annual basis. Following admission there are no further requirements imposed on a person before becoming entitled to a practising certificate.¹²⁴

155 Once admitted to practice, institutionalised legal training ceases. Continuing legal education is not compulsory in New Zealand. Every year, however, the NZLS runs a national continuing legal education programme for lawyers. The programme has been in operation since the late 1970s and is administered by the NZLS Director of Education under the direction of the NZLS Continuing Legal Education (CLE) committee. On average, lawyers enrol for at least 1.5 NZLS courses annually.¹²⁵

156 The 1997 national programme is divided into four main types of courses: standard seminars; conferences or "intensives"; skills-based training programmes; and a planned curriculum for practitioners in their first 3 years. There are also CLE courses which are effectively permission-to-practice courses. These include the workshop "Counsel for the Child – Techniques and Issues". Usually the CLE programme includes some family law content.¹²⁶

Specialisation

"With respect to Family Court matters, specialisation within the legal profession should be an important factor, enabling lawyers to provide accurate estimates in advance and to adhere to those estimates, at the same time as providing a high quality service. . . . costs in a particular case get out of hand because a non-specialist becomes involved, will adopt an unhelpful adversarial approach insisting for example on a defended hearing, often with extensive interlocutory steps where experienced counsel would settle with as good as or better result than can be provided through the court, and at a much lower cost." – *Submission 4 on Information about Lawyers' Fees, (NZLC MP3)*

Certification

157 In 1993, the Boshier Report recommended that the NZLS and district law societies should investigate ways and means of improving professional standards, and that the NZLS investigate, with a view to implementing if possible, some form of certification for family lawyers.¹²⁷

¹²³ (ALRC, 70, 1994), para 8.35 (footnotes omitted).

¹²⁴ Sections 44, 46, 49, 56 and 57 of the Law Practitioners Act 1982, and Working Party of the Council of Legal Education, *Review of Practical Legal Training in New Zealand* (1996), 10.

¹²⁵ NZLS Annual Report for the Year Ended 30 November 1996, 18.

¹²⁶ This will be discussed further by the Women's Access to Justice Project in our forthcoming consultation paper on lawyers' education.

¹²⁷ 101.

158 The NZLS is currently investigating the issue of specialist certification. At this stage it is intended that certification should be available to any NZLS member who satisfies the necessary criteria. The criteria may include such matters as time in practice, the proportion of work in the specialist area, satisfactory referees' reports, and the satisfactory completion of training or education.¹²⁸

159 In a number of Australian jurisdictions (NSW, Queensland (for mediation services only), Victoria and Western Australia), there are formal schemes by which lawyers with skills and experience in certain areas may be formally accredited as specialists in those areas. Generally, the accreditation schemes require lawyers seeking accreditation to have a number of years of full-time practice or equivalent experience, to supply a number of references from practitioners or others who can attest to their competence, and to pass a formal examination or other assessment process. Accreditation entitles accredited lawyers to advertise their specialist skills.¹²⁹

160 The Australian Access to Justice Advisory Committee (AJAC) reported on this issue recently. It found that the main benefit of accreditation is seen as enhanced information for consumers. Accreditation schemes provide objectively-verified information about the skills of accredited practitioners, enabling infrequent customers of legal services to locate a lawyer specialising in the required area of law.¹³⁰

161 The disadvantages were found to include that consumers may be misled into believing that an accredited lawyer is necessarily a good lawyer; accreditation schemes only test for expertise in a particular field and not for such characteristics as efficiency, ethics, client care, or cost effectiveness. There is also a danger if they are operated in such a way as to restrict competition between accredited and non-accredited lawyers. There are likely to be many lawyers whose experience has made them specialists in their field but who have not completed the formal requirements for accreditation. Such schemes may, over time, develop increasingly restrictive requirements that could have the effect of limiting diversity and innovation in and between the specialist areas. If specialisation were to become too rigid, non-specialists could be prevented from practising in the specialist areas, thus limiting competition, or clients may have to consult more lawyers than necessary.¹³¹

162 AJAC concluded that "we consider that accreditation is desirable because it provides consumers with reliable information about the skills and experience of particular practitioners in a market where consumers are often unsure of how to locate a suitable lawyer".¹³² AJAC recommended that formal accreditation schemes should continue, but should not operate in such a way as to restrict information to consumers about non-accredited lawyers or restrict competition between accredited lawyers and other lawyers or non-lawyers where appropriate. In particular, advertising of lawyers' areas of specialisation should not be limited to accredited specialists. AJAC proposed that a national advisory council on legal services be established to monitor the operation of specialist accreditation schemes. This would ensure that the schemes were regulated in a way that maximised the information provided to consumers and restricted competition between lawyers to the least extent necessary in the public interest.¹³³

¹²⁸ (1996) 466 *Lawtalk* 1.

¹²⁹ A JAC, *Access to Justice – An Action Plan* (Canberra, 1994), para 3.36.

¹³⁰ Para 3.148.

¹³¹ Paras 3.150–3.151.

¹³² Para 3.152.

¹³³ Paras 3.154 – 3.161.

Family Law Section

163 Plans for a new family law section (FLS) of the NZLS are currently being advanced, with the possibility that the establishment of this section will be a blueprint for the development of further NZLS sections in other areas of practice.¹³⁴ It is intended that the section would have substantial autonomy to act in matters affecting family law and family lawyers including responsibility for law reform and policy issues affecting family law. It is not envisaged that membership will be compulsory nor that membership will be a pre-condition to any aspect of the society's involvement in the area of family law.¹³⁵ At this stage it is envisaged that the NZLS is likely to appoint the FLS to administer specialist certification in the area of family law. The section may also arrange continuing legal education for family lawyers, and develop a code of practice for family lawyers, which may in time become part of the NZLS *Rules*. The objects of the NZLS FLS would include:

- to further the objects of the NZLS, and
- to enable members of the FLS to promote their common interest in family law.

164 The aims of the FLS will include facilitating and encouraging discussion and debate among its members about issues of interest and concern to family lawyers; facilitating the study of family law matters by gathering and sharing information about those matters; promoting a collegial approach among its members to family law issues through meetings, conferences and seminars; providing opportunities for its members to maintain and improve their professional skills; promoting professional standards for the practice of family law; and promoting a voluntary system of specialist certification of family lawyers.¹³⁶

165 Former president of the NZLS Austin Forbes QC, stated recently:

This will be the path for the future of the profession whereby groups with a common identity of interest will want to formalise their networks. This section will provide an exciting opportunity for professional development for the benefit not only of practitioners involved in the area, but, as well, others interested in or involved in providing family law services. These include the clients of family lawyers and the Family Courts as well as counsellors and others involved in the Family Court system.¹³⁷

166 Some arguments have been made against the establishment of a family law section. There is concern that such a section would involve higher practising costs, an added level of bureaucracy, fragmentation of the profession, specialist certification and the demise of the general practitioner. It was recently argued that there is no need for such a section as there is already a national structure consisting of the NZLS Family Law Committee. It was further argued that the advantages sought by the proponents of the section could be achieved within the existing structure, and that there are dangers with the new proposed regime, such as causing fragmentation of the profession into specialist sections.¹³⁸

167 The target date for the commencement of the FLS is mid 1997.¹³⁹

¹³⁴ (1996) 463 *Lawtalk* 7.

¹³⁵ (1996) 466 *Lawtalk* 1.

¹³⁶ (1996) 466 *Lawtalk* family law section.

¹³⁷ (1996) 466 *Lawtalk* 1.

¹³⁸ (1997) 473 *Lawtalk* 20.

¹³⁹ (1996) 463 *Lawtalk* 7.

Questions

18 Will the types of specialisation discussed here assist women? If so, in what ways?

On-going support to lawyers

168 The NZLS *Poll of Lawyers* found that while the majority of lawyers are satisfied with their working life (72%), 75% see the high level of stress and burnout among lawyers as a problem for the profession, with one in 10 lawyers identifying this as one of the most important issues that needs addressing. Further, many said they were struggling to achieve a balance between their career and family (53%), while 43% said they were getting “a bit disillusioned with working in law”.¹⁴⁰ Most areas of work are more often enjoyed than not enjoyed by lawyers working in that particular area, however, family law rated as a notable exception. There are almost as many lawyers working in family law who claim they do not enjoy the work as there are lawyers who claim to enjoy it.¹⁴¹

169 The Commission has heard from lawyers about the high emotional costs they face, particularly in the area of family law, where they deal with conflict on a daily basis. While some family lawyers described emotional involvement and emotional cost as an occupational hazard, others said that in identifying too closely with clients, they risked losing objectivity. Some lawyers suggested that their own need to distance themselves from their clients’ issues may result in an inability to make effective contact with their clients.

170 It has been suggested that the implementation of mechanisms for the on-going support or supervision of lawyers might be appropriate.

QUESTIONS

19 What are the costs to lawyers of working in the area of family law?

20 What could be done to improve this?

¹⁴⁰ Those with children at home are particularly likely to agree they are “constantly struggling to achieve balance between career and family (67% as compared with 41% of those with no children, and 46% of those whose children have left home), 37.

¹⁴¹ 41.

CONCLUSION

171 This paper calls for an evaluation of the issue of lawyers' costs in family law disputes. There are many ways in which a call for such evaluation might be framed or justified. It may be argued that it must come simply in light of an established need. Lawyers, as well as women, have recognised many of these issues in recent times. The NZLS *Poll of Lawyers* found that among the six most important issues lawyers perceive need to be addressed by the profession in the next 5 years are: the public image of lawyers; issues related to the courts – particularly delays, the costs involved and limited access to the courts; and the cost of law – the cost of lawyers' fees discouraging the public, as well as the costs involved in going to court.¹⁴²

172 Justification may also be framed in terms of the obligations imposed on lawyers by virtue of membership of their profession. It might be argued that attention should be paid to these issues particularly in light of the identification in recent times of a “crisis of morality” within the legal profession. The Cotter Report referred to the risk of an emerging “amorality” in the New Zealand legal profession with regard to professional ethics. The report suggests that one of the reasons for this may be that by not dealing with legal ethics the law school gives students the message that they do not matter. When combined with widespread non-observance and lack of enforcement there emerges a strong culture that says that ethics do not need to be observed, or that as one way to cut costs, given the pressures of a competitive environment, is to ignore ethics.¹⁴³

173 It can be further argued that reducing costs is directly in lawyers' best interests. There may, for example, be economic benefits. Many women told the Commission that they simply do not go to a lawyer at present, or have abandoned claims partway through because they could not afford to continue.¹⁴⁴ It is argued by some that a disgruntled client tells many more existing or potential clients of their dissatisfaction than a satisfied client tells of their satisfaction.¹⁴⁵ Others cite more specific savings and suggest, for example, that if law societies placed more emphasis on educating lawyers to the economic benefits of improved client communications, they may avoid costly disciplinary procedures against lawyers for violating the rules of professional conduct.¹⁴⁶

174 Others have argued that economic benefits alone do not provide sufficient justification. Issues of job satisfaction, stress and burnout among lawyers are relevant here. There has been discussion of a “crisis of morale” within the legal profession. Professor Anthony Kronman, Dean of the Yale Law School, in his book *The Lost Lawyer: Failing Ideals of the Legal Profession*, states:

This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul. The crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up. Disguised by the material well-being of lawyers, is a spiritual crisis that strikes at the heart of their professional pride.¹⁴⁷

175 The NZLS *Poll of Lawyers* found that lawyers are more likely to rate the profession more negatively than the public. It states: “Lawyers' perceptions of their own profession, and their feelings about how the public views the profession, suggest that the image of the legal

¹⁴² 14.

¹⁴³ 56. This will be discussed further by the Women's Access to Justice Project in our forthcoming consultation paper on lawyers' education.

¹⁴⁴ See *Women's Access to Legal Advice and Representation* (NZLC MP9).

¹⁴⁵ F Fenton and A Grutzner, *The Rain Dance* (Fenton Communications, Melbourne, 1996), 44.

¹⁴⁶ “Meeting the Challenges of Client Dissatisfaction”, 87.

¹⁴⁷ (Harvard University Press, Massachusetts, 1993), 1.

profession among the profession itself is a major issue".¹⁴⁸ When lawyers were asked to identify the problems facing the profession, 72% mentioned public image. Of the most important problems the profession needs to address in the next 5 years, public image was the issue which most lawyers identified.¹⁴⁹

176 The various justifications have been interlinked by others. Some have argued that the crisis of morality may be a contributing factor to a loss of morale. One commentator argues that an ethical, aspirational code of conduct for lawyers is particularly important, as one of the main causes of the disillusionment among the profession's members in recent years is an overemphasis by lawyers on the business dimension of the practice of law. This overemphasis entrenches a corresponding belief, shared by many members of the public that the profession as a whole is self-interested.¹⁵⁰ Others have argued that solving the "crisis of morale" will have economic benefit for lawyers.

A happier, more satisfied lawyer is simply more productive. Improving morale enhances productivity which enables lawyers to achieve their maximum potential. Across the board salary reduction must be accompanied by reduced expectations for billable hours so that lawyers have more personal time. . . .

Lawyers' dissatisfaction with the profession is a great concern for the profession because 'unhappy lawyers mean unhappy clients'. . . . The legal profession must recognise that job-related stress impairs the quality of service the attorney can provide for clients. . . . Increased dissatisfaction impacts on lawyers' productivity, the quality of their work and thus their clients.¹⁵¹

177 It has also been argued that even if there is no economic justification, other considerations must ultimately override. Former president of the NZLS, Austin Forbes QC, commented that the ultimate cornerstone of the structure and organisation of the legal profession must be the public and consumer interest. This interest must, he argued, prevail over the profession's self-interest, in particular its economic interest, and over current competition policy principles, in the event that the two interests are in conflict.¹⁵² In Australia, similar sentiments have been expressed by the Hon Justice Kirby, of the High Court of Australia, who has written:

Let me challenge the Australian legal profession to re-evaluate its conduct with a view to enhancing the level of service provided to a community which has ever-increasing expectations of the profession but a diminishing estimation of the likelihood that such expectations will be fulfilled. . . .

It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection

The challenge before the Australian legal profession as it approaches a new century is to resolve the basic paradoxes which it faces. To adapt to changing social values and revolutionary technology. To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation for ordinary citizens. To preserve and, where necessary, to defend the best of the old rules requiring honesty, fidelity, loyalty, diligence, competence and dispassion in the service of clients – above mere self-interest and, specifically, above commercial self-advantage. Yet to move with the changing direction of legal services in a global and national market. To adapt to the growth

¹⁴⁸ 9.

¹⁴⁹ 30% identified this issue, 15.

¹⁵⁰ G MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession", (1995) 33 Alberta LR 859, 870.

¹⁵¹ "Meeting the Challenges of Client Dissatisfaction", 86.

¹⁵² Responding at the Law Conference 1996, to Commerce Commission Chairman Dr Alan Bollard's paper *Competitive Issues in the New Zealand Legal Services Market*, (1996) 474 *Lawtalk* 5.

and changing composition of our society and of its legal profession: beyond the monochrome club of Anglo Celtic males. And to mould itself to the fast changing content and complexity of substantive and procedural law. It is quite a tall order. . . .

What is vital is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service. We must certainly all hope that the basic ideal of the legal profession, as one of service beyond pure economic self-interest, will survive. But whether it survives or not is up to the lawyers of today. They should do what they can, while moving with the times, to revive and reinforce the best of the old professional ideals, to teach them rigorously and insistently to new recruits and to enforce those ideals strictly where there is default.¹⁵³

178 The purpose of the paper has been to stimulate debate on these issues. We welcome your responses.

¹⁵³ “Billable Hours in a Noble Calling? Ethics and the Australian Legal Profession” (1996) 21 *Alt LJ* 257, 257 – 261.

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