

Law Commission Consultation Paper

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

INFORMATION ABOUT LAWYERS' FEES

The Law Commission

The Law Commission is an independent advisory body, established by statute and funded by the taxpayer. Its main function is to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just principled and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

Women's Access to Justice : He Putanga mo nga Wahine ki te Tika

During the course of the project's consultations, women have defined "access to justice" to mean "access to legal services and procedures". The project team will therefore concentrate on four major areas in its report to the Minister of Justice which is due at the end of 1997. These areas are:

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

Research is now underway on several topics within those broad areas.

This paper is part of the Commission's work on the cost of legal services.

The Commissioner responsible for the project is Joanne Morris.

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PART 1 - INTRODUCTION

1 Lawyers' fees are the major financial cost for women seeking access to the legal system.¹ In many of the submissions made to the Law Commission and frequently in its consultations with women, comments have been made about lawyers' fees and the mystery that surrounds them. These comments have often been made by women who have been presented with large bills with no forewarning. One woman called the Commission to say that she had received in the mail a bill for \$20,000 and had no idea that it was coming, nor any way of paying it. The woman said that she did not know what her lawyer's hourly rate was nor why the bill was for \$20,000.² One woman who had been to a lawyer asked how lawyers' fees were set. The woman said she felt that she had been charged unfairly and that her lawyer had not explained the cost of the legal advice.³

2 Comments have also been made about the inaccuracy of quotes or estimates when they are provided by lawyers. Sometimes the wrong hourly rate has been quoted; a service is mentioned as being free, for example the first interview, when in fact it is not; and disbursements are often not included in quotes or estimates. Women who have expressed dissatisfaction with their lawyers and the cost of the service provided have not always been aware of the cost revision process. One woman commented to the Commission that it was not until she went to the Citizens Advice Bureau that she discovered she was entitled to a revision of costs. Many women seem unaware that they can negotiate with their lawyer about fees and shop around for better arrangements.⁴

3 The following comments have been made to the Commission in both written and telephoned submissions-

"I often asked why this process took so long to finalise. My solicitor told me that my costs would be between \$600 - \$2000 initially, but my final account totalled \$25,000."⁵

"The first account was not itemised at all and was for the sum of \$712.00. I rang their accounts department and was told that I had received [an itemised account] and it took some arguing to convince them that I had not and that I insisted on getting one. When I received this itemised account I saw I was being charged for [a lawyer's] time, even though I had not seen her and she had done nothing for me. I was being charged for the first interview when I was told I would not be. ... The hourly rate had also leapt up, during proceedings from \$170 the hour to \$195 the hour. I telephoned [the lawyer's] secretary to query these and was told an adjustment had been made for [the

¹ Other significant financial costs which may be incurred when seeking legal advice and representation include court, transport, and childcare costs.

² Submission 301.

³ Minutes of hui held with Maori women in the Waikato see forthcoming Miscellaneous Paper *He Putanga Mo Nga Wahine Ki Te Tika : Women's Access to Justice - Maori Women's Views. (Maori Women's Views).*

⁴ In Mary Nash and Lesley Read *How Women Consumers Experience the Legal Process of Family Separation* (Massey University, Research Report, 1991) the results of qualitative research of 36 women's experiences noted "Seven respondents mentioned difficulty in finding out about costs in advance. Some were too embarrassed to ask, others couldn't understand the explanations, while several seemed not to have been given the information, or not to have asked. One or two respondents were quite surprised to discover they had to pay legal aid out of their settlement and felt quite bitter about this. One was not told she could apply for legal aid" (p 17).

⁵ Submission 227.

[lawyer's] "time" and as for the first interview she asked did I have it in writing that I would not be charged for this!"⁶

"The whole 35 minutes I was in his office he was on the phone to other clients. I feel as if I had been a man that he wouldn't have been so rude or he would at least have taken my case more seriously. ... When his account arrived amounting to \$200 I phoned him and inquired about the price as he had only written one letter for me. When I said to him that I didn't see why I should be paying for the time he was on the phone talking to other clients, and that I had provided all the information he asked me how much I was prepared to pay. I said only half and he agreed. I feel that his service was very unprofessional towards women."⁷

V called the Law Commission and said that she had just received a bill for \$900. The bill was not itemised and V was unable to say what her lawyer's hourly rate was or whether there were any disbursements. V said "I was told that it was going to be short and simple and that it wouldn't cost much at all. There needs to be more information about how to go through a lawyer."⁸

C called the Commission and talked about receiving a very large bill from her second lawyer. C said that she had not known what to do about it and said "I just left it for a certain period of time". C said that she has now asked for a detailed breakdown of the account. C said that she wished that she had known more when she first went to the lawyer."⁹

E asked for an estimate at the beginning of the process and the lawyer said it was difficult to provide an estimate of these cases because the matter was very complicated. E expected a bill of \$1,000. However, she has just received a letter from the lawyer saying that he spend 48 hours at \$150 an hour on the case. He has said that he is prepared to negotiate his fee."¹⁰

J separated from her husband 3 years ago after years of domestic violence during which time she had received threats involving guns, knives, boiling water, as well as broken ankles and various other injuries. J didn't know that she could ask for a cost review of the \$9,000 lawyers' fees she paid for separating from her husband and getting non-molestation orders and custody of the two children. J's counsellor told her about being able to get cost reviews. However, J is now out of time."¹¹

F can't get any more legal aid and has a charge on the house and will have to refinance. Her lawyer is still acting for her. F said it was unclear whether he is charging her and what sort of bills will emerge."¹²

⁶ Submission 63.

⁷ Submission 74.

⁸ Submission 330 (telephoned).

⁹ Submission 142 (telephoned).

¹⁰ Submission 145 (telephoned).

¹¹ Submission 380 (telephoned).

¹² Submission 178 (telephoned).

4 There are many issues raised by the women's comments about lawyers' fees. These include the reasonableness of legal fees, controls over lawyers' fees, the process of cost revisions and general communication issues. This paper only considers whether information should be provided to clients and potential clients about the cost of legal services and the cost revision process. Some of the remaining issues will be addressed by the Commission in its forthcoming papers on *Women's Access to Legal Advice and Representation* and *Lawyers' Education*. Part 2 of this paper outlines why information about lawyers' fees is of concern to New Zealand women. Part 3 examines the current practice of lawyers in New Zealand and provides an overview of the rules governing lawyers. It also outlines the New Zealand Law Society initiatives over the past 12 years to inform the community about lawyers' fees. Part 4 of the paper provides an overview of current Australian initiatives which require lawyers to provide fee information to clients. Part 5 considers the work by the Australian Access to Justice Advisory Committee (AJAC) in its report *Access to the Law - an Action Plan*¹³ and asks whether it may be appropriate to implement some of its recommendations in New Zealand.

The Commission would be very grateful for your views on any of the issues raised by this paper and, in particular, on the questions asked throughout this paper. Please send your comments to Women's Access to Justice : He Putanga mo nga Wahine ki te Tika Project, Freepost 56452, Law Commission, PO Box 2590, WELLINGTON by **Friday 29 November 1996**.

If you have any questions about aspects of this paper please phone Michelle Vaughan on 0800 88 3453.

PART 2 - INFORMATION ABOUT LAWYERS' FEES - A WOMEN'S ISSUE?

5 The provision of accurate information about the cost of the legal service to be provided is of prime importance to all lawyers' clients and potential clients whether women or men. Many issues have arisen in the Commission's consultations which are important to both women and men. However, the issues have a gendered dimension for women because of the lower social and economic status of women in New Zealand society.¹⁴ While providing information about

¹³ (1994). This will be referred to as the AJAC report.

¹⁴ Statistics from the 1991 Census illustrate this point. In 1991, the median income of mother-only families was \$14,599 (\$16,059: 1996), 85% of that father-only families. (The greater income of father-only families results from the greater tendency of male solo parents to be in full-time labour force.) Twenty three percent of female solo parents were employed in the paid workforce for more than one hour per week.

In the year ended March 1991, 76% of women (compared to 52% of men) received incomes of less than \$20,000 (22,000: 1996), while 39% of women (compared to 24% of men) received incomes of less than \$10,000 (\$11,000: 1996). Eighty five percent of Maori women received incomes of less than \$20,000 (\$22,000: 1996) in the same period, with 42% of Maori women receiving an income of \$10,000 (\$11,000: 1996) or less.

The median income from all sources for women aged 15 years and over in 1991 was \$11,278 (\$12,405: 1996) (compared with \$19,243 (\$21,167: 1996) for men). The median total income for Maori women was \$10,027 (\$11,029: 1996) in 1991, 88% of that of non-Maori women. The median total income for Pacific Islands women was \$9,700 (\$10,670: 1996). Women's total weekly earnings from paid work, including overtime, were on average 74% of men's at February 1993 and including all income were 59% of men's. Women's experience of paid work is characterised by both a lower level of participation and a lesser rate of pay.

lawyers' fees may simply confirm the fears that many women have about the cost of legal services, it may indicate to some women that legal services are affordable. It may enable others to negotiate with their lawyers about the services that they want and the price they are prepared to pay.

"Lawyers' fees are too high. If women can't afford their services or are not eligible for legal aid then they will just put up with their problems. Where is the justice in the legal system when lawyers' fees are too much for us to pay? How do we get help?"¹⁵

6 The reasons legal services are not accessible to women are complex. Many more women than men are isolated from the public community because of their private lives as caregivers: there are not often corner legal stores in the suburbs sitting alongside the dairy. Women often do not have contacts in the legal world - a fact which transcends socio-economic status.¹⁶ This can result in a lack of confidence when women try to find a lawyer and to negotiate the legal system - a situation which is exacerbated for those who live in geographically remote communities where some distance must be travelled to access legal advice. Ethnicity places fundamental cultural and language barriers between people and the system - an effect which is compounded by gender. Accordingly, information produced in English and in a written form may be of little use to women from oral cultures. Women who are differently abled may also have physical and mental barriers between themselves and the system.

"[Women] are uncertain about processes and costs, delays undermine them and they are intimidated by legal jargon. Women feel they have no control over a situation when they don't understand things. Low self esteem makes it difficult for women to press their case if they are being "fobbed off".¹⁷

7 Also relevant are the types of matters about which women seek legal advice. From the Commission's consultations it appears that women usually consult lawyers because of a breakdown in a family relationship (which may include matters relating to protection from domestic violence, the custody of children, and the division of matrimonial or de facto property). In these situations women are often traumatised and this may affect their ability to think about asking for information about fees and also their understanding of that information. However, women who have dealt with lawyers in less emotional matters have commented that they often do not feel confident to ask their lawyers about fees.

"I'd be too shy first thing to ask how much it cost."¹⁸

These statistics have been drawn from *All About Women in New Zealand* (Statistics New Zealand, 1993). Statistics NZ advises that from 1991 until the end of 1995 the Consumer Price Index moved upwards by 10.4%. An indication of 1996 figures can be achieved by multiplying the 1991 figures by 10%. That is how the 1996 figures have been reached.

¹⁵ Minutes of hui held with Maori women in Hawkes Bay. See *Maori Women's Views*.

¹⁶ In meetings women have often described the difficulties they experience trying to find a lawyer. Women who are the partners of professionals have described their difficulties trying to find a lawyer when their partners' friends close ranks. In some cases this has meant that women have had to go out of their area to find legal representation.

¹⁷ Submission 258.

¹⁸ Minutes of meetings held with Refugee and Migrant women in Christchurch on 10 June 1996.

Other women have commented that they simply did not know that they could and should ask about lawyers' fees and were too embarrassed to object once they received the bill.

8 The provision of information about the cost of legal services will begin to break down some of the barriers that women experience. However, other measures need to be considered which, together with initiatives to improve information about legal services, will increase women's access to justice. These initiatives will also benefit men, as men will get better value for their money. As aptly noted by Martha Minow, by making curbs flat to benefit the disabled, many others, such as bike riders and parents with baby strollers, will also benefit.¹⁹

9 Measures designed to increase the information available to clients and to the wider community about lawyers' fees must take account of the diversity of both clients and the wider community. The challenge is to find appropriate and effective ways to provide information about lawyers' fees.

PART 3 - NEW ZEALAND : WHAT ARE THE RULES?

10 This part of the paper contains a brief discussion of the comments lawyers have made to the Commission about the provision of fee information to clients; the obligations placed on lawyers to provide information about fees; and the information available in the community about lawyers' fees.

What lawyers have said

11 The Commission has received a number of comments from lawyers, both male and female, about their practice of advising clients about fees. The comments include -

"If I don't explain costs to client[s] then they don't know what they'll be up for and I don't know that I'll get paid. It's just commonsense really."²⁰

"We are open about costs but not specific about charge-out rates. These are kept relatively private unless necessary."²¹

"[I give an estimate of the cost of services] if required. If not requested I don't tend to do this as it is 'down time' making less time in the day to achieve my budget of chargeable time for the day."²²

"I only explain [billing] if the client asks".²³

"[I] generally only explain [billing] if raised by client"²⁴

¹⁹ Martha Minow *Making All the Difference* (Cornell University Press, New York, 1990) 70.

²⁰ Submission 103.

²¹ Submission 109.

²² Submission 141.

²³ Submission 292.

²⁴ Submission 297.

*"[I] always explain! ... and I always advise my clients to ASK ASK ASK about fees etc."*²⁵

*"[I] give clients a client brochure, which contains all relevant information [and I] have a standard form letter which confirms instructions and can be sent out enclosing client brochure."*²⁶

*"An estimate of the fees and disbursements would usually be supplied, together with an explanation of what my work would involve. It would also be explained that should unforeseen or abnormal circumstances arise that involve further input by me, then this may increase the original estimate of fees."*²⁷

*"I usually outline the likely cost of a job to a new client at the first interview. If appropriate, I give a quote but mostly I give an estimate and explain the concept of charging for time, hourly rates, disbursements and GST."*²⁸

*"Yes, I do explain, although I have difficulty in explaining/justifying the partner's huge fee and involvement."*²⁹

*"Where possible I give an indication [of the cost of the service]. Usually it is very hard so a full estimate will only be given on request."*³⁰

*"No, forget many times."*³¹

12 In one submission a lawyer commented that she was not often asked about fees because of her clients' embarrassment. Despite that awareness on her part, she did not usually give information about fees as there was no policy in her firm.³² Many of the lawyers who have made submissions³³ have commented that their firms do not have clear policies about the type of costs information to be given to clients.³⁴ There are also differing opinions as to the ease with which information about fees and the cost of a legal matter can be given to clients. Some lawyers say that providing such information is very difficult, others say it can be done with relative ease. It seems that much depends upon the certainty of the procedure to be followed and the issues likely to arise.

²⁵ Submission 322.

²⁶ Submission 129.

²⁷ Submission 93.

²⁸ Submission 141.

²⁹ Submission 99.

³⁰ Submission 122.

³¹ Submission 225.

³² Submission 132.

³³ Approximately 150 submissions have been received from lawyers to date.

³⁴ Submissions 280, 287, 288, 290, 291, 292, 293, 297, 337, 340, 347, 351, 359, 360.

" [I] very seldom [give an estimate] because due to the nature of the work it is often difficult [to do so]."³⁵

"If asked [I provide an estimate or quote] otherwise not invariably. [I] find it difficult to discuss."³⁶

"I usually give a quote or estimate including all disbursements at the first meeting."³⁷

"Much of my work is done on an estimate basis."³⁸

13 However, the *Costing and Conveyancing Practice Manual*,³⁹ which provides lawyers with some guidance as to whether and what type of information should be provided to clients about fees, notes that in many, if not most, transactions, it should be possible for a practitioner to give some estimate to a client on the basis of details then known and on the assumption that the transaction will not prove to be substantially more complex or time consuming than can reasonably be expected.

14 Another theme of the Commission's consultations with women has been the difficulties women experience finding out about civil legal aid.⁴⁰ Women have commented to the Commission that they are reluctant to apply for civil legal aid because of the risk that their only property will later be subject to a charge. While information about civil legal aid may reinforce that fear, it is important that full information about civil legal aid is given to clients so that they are aware of their potential liability and can discuss with their lawyer ways of reducing costs. From the comments received from lawyers about their billing processes, it appears that some lawyers hold the view that if a client is legally aided then she or he does not need to know about the cost of their legal services.

³⁵ Submission 360.

³⁶ Submission 297.

³⁷ Submission 310.

³⁸ Submission 285.

³⁹ These are rules approved by the Council of the New Zealand Law Society on 22 June 1984 to be observed from 1 November 1984.

⁴⁰ Issues relating to civil legal aid are discussed in *Women's Access to Legal Information* (Law Commission, MP 4, October, 1996) and the forthcoming paper on *Civil Legal Aid*. The paper *Women's Access to Legal Information* describes the very clear message which has emerged from the Commission's consultations with women about the lack of information readily available in the community on law, legal processes and services.

"Most clients are legal aid. Otherwise I talk about fees and how they can pay them off etc as soon as I know what's involved in the work."⁴¹

"If [my clients are not on legal aid] I usually give them an estimate of cost for initial work to be completed."⁴²

"[I] generally investigate eligibility for legal aid and complete any necessary application then. If legal aid n/a, [I] then explain basis of charging on hourly rate plus gst and [disbursements]. Ask if they wish to institute automatic payments on a/c of fees/disbursements. Discuss interim billing."⁴³

"Private clients I explain my hourly rate at an early interview plus a rough guess of costs, and explain my "charge out rate" is based on every time I work on the file there is a charge."⁴⁴

"If the client is not legally aided explain the time and attendance rate at first interview."⁴⁵

"If private client, yes [I explain billing processes]. If legal aid - not unless charge is likely."⁴⁶

"80% of clients are legally aided ... Others we discuss billing at first meeting to offer choice of monthly/interim billing, Aps etc."⁴⁷

15 While this approach may have had some validity under the earlier legal aid regime, the current philosophy of the Legal Services Act 1991 is that civil legal aid is a loan and not a grant. Indeed, one of the objects of the change in philosophy from the 1969 Act was to encourage the client to take a more active role and greater interest in the matter being pursued. Therefore, legally aided clients, like non-legally aided clients, need to know the cost of the services they are purchasing. Other lawyers have commented in their submissions that information about their fees and estimates must be provided to legally aided clients.⁴⁸

"Sometimes [an estimate is given], obviously if legal aid paying. Depends on nature of brief."⁴⁹

"If entitled to legal aid, explain legal aid system, possibility of charge etc."⁵⁰

⁴¹ Submission 107.

⁴² Submission 231.

⁴³ Submission 95.

⁴⁴ Submission 183.

⁴⁵ Submission 220.

⁴⁶ Submission 149.

⁴⁷ Submission 287.

⁴⁸ Submission 195, 319, 323, and 325.

⁴⁹ Submission 91.

16 While the submissions received from lawyers may not be representative of the profession as a whole, they do illustrate that lawyers' practice of providing information to clients about fees is variable both across the profession and, in all likelihood, within law firms - given the number of lawyers who have commented that they are unsure whether their firm has a policy about the provision of information about fees.

The basis of charging

17 Until 1984 the Council of the New Zealand Law Society promoted *Scales of Professional Charges within New Zealand*.⁵¹ Under Schedule 2 of the *Scales* lawyers could only charge clients for conveyancing in accordance with ad valorem scales,⁵² while for certain miscellaneous matters (eg adoptions) a flat fee was charged. For matters which were not included within Schedule 2, Schedule 1 of the *Scales* provided that:

Charges ... shall be fixed to give a fair and reasonable return for services rendered, having regard to the interests of both client and practitioner. Such charges shall take account of all relevant circumstances and in particular:

- (i) the time and labour expended
- (ii) the complexity of the matter or the difficulty or novelty of the questions involved
- (iii) the skill, special knowledge and the responsibility required
- (iv) the number and importance of the documents prepared or perused
- (v) the urgency and circumstances in which the business involved is transacted
- (vi) importance of the matter to the client
- (vii) the nature and value of any property involved
- (viii) the cost of running the particular practice.

18 With the abolition of the *Scales* in 1984, the New Zealand Law Society issued the *Costing and Conveyancing Practice Manual* which contains principles of charging which are very similar to those originally contained in the *Scales*. With those principles in mind lawyers can calculate their bills in the following ways:

- *item based charging* - where a charge is based on prescribed items or actions (such as attendance of counsel or preparation of a letter);
- *time-based charging* - where a charge is based upon time spent undertaking particular work;
- *flat fee or event based charging* - where the charge is a set fee for the total conduct of the matter or for particular stages or events in the matter;

⁵⁰ Submission 286.

⁵¹ Approved by the Council of the New Zealand Law Society on the 2nd day of October 1981 to be observed from the 19th day of November 1981.

⁵² See definition in para 18.

- *ad valorem charging* - where a charge varies according to the value of the subject of the legal work (eg where the conveyancing fee increases according to the value of the property concerned).

19 Also relevant is the method of charging, for example, on contingency. 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, she or he will not need to pay the lawyer's fees and that, if successful, the fees can be paid out of the amount recovered.⁵³

20 Contingency fee arrangements can take a number of forms:

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

21 Lawyers in New Zealand may enter into contingency fee arrangements based on the usual rates (ie speculative fees) but cannot, in general, accept payment which is calculated as a proportion of the sum recovered from the defendant.⁵⁴ 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 to the end because of the bills of costs that they have 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.

22 However, the appropriateness of contingency fees has been questioned in family law matters. Recently, 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 and, more importantly, because the object of family law is to enable the equitable distribution of matrimonial property and to provide for the welfare of the children, contingency fees have the effect of reducing the pool of assets available to the children.⁵⁵ However, the "non-contingency" method of charging also effectively reduces the pool of assets available - and sometimes by significant amounts.⁵⁶

23 Lawyers' fees can be calculated in a number of ways and can be charged on either a contingency or non-contingency basis. It seems that if more information were made available to clients about the methods of charging, the principles underlying the calculation of the bill, and

⁵³ 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.

⁵⁴ *Laws NZ - Law Practitioners* para 271. The New Zealand Law Society's Ethics Committee is currently studying the question of contingent and conditional fees.

⁵⁵ Para 6.33. The Law Institute of Victoria in its recommendations about contingency fees also excluded family law matters: *Funding Litigation* (1989) at 29.

⁵⁶ Contingency fee arrangements are subject to the cost revision process under Part VII of the Law Practitioners Act 1982.

the financial implications of each method, then clients may be in a better position to discuss with their lawyer the options available to them and to make an informed decision about progressing their legal matters.

"[I explain my billing process] if a new client and especially if an individual. I try to help [my clients] make an informed decision before proceeding with litigation."⁵⁷

Information required to be provided to clients about fees and cost revisions

Law Practitioners Act 1982

24 Lawyers' conduct is governed by the Law Practitioners Act 1982 and the rules made by the Council of the New Zealand Law Society pursuant to that Act. The Act makes no specific reference to any obligations upon lawyers to provide information to clients about fees or cost revision procedures.⁵⁸ However, the Rules made pursuant to the Act do contain some reference to the information that should be provided to clients.

Rules of Professional Conduct for Barristers and Solicitors

25 The New Zealand Law Society's *Rules of Professional Conduct for Barristers and Solicitors*, which are in the nature of broadly worded standards rather than prescriptive rules, do not require lawyers to provide particular information to clients. The only reference in the Rules to information that should be provided to clients about fees relates to the cost revision process.⁵⁹

26 The Rules state that when a client expresses dissatisfaction about the amount of a fee and continues to do so after having the matter explained, the client must be advised of the client's rights under Part VIII of the Law Practitioners Act to seek a cost revision. Women have described to the Commission their feelings of disbelief and embarrassment when posted a large bill. Some women have said that they do not make contact with their lawyer again, even to complain about the bill. The impact of a large bill on those who do not feel confident enough to discuss such matters with their lawyers suggests that the Rule may not be sufficient to inform clients of their rights to seek a cost revision.

The Costing and Conveyancing Practice Manual

27 The President of the New Zealand Law Society in 1984 commented at the time the *Manual* came into force:

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.⁶⁰

⁵⁷ Submission 290.

⁵⁸ Part VIII of the Act governs the revision of bills of costs by District Law Societies and the appeal process subsequent to that revision.

⁵⁹ See commentary to Rule 3.01.

⁶⁰ Bruce Slane "Costing: reassurance for efficient profession" (1984) 206 LawTalk 1.

28 As noted earlier in the paper, the New Zealand Law Society's *Costing and Conveyancing Practice Manual* contains some guidance as to whether and what type of information should be given to clients about lawyers' fees.⁶¹ However, the tenor of the relevant parts of the *Manual* is not prescriptive and instead describes the behaviour of a "willing practitioner" responding to a request for information. The *Manual* also makes no reference to lawyers' obligations to provide information about cost revisions. As can be seen from the content of lawyers' submissions, it may be that more prescriptive rules are desirable. Parts 3 and 5 of the *Manual* provide as follows -

Part 3

...

2(a) A practitioner should not charge a fee in excess of an estimate given to the client in accordance with Part Five hereof except:

- (i) in emergency circumstances where urgent additional work is required to protect the interests of the client; or
- (ii) 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. Practitioners are recommended where possible to estimate in such notification the amount by which the fee is likely to exceed the original figure.

(b) A practitioner owes a legal and professional duty of care in estimating likely charges and disbursements. If a practitioner is careless or negligent in giving an estimate then he or she may not later attempt to charge more than that estimate.

...

Part 5

1 Practitioners will frequently be asked to give estimates or quotes of their charges. It is recognised that it is not always possible at the outset of a transaction to calculate a fair and reasonable charge accurately. However, in many, if not most, transactions, it should be possible for a practitioner to give some estimate of what such charge and the disbursements are likely to total on the basis of details then known and on the assumption that the transaction will not prove to be substantially more complex or time consuming than can reasonably be expected.

2 The wish for an early estimate of the likely commitment for charges and disbursements is readily understandable, and, in most cases, where it is reasonable to do so, the giving of such information is recommended.

3 If a practitioner decides to give an estimate it is important that it should be carefully considered and comprehensive including not only [her or] his charges but also all disbursements and out of pocket payments likely to be incurred. A practitioner is recommended not to give such an estimate orally but, if it is given orally, it is desirable that the enquirer should be advised that the practitioner will confirm it in writing when instructed to proceed in the transaction.

4 Practitioners are recommended to use the standard form which is designed to serve as an aide memoire for calculations and to constitute the written estimate.

5 If it is apparent that the enquirer is "shopping around", the opportunity should be taken of emphasising the need to ensure that details then known to the enquirer, will be confirmed in writing by the practitioner when [she or] he is instructed to act in the matter. This will not only warn the enquirer of the dangers of accepting information given orally, especially by telephone, but will tend to ensure that other enquiries are sought on a comparable basis.

⁶¹ Parts 3 and 5.

6 If a practitioner is willing to give an estimate of [her or] his charges and disbursements the following practice is recommended:

- (a) Full details of the transaction should be obtained (preferably at an interview to avoid the misunderstandings which can sometimes arise when the enquiry is received on the telephone) and warning given that the figure may have to be revised if the transaction proves to be more complex or time consuming than expected.
- (b) Using the standard form, the enquirer's name, address, and/or telephone number should be noted, the figures worked out on the form and final total intimated to the enquirer.
- (c) The enquirer should be told that the figure includes stamp duty and other disbursements and out of pocket expenses. If immediate instructions to proceed are not received and a copy of the form then given to the enquirer, an indication given that the practitioner will confirm the estimate and the facts on which it is based in writing once instructed to act in the matter.
- (d) The completed form should be delivered to the client. If the client has not provided details in writing, the form should be accompanied by the practitioner's record of the details given by the client with a copy of both kept on the practitioner's file.
- (e) In many cases the practitioner may not be able to estimate all disbursements and out of pocket expenses accurately at the time of completing the form because of further investigation necessary into rebates for stamp duty or the like or because the practitioner may not have personal knowledge of the release fees, consent fees etc that might apply in the particular transaction. The practitioner should in such circumstances estimate the likely disbursements to the best of [her or] his knowledge and ability but should draw the uncertainty to the attention of the enquirer by specific reference to the point when submitting the written form.

7 Should it become apparent as the transaction progresses that the final charge is likely to exceed the original estimate the practitioner should immediately and in writing bring this to the client's attention. Particular reference should be made to Costing and Conveyancing Guideline No 2 - see Part Three of this Manual. [quoted above]

8 Practitioners may at their option, when requested by a client, provide a firm quote. If the estimate form is used it should then be amended accordingly. If a firm quote is given practitioners must be aware of their contractual obligations in terms of such quote.

New Zealand Law Society Initiatives

29 The Law Practitioners Act states that one of the New Zealand Law Society's functions is "to promote the interests of the legal profession and the interests of the public in relation to legal matters"⁶² and also that the Society has the power "to publish or arrange for the publication of such ... pamphlets, or other publications as it may consider of benefit to the public in relation to the practice of the law ...".⁶³ Over the past 12 years the Society has taken a number of steps to encourage lawyers to provide clients with fee information. Those initiatives, which are in addition to the Rules promoted by the Society, are discussed in this section.

30 To remind lawyers of their obligations in this area, in May/June 1989 the New Zealand Law Society, as part of its Continuing Legal Education programme, presented a seminar to lawyers - *Costing*. The content of the seminar booklet indicates that the change in practice envisaged in 1984 had not occurred and it was noted that "most practitioners are embarrassed and find it difficult to discuss costs with clients due to a lack of confidence on the practitioner's

⁶² Section 4(a).

⁶³ Section 5(2)(b) Law Practitioners Act 1982.

part".⁶⁴ However, the seminar promoted the early discussion of fees with clients. From the submissions the Commission has received from lawyers it appears that this "recommended" practice has not become widespread. A more sustained campaign amongst all lawyers about the content of the *Manual* may be necessary.⁶⁵

31 As noted earlier, the *Manual* came into force when the Society's *Scales of Professional Charges within New Zealand* were abolished. At that time, the New Zealand Law Society screened a television commercial for three weeks and also produced a series of Law Awareness pamphlets which were widely distributed amongst the profession. The Society carried out a survey of its advertising to measure public awareness of its television campaign. The survey showed that the commercial reached 54% of those sampled. Of those, 82% understood the message it was trying to convey in total or in part, with only 18% having no recall as to the content of the advertisement seen. The survey was carried out immediately after the television campaign using a sample of 1000 households (500 male and 500 female interviews) chosen to reflect a statistically relevant national spread. Unprompted recall was 43% rising to 54% after prompting.⁶⁶ While the recall and awareness may have been high 12 years ago, the information received by the Commission indicates that many women are now unaware that they can ask their lawyers for quotes and estimates. Another more sustained campaign may be necessary to ensure public awareness is renewed.

32 Another Law Society initiative aimed at informing the public about lawyers' fees is the pamphlet *Fees, Charges and Value*.⁶⁷ The pamphlet is produced by the New Zealand Law Society in its Law Awareness series and is the only pamphlet available to the New Zealand public about lawyers' fees.

33 The contents of the pamphlet include material under the following headings

- . Ask how much it will cost
- . Estimates
- . How fees are fixed for the work
- . How to get the best value
- . If you are not satisfied about value
- . Save money, save worry - see your lawyer first
- . What will it cost
- . Your own independent lawyer
- . Your lawyer
- . Finding a lawyer

⁶⁴ *Costing* New Zealand Law Society (1989) p 18.

⁶⁵ The Continuing Legal Education seminars are not compulsory so not all lawyers would have received the 1989 reminder as to good practice.

⁶⁶ "Television advert prompts high recall: survey" (1984) 211 LawTalk 1.

⁶⁷ New Zealand Law Society Law Awareness Programme, February 1995.

- Law Awareness programme pamphlets.

34 The pamphlet suggests to the public that they should ask lawyers what their fees are likely to be. It also contains the following statement

Lawyers are now encouraged to give written estimates or quotes for the cost of the job. Many lawyers use a standard Law Society form for estimates. It ensures that all the particulars are obtained and properly recorded.

35 A number of comments may be made about the pamphlet

- *Language* - The pamphlet is available in English only. The New Zealand Law Society has begun translating the Law Awareness series into Maori.⁶⁸ There are no plans to translate the series into other languages, for example, Samoan, Cook Island Maori, Tongan etc. This has implications for people who speak English as a second language.⁶⁹
- *Form* - The information is only available in written form and in fairly small type which excludes sight impaired people and creates difficulties for those from oral based cultures.⁷⁰
- *Distribution* - The Society distributed 100,000 pamphlets during 1995. It is likely that 7,000 of these were the pamphlet *Fees, Charges and Value*. The Law Awareness pamphlets are distributed by the Society through District Law Societies, law firms and voluntary agencies. District Law Societies will distribute pamphlets to enquirers. While postage to an enquirer will remove the cost and inconvenience of travel, it presupposes knowledge of the existence of District Law Societies and that they have this type of information. It also presupposes that the District Law Society offices are usually staffed. While the pamphlets are available from some law firms, the Commission's consultations suggest that in a climate of uncertainty about what a lawyer may charge, it is unlikely the information will be sought directly from a lawyer. The problems associated with obtaining information from voluntary agencies may also be resolved by the agency posting out the information. However, obtaining information from these agencies also requires a degree of "prior knowledge".⁷¹

36 All other Law Awareness pamphlets contain the following paragraph⁷²

What will it cost?

Probably less than you expect

Like other professional people, your lawyer charges for time, experience and skill in looking after your affairs. But ask at the beginning about the likely cost - or tell your lawyer that you don't want to spend more than a certain amount without the lawyer first checking back with you.

⁶⁸ *New Zealand Law Society 99th Annual for the year ended 30 November 1995* p 19.

⁶⁹ Suggestions for providing information to women who speak English as a second language are contained in *Women's Access to Legal Information* (Law Commission, MP 4, October 1996).

⁷⁰ Suggestions for providing information in a variety of media are contained in *Women's Access to Legal Information* (Law Commission, MP 4, October 1996).

⁷¹ Suggestions relating to the distribution of information are contained in *Women's Access to Legal Information* (Law Commission, MP 4, October 1996).

⁷² Which include LawHelp; Making a will?; Estate administration and enduring powers of attorney; Buying or selling property; Your lawyer and your business; Over the fence ... are your neighbours; Living together; What happens when your marriage breaks up; Family violence; Motor vehicles; Accidents and alcohol; You and the police; Giving evidence in court.

Some of the pamphlets⁷³ include within the paragraph a further reference to the pamphlet *Fees, Charges and Value*, and also to the LawHelp scheme.⁷⁴

37 *Fees, Charges and Value* is the only pamphlet in the Law Awareness series providing information about cost revisions.⁷⁵ However, on the reverse of all Law Awareness pamphlets there is a list of the Law Awareness pamphlets available which includes the pamphlet on fees. This may alert consumers to the possibility that information is available. Given that information about cost revisions is potentially applicable to all work done by lawyers, its inclusion in only one pamphlet can be queried. Many of the comments received from lawyers indicate that information about cost revisions is not volunteered until after there has been a complaint, and some query whether information about the process should be volunteered at all despite the requirement to do so in the Rules.

*"Why should we [tell clients about cost revisions]? Do plumbers say 'here's my bill and you can to the Fair Trading dept of the Ministry of Commerce if you don't like it.' Get real."*⁷⁶

*"Do lecturers explain how to complain about their poor teaching. Do doctors give [the] address of their disciplinary council to patients?"*⁷⁷

38 In this context, it is worth noting that in the Wellington Yellow Pages there is a very full advertisement by the Wellington Master Plumbers Association which states "Protect yourself and your property by using a fully qualified craftsman **Master Plumber** whose work is guaranteed by the **Wellington Master Plumbers Association**".⁷⁸ It is clear from the Commission's consultations that women often consult the Yellow Pages when trying to find a lawyer. However, there is no mention of the Wellington District Law Society or its role in either the "Barristers and Solicitors" or "Lawyers" section. And a quick browse of the regional Telecom Yellow Pages indicates that only one, the Gisborne Telecom Yellow Pages, contains a reference to the local District Law Society under "Barristers and Solicitors". However, the reference does not state what the role of the Society is. It is arguable that some mention of the role of the District Law Societies in the cost revision process should be mentioned in places where consumers of legal services commonly look for information.⁷⁹

⁷³ Similar issues to those noted above apply to the other Law Awareness pamphlets (for example, print size, distribution, media used).

⁷⁴ This scheme was established in 1980 on the initiative of the New Zealand Law Society. Under the scheme lawyers agreed to see clients for 20 minutes for \$20. It seems that the scheme is largely in abeyance in most areas.

⁷⁵ Some District Law Societies have pamphlets with cost revisions information for clients. The costs revision process is currently under review and may be abolished. However, while the process exists the public should be made aware of its existence.

⁷⁶ Submission 234.

⁷⁷ Submission 281.

⁷⁸ *Telecom Yellow Pages: Wellington 1996* p 729.

⁷⁹ The importance of multi-faceted approaches to providing legal information is discussed in the Commission's paper on *Women's Access to Legal Information* (Law Commission, MP 4, October 1996).

Summary

39 It seems clear that clients need information about the cost of legal services and the cost revision process. The New Zealand Law Society encourages lawyers to provide information to its clients through the content of the *Manual* and its reference to the procedure of giving estimates in the Law Awareness pamphlet. The Society's seminar on *Costing* may have also served to remind some lawyers of the need to provide information to clients. However, a theme which runs through the Commission's consultations with women is that many lawyers are not providing fee information to clients. The Society has also tried to provide the public with information about lawyers' fees and the cost revision process. However, the clear message from the Commission's consultations is that this information is not reaching women either and that many do not feel confident raising the issue of fees with their lawyers. It seems that a different approach may be required.

Should lawyers be required to provide fee information to clients at the outset of a legal matter?

What type of information should be provided?

Who should be responsible for enforcing such a requirement?

When should lawyers provide information to clients about the cost revision process?

How can community knowledge about lawyers' fees and the cost revision process be improved?

PART 4 - CURRENT AUSTRALIAN RULES

40 This part of the paper considers some of the rules regulating the conduct of lawyers in Australia. A number of reports in Australia have recommended that more information be made available to consumers of legal services through advertising, community education and mandatory disclosure by solicitors to clients of costs details.⁸⁰ Some Australian states have already moved to require disclosure of information to clients with either the legal profession or Parliament responding to the needs of clients by adopting client care/disclosure rules. The purpose of the discussion of the Australian developments is to ask whether similar approaches might usefully be taken in New Zealand.

Family Court of Australia

41 Solicitors in the Family Court⁸¹ are required by that Court to provide written information to their clients, before pre-trial conferences or directions hearings, detailing

- the approximate costs to the client up to and including the pre-trial conference or hearing;
- the estimated costs of the preparation for trial; and
- the estimated costs of the first day of the trial.⁸²

⁸⁰ See for example Trade Practices Commission *Study of the Professions - Legal* (1993) at 178; Senate Standing Committee on Legal and Constitutional Affairs *The Cost of Justice, Foundations for reform* (1993) (Cost of Justice 1st report).

⁸¹ A Federal court governed by Australian Commonwealth law.

42 The Family Court requirements were motivated by concerns that clients were not being properly informed about the costs of their proceedings, either because they were told nothing or because the estimates given were inaccurate. They have now been incorporated into the Family Court's new *Case Management Guidelines*, and extended by requiring lawyers to provide information about costs at various stages of Family Court proceedings both to their clients and to the other party on :

- directions hearings;
- conciliation conferences;
- pre-hearing conferences; and
- defended hearings.⁸³

43 As well, where a costs agreement between a solicitor and a client is to be made for a family law matter, the solicitor is required before entering into the agreement to advise the client that she or he may seek independent advice and provide the client with a Family Court pamphlet setting out the main costs rules.⁸⁴

Queensland

44 In Queensland, the Client Care Rule,⁸⁵ which came into effect on 5 April 1993, requires lawyers to discuss fees with clients at the first opportunity. The rule requires a solicitor to tell a client at the outset of a matter:

- the name and status of the person responsible for the day to day conduct of the matter;
- the name of the person⁸⁶ who can be approached should a client have a problem with the service and the client has been unable to resolve the issue with the person responsible for the conduct of the matter;
- the basis on which costs will be charged and, if reasonably possible, an estimate of the costs; and
- the complaints handling procedure within the firm and also the fact that the client may refer unresolved problems to the Law Society.

45 The client must also be informed, both at the outset and during the course of the matter, where appropriate, of the steps required for the matter, how long the action will take, and its progress from time to time, including explanations as to any unreasonable delays that occur. Clients are also to be provided with Law Society brochures setting out client care information and written material from the lawyer detailing matters required by the rule.

⁸² Family Court of Australia, Practice Direction 2/91.

⁸³ The requirement to inform the other party has since been suspended due to opposition from the Law Council of Australia but remains in the guidelines

⁸⁴ Family Law Rules, Order 38, rule 8.

⁸⁵ Queensland Law Society, *Solicitors Handbook*, rule 4.09. The rule and the client/care brochure is set out in full in Appendix 1.

⁸⁶ In large firms this is the senior partner. For smaller firms it is a solicitor in another firm or an employee of the Law Society.

South Australia

46 Lawyers in South Australia are required under the Law Society's Rules,⁸⁷ to provide clients with the following information unless it is unreasonable or inappropriate in the circumstances:

- written advice, as soon as practicable, on the reasonably estimated range of costs and disbursements the client may incur and the method of calculation of those costs;
- written advice, as soon as practicable, on the basis upon which the client will be charged for services rendered and the current rates applying (unless there is already a written agreement for an agreed rate with that client);
- when reasonably requested, a review of costs and disbursements and the reasons for them; and
- prior to the settlement of litigation, an estimate of the likely net amount the client will receive, given the terms of the settlement and accounting for foreseeable payments.

New South Wales

47 In New South Wales the Legal Profession Act 1986⁸⁸ provides that a barrister or solicitor must disclose to a client, where it is reasonably practicable to do so:

- the amount of the costs, if known;
- if the amount of the costs is not known, the basis of calculating the costs;
- the billing arrangements;
- the client's rights under the Act in relation to a review of costs;
- the client's rights under the Act to receive a bill of costs.⁸⁹

48 If disclosure is not made then the client need not pay the costs of the legal services until the costs have been assessed under processes specified by the Act, nor can an action for costs against the client be maintained until the costs have been assessed. The failure to make the disclosures is not a breach of the Act but may be unsatisfactory professional conduct or professional misconduct.⁹⁰

Summary

49 There are many more rules in Australia than in New Zealand which specify the type and content of information that lawyers are required to provide clients and potential clients about legal fees and the cost revision process. Ethical rules, statutory provisions and the rules of the Family Court all require that fees information be given to clients.

⁸⁷ Law Society of South Australia, *Professional Conduct Rules*, rule 9.14.

⁸⁸ Sections 175-183.

⁸⁹ Section 175.

⁹⁰ A complaint can then be made by the consumer under Part 10 of the Act.

What comments do you have on these Australian initiatives?

PART 5 - THE AUSTRALIAN ACCESS TO JUSTICE ACTION PLAN

50 As Part 4 of the paper has shown, a considerable amount of work has been done in Australia on the issue of providing information to clients about lawyers' fees. It is interesting in this context to consider the recommendations made by AJAC⁹¹ to further improve the information Australian lawyers must provide to their clients and to consider the initiatives that could be explored in New Zealand. This section of the paper considers the recommendations made in the AJAC report (which were accepted by the previous Federal Government) and, where applicable, makes suggestions for possible practice in New Zealand.

51 One issue specifically addressed by the AJAC report was the need for consumers to be provided with information about legal services. The Committee began its discussion by stating

People who need to consult a lawyer should be able to do so with the power and confidence that derives from being fully informed about the legal services available to them and their rights as consumers of legal services. Consumers who are informed are better able to bargain with lawyers about the services they want and are better able to take advantage of competitive pressures in the legal services market.⁹²

52 The report noted in this context that a system is required that:

- encourages the flow of useful information to the community about the market for legal services, both through advertising and other means;
- informs consumers of their entitlement to negotiate about fees and other aspects of the agreement with their lawyer;
- ensures consumers receive specific information about their case including information on proposed fee arrangements, to enable them to make an informed choice when entering an agreement; and
- ensures that clients receive updated information on the progress of the matter and any changes in expected costs.

In addition ... there must be an opportunity for clients to apply to set aside unfair fee arrangements or those that allow the lawyer to impose unreasonable charges.⁹³

53 In New Zealand there is no such system in operation. Yet it appears that there is a need for such a system. AJAC noted that there were three principal methods by which consumers can become better informed about legal costs:

- the advertising of prices;
- community education; and

⁹¹ See Appendix 3.

⁹² AJAC report para 4.1.

⁹³ AJAC report para 4.4.

- mandatory disclosure of information to clients.

Advertising

54 Multi-media advertising could be used to inform potential clients about prices and the types of services available. Evidence from the United States indicates that price advertising is capable of reducing prices without reducing service quality.⁹⁴ The Australian Trade Practices Commission has noted that

it is not aware of any evidence, based on experience in other jurisdictions, that fee advertising leads lawyers to compromise on service quality. Indeed the freedom to advertise more extensively may in fact prove an incentive to improve quality - in order to attract new clients or to maintain an existing client base.⁹⁵

55 In New Zealand, lawyers' advertising is generally used to identify firms and lawyers that undertake particular types of work. The rules for advertising were relaxed considerably in 1984.⁹⁶ By 1986 advertising by lawyers was virtually unrestricted and advertising of price was permitted.⁹⁷ There is still very little advertising of the price of legal services except in the conveyancing area. For example, in the Telecom Wellington Yellow Pages there is only one advertisement as to price - Chris Jones Lawyer advertises legal fees for conveyancing property from \$295 (buy) and \$395 (sell) plus disbursements and GST. The other Yellow Page directories similarly contain little reference to prices, which is understandable given the difficulty of pricing matters before all the facts are known.

56 While lawyers' advertising has increased over the years it is not yet common to see advertisements stating that quotes or estimates for legal fees are readily given. Some, but certainly not the majority of lawyers' advertisements in the Yellow Pages, include the following statements:

"Telephone for a free quote or estimate"

"Estimates given on request"

"Free Quotes / Estimates"

57 While the removal of restrictions on advertising is a positive initiative for potential clients, it is unfortunate that few lawyers have seen this as a way to advise that quotes and estimates are available.

Should lawyers' advertisements be required to contain a statement that quotes and estimates are available?

⁹⁴ Market Force Background Paper (footnote 30) at 50. Cited in AJAC report.

⁹⁵ Trade Practices Commission - *Study of the Professions - Legal* (final report, March 1994) p 177. On page 178 the Commission recommended that the two states that maintained fee advertising restrictions, Queenstown and Tasmania, should remove them.

⁹⁶ In 1984, the Averill Committee in its report commented, having based its recommendations on the assumption that quotations or estimates for legal fees would readily be given, that "we do not favour open advertising of process or rates of charge. A lawyer is committed to providing quality service and professional competency. Advertised "special fees" would sacrifice these essential parts of a lawyer's work. We believe a liberalisation of advertising in this areas should not be undertaken until experience of the quotation system has been gained." (*Advertising the Services of Lawyers - Report to the Executive Committee and Council* p 3.

Mandatory disclosure of information

58 As previously noted, a number of Australian jurisdictions have already introduced requirements that lawyers disclose information about fees and related matters to clients at the earliest opportunity.⁹⁸ The approach outlined by AJAC could be considered in New Zealand, as women have told the Commission that they find it very difficult to obtain information about the likely costs of a matter, even when they ask directly.

Disclosure - a two stage approach

59 AJAC strongly supported the introduction of requirements in all jurisdictions for the disclosure of fee information to the maximum extent reasonably practicable. It recommended that disclosure occur in two stages -

(1) Information about the lawyer's charges and billing arrangements and about the availability of comparative information should be given at the first interview, except in cases of urgency or where it is otherwise impracticable to do so. The client should also be told in writing

- the name and status of the lawyer responsible for the conduct of the matter and the name of a person in the firm who can be approached in the event of a difficulty;
- the amount of costs for the transaction, if known;
- the right of the client to receive a detailed bill of costs and to obtain a review of costs if the cost agreement is unfair or the charges under it are unreasonable;
- about the procedures for complaints about lawyers; and
- that information about costs specific to the case will be disclosed as soon as reasonably practicable.⁹⁹

(2) As soon as possible after the instructions are taken and the costs agreement is entered into, the client should be given

- an estimate of fees likely to be required for barristers (or other lawyers);¹⁰⁰
- an estimate of the likely total costs and disbursements of the matter;

⁹⁷ See Rules 4.01-4.06 *Rules of Professional Conduct for Barristers and Solicitors* (4th Edition, 1996).

⁹⁸ This requirement has also been promoted in the United Kingdom. In *Access to Justice - Final Report* (1996) Lord Woolf states that the litigant needs information on what she or he will pay her or his solicitor and that this must go beyond quoting an hourly rate for fast-track (civil matters involving less than £10,000) proceedings. The report encouraged the use of costs agreements which set out the hourly rate actually charged, the likely level of disbursements and expert fees and which must be updated in the event of a change of circumstances (p 45).

⁹⁹ AJAC recommended that where the lawyer is aware that the client does not have sufficient facility in the English language, the lawyer should be obliged to ensure that the client receives the document in his or her own language, or has the disclosed information translated into the client's language. AJAC report para 4.31.

¹⁰⁰ In New Zealand the possibility of employing a barrister and the advantages of doing so could be canvassed.

- the financial implications of success or failure in any litigation (including an explanation of solicitor-client and party-party costs);
- in the case of litigation the likely time frame for the proceedings including reference to possible delays; and
- where appropriate, a statement of means, other than litigation, which may be available to resolve the dispute, including specific reference to alternative dispute procedures available to the client.¹⁰¹

Costs agreements

60 AJAC recommended that if charging was to be other than according to scale, an essential element in a regulatory regime should be the requirement that lawyers enter into written costs agreements with their clients at the outset.¹⁰² It also recommended that any legislation or rules should prescribe the content of the standard form agreement in readily comprehensible language and set out basic information likely to be common to all charging agreements.¹⁰³ It suggested that law societies should consider producing the standard form in a range of community languages.

Independent advice

61 AJAC proposed that clients should have the right to obtain independent advice before entering into a costs agreement, and that the source of such advice should also be disclosed to prospective clients. The sources of independent advice suggested by AJAC included: other solicitors; law societies; Ministry of Consumer Affairs; and cost revision committees.¹⁰⁴

Cooling-off periods

62 AJAC also considered whether clients should be given a "cooling off" period after entering the costs agreement in order to cancel the agreement should they change their mind. It found that the introduction of a cooling-off period would present difficulties in many cases, "because much of the legal work - perhaps all of the necessary work - will be completed before the expiration of the period".¹⁰⁵ AJAC also noted that in some cases such a requirement could also unnecessarily complicate the lawyer/client relationship. AJAC concluded that it was enough for the client to be made aware that she or he need not enter into a costs agreement without an opportunity to consider it and, if necessary, to seek independent advice, and be informed of the right to terminate the lawyer's retainer at any time (subject to the liability to pay fees properly incurred and charged).¹⁰⁶

¹⁰¹ AJAC report para 4.32.

¹⁰² AJAC report para 5.38. Currently, costs agreements are permitted in all Australian jurisdictions, but can be set aside by a court if they are found to be unfair or unreasonable.

¹⁰³ See Appendix 1 for the detail required in Queensland. The New South Wales requirements are not nearly as comprehensive.

¹⁰⁴ AJAC report paras 5.42-5.43.

¹⁰⁵ AJAC report para 4.33.

¹⁰⁶ AJAC report para 4.33.

Continuing obligation to keep clients informed

63 As part of the lawyer's continuing obligation to keep the client informed, AJAC also thought that the client should be informed as soon as practicable if circumstances necessitated the revision of the initial information. Conscious of any disclosure regime costing more than the matter itself, the AJAC noted that these more extensive disclosure arrangements should not apply in relatively minor matters, "such as where the total bill is not expected to exceed a specified amount, perhaps \$500".¹⁰⁷

Sanctions?

64 AJAC considered the compliance issues of its proposed scheme and concluded:

- A costs agreement entered into without the lawyer having disclosed the prescribed information should not be enforceable.
- Any charges made without such disclosure should not be recoverable without an independent assessment of the costs.
- A failure to comply with the disclosure requirements should be capable of constituting professional misconduct or unsatisfactory professional conduct.¹⁰⁸

The Australian Labor Government's Response

65 The Australian Labor Government of the day supported the recommendations made by AJAC and stated that it would

develop model rules for information disclosure by lawyers drawing on the best practice in the States and on the recommendations of the Access to Justice Advisory Committee. These rules may serve as a national standard for adoption by other States and, in any event, will be applied in federal matters.¹⁰⁹

The Commission is currently investigating whether these model rules have been developed.

Summary

66 In its discussion of disclosure to clients, AJAC considered that if a client receives early information she or he is:

- in a much better position to make decisions about engaging a lawyer, pursuing litigation or seeking alternative courses of action;
- better able to negotiate appropriate arrangements or to obtain quotations on fees from other lawyers;
- more likely to have anxiety alleviated, because he or she is in a better position to understand the legal process and the costs of invoking the law; and

¹⁰⁷ AJAC report para 4.34.

¹⁰⁸ AJAC report para 4.57. Most of these recommendations were based on the reforms implemented by the New South Wales Legal Profession Reform Act 1993.

¹⁰⁹ *Justice Statement* (May 1995) p 46.

- better placed to assess the charges actually levied by the lawyer and to determine whether those charges are in accordance with the arrangements made at the outset.¹¹⁰

67 AJAC also commented that while

potential clients will still be intimidated by their lawyers or will be less confident and articulate than their lawyer. ... [W]e consider maximising the information provided to consumers will result in a legal services market that is better understood by most clients and accordingly more responsive to their needs.¹¹¹

68 It seems desirable that lawyers should disclose to their clients the cost of their services. If implementation of a disclosure model were to be considered in New Zealand the following methods could be considered:

- amendment of the rules of professional conduct;
- amendment of the Law Practitioners Act;
- the issuing of practice notes, especially in the Family Court.

If implementation of mandatory disclosure rules were to occur in New Zealand, which method of implementation would be appropriate?

What comments do you have on the AJAC proposals?

Community education

69 AJAC recommended that upon the adoption of its proposed disclosure regime it would be necessary to have an education campaign to inform the community of its existence and essential features.¹¹² The Commission is aware from its consultations that women often delay seeking advice because of their fear of unknown high costs. Women may be more likely to approach a lawyer if they know that they will be informed from the outset about the basis on which fees are calculated and about the likely total costs involved in pursuing their matter. If lawyers begin to advertise more widely that quotes and estimates are available, more people will know that it is possible to obtain quotes and estimates, but they would not be better informed about their rights under a disclosure regime. The disclosure regime would then only benefit those people who actually seek the services of a lawyer and are then told of their rights under it. It seems that alongside the implementation of any disclosure regime there would need to be an initiative to inform the public about the regime, so that they could assert their rights under it.

70 There is also the question of who should be responsible for providing this information. The New Zealand Law Society may be the most appropriate body to provide information to the community, given its previous initiatives and its functions under the Law Practitioners Act, including the fact that it makes the rules governing lawyers' conduct. The involvement of a

¹¹⁰ AJAC report para 4.29.

¹¹¹ AJAC report para 4.30.

¹¹² AJAC report paras 4.58-4.59.

national body would also mean that the information available to the public could be monitored, and distribution could be more readily co-ordinated.¹¹³

If a disclosure regime is introduced, who should be responsible for informing members of the community of their rights under it?

PART 6 - WHERE TO FROM HERE?

71 Underlying the Commission's consultation with women has been the theme that women are unaware of the way lawyers charge their fees and the cost revision process. Women's experiences indicate, as do the lawyers' submissions, that lawyers are currently not a reliable source of information about fees and charging, as they do not seem to follow a consistent practice when advising clients about charges and likely costs, despite the New Zealand Law Society's encouragement that they do so. The changes in practice envisaged in the mid-eighties by the Society do not appear to have come to fruition among lawyers - to the detriment of consumers of legal services. It seems to the Commission that some action is necessary to better inform consumers about the cost of legal services. The Commission would very much like your views as to how information about lawyers' fees and charging should be made available.

¹¹³ On this issue generally see the Commission's paper *Women's Access to Legal Information* (Law Commission, MP 4, October 1996).

APPENDIX 1

QUEENSLAND - SOLICITORS' HANDBOOK

4.08 CLIENT CARE RULE

The Rule provides:

- 1 Subject to paragraph 2 of this Rule, every principal in private practice shall:
 - (a) Have in place a procedure whereby at the outset of a matter client is given the information set out below:
 - (i) The name and status within the firm of the person responsible for the day to day conduct of the matter and, if appropriate, the partner responsible for its overall supervision.
 - (ii) The name of the Solicitor or Executive in the firm, or if appropriate, of a nominated Solicitor outside the firm, or a nominated person approved by the Queensland Law Society (hereinafter called "the Society"), who should be approached if the client has any problem with the service provided, which the client has been unable to resolve with the person or person referred to in sub paragraph (i) above.
 - (iii) The basis upon which costs will be charged and if reasonably possible, an estimate of costs.
 - (iv) The complaints handling procedure within the firm.
 - (b) Both at the outset and during the course of the matter cause the client to be informed, where appropriate, as to the issue raised by the matter, the steps which are likely to be required, how long it is likely to be before it is conclude and progress from time to time.
 - (c) During the course of the matter, if unreasonable delay occurs, provide the client with an explanation of such delay including whether or not it is within the control of the person responsible for the matter to resolve such delay.
 - (d) On receiving instruction hand to the client himself or herself or cause the person handling
 - (i) The brochure published by the Society entitled "Getting the Best From Us - A Guide for our Clients" detailing the firm's "Client Care" and "Complaints Handling" procedures;
 - (ii) A brochure published by the firm containing the information set out in paragraphs 1 and 5 of the brochure published by the Society;
 - (iii) A letter published by the firm containing the information set out in paragraphs 1 and 5 of the brochure published by the Society.

- 2 (a) It shall not be necessary for a Principal to comply with subparagraphs (i), (ii) and (iv) in paragraph 1(a) above, nor with 1(d) above when performing work of a repetitive nature for a client.
- (b) It shall not be necessary for a Principal to comply with paragraph 1 above when the following criteria are met:
- (i) The client is a long standing client of the firm, or
 - (ii) It is reasonably considered unnecessary by the Principal, taking into account the knowledge and experience of the client in instructing and dealing with solicitors.
- (c) It shall not be necessary for a Principal to comply with paragraph 1 above in the following circumstances:
- (i) Any matter which the practitioner reasonably anticipates will be billed and concluded in 21 days.
 - (ii) Any matter in which the practitioner reasonably anticipates the amount of the bill, excluding outlays, will be less than \$250.00 or such sum as the Society resolves from time to time.

(Council Resolution 11 February 1993) (Effective from 5 April 1993)

Following are the "Client Care" brochures as published by the Queensland Law Society, 23 February 1993.

While it is not compulsory for a practitioner to use either of the brochures published by the Society, practitioners must ensure that clients receive a brochure or letter published by the firm containing the information set out in paragraphs 1 and 5 of either of the Society's brochures as well as complying with other regulations of the Client Care Rule.

GETTING THE BEST FROM US
A Guide for Our Clients

We want the best relationship between us in helping you with your matter and this leaflet tells you:

- the name of the person looking after your matter;
- who the supervising solicitor will be;
- when the office is open;
- information about our costs;
- how you can help us offer the best service; and
- what to do if you are concerned about the way your matter is being dealt with.

1 Your Instructions are being looked after by: who is a partner/consultant/associate/solicitor/articled clerk. If he/she is unavailable will be pleased to take a message for you. The supervising partner is

2 Our office is open from a.m. to p.m. every weekday.

3 Our service to you

Our aim is to meet the standards of service set by the Queensland Law Society and we will advise you of the basis upon which the costs will be charged and if reasonably possible an estimate of the costs (including disbursements) of the matter.

4 How you can help us:

- (a) Give us clear instructions.
- (b) Tell us if you have any important time limits.
- (c) Tell us if you have changed address.
- (d) Make sure we have understood each other correctly. Ask us if you are not sure about anything.
- (e) Deal with any important questions that arise promptly.
- (f) Keep in regular touch. Don't hesitate to ask for a progress report if you are worried about anything or do not hear from us when you expect.

5 If you are concerned about the way your matter is being handled:

- (a) Tell us if you feel you are not receiving the service you hoped for. We want to know if you are concerned about the way your matter is being handled. We can try to put it right and will look into it promptly and thoroughly;
- (b) Mention it first to the person looking after your matter;
- (c) If you are still concerned after that (or feel you are unable to discuss the problem with the person looking after your matter) please contact

..... of who will investigate it and contact you to talk about the problem. This will be at no extra cost to you.

GETTING THE BEST FROM ME
A Guide for My Clients

I want the best relationship between us in helping you with your matter and this leaflet tells you:

- the name of the person looking after your matter;
- when the office is open;
- information about our costs;
- how you can help me offer the best service; and
- what to do if you are concerned about the way your matter is being dealt with.

1 Your Instructions are being looked after by: who is a partner/consultant/associate/solicitor/articled clerk. If he/she is unavailable will be pleased to take a message for you. If I am not the person handling your instruction, I will be supervising the person who is.

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- (b) If you are still concerned after that (or feel you are unable to discuss the problem with the person looking after your matter) please contact of who will investigate it and contact you to talk about the problem. This will be at no extra cost to you.

APPENDIX 2

Access to Justice Advisory Committee recommendation**Action 4.2**

Unless the States all act swiftly to implement minimum standards of disclosure, the Commonwealth should legislate, to the extent of its constitutional power, so that, except in urgent cases or where it is otherwise impracticable, lawyers must:

- provide to prospective clients at the first interview the following information, in writing and in plain English:
 - the name and status of the lawyer responsible for the conduct of the matter;
 - the name of the person who can be approached should a client have a difficulty with the services provided;
 - a statement specifying the external avenues available for complaints concerning lawyers' conduct or fees, the client's right to a detailed bill of costs and to a review of costs if the agreement is unfair or the costs unreasonable;
 - details of the method of costing, billing intervals and billing arrangements;
 - an estimate of the total likely costs, if possible;
 - the fact that the client need not enter into the costs agreement at once but may take time to consider its terms and seek independent advice;
 - advice as to where comparative market prices information (including government and legal aid commission payment tables and any market surveys) can be obtained; and
 - advice that the lawyer must provide further information about costs and other matters specific to the client's case as soon as reasonably practicable (except for minor matters, where the total bill is less than a specified amount, say, \$500);
- as soon as is reasonably practicable after taking instructions, provide the client with the following information (except for minor matters, where the total bill is less than a specified amount, say \$500):
 - an estimate of the amount of fees that will be required for barristers or other lawyers to be engaged in the case;
 - an estimate of the likely total costs and any potential additional costs and disbursements;
 - the likely prospects of success in any litigation and the financial implications of litigation, including an explanation of the difference (if any) between party-party and solicitor-client costs;
 - an explanation of the process of taxation (or assessment);

- the likely time frame for the action and the possible delays that may be incurred; and
- any alternative means of dealing with the client's matter and an estimate of the relative costs of those alternative means;
- advise their clients at regular intervals of the progress of the matter, including the costs incurred and any changes likely to alter initial estimates of success or of costs and time required for completion; and
- in family law matters, advise the client where details of event-based costing arrangements entered into by the local legal aid commission may be obtained (if such arrangements are used by the commission). Those details should point out the factors that influence the level of legal aid commission rates, namely, that legal aid commission provide a source of further cases for lawyers and offer prompt and guaranteed payment and that some lawyers perform legal aid work at a lower fee from philanthropic motives.

Where another lawyer (such as an advocate or specialist) is retained on behalf of the client, the legislation should provide that the other lawyer must disclose to the client (directly or through the first lawyer):

- details of the method of costing, billing intervals and billing arrangements; and
- an estimate of the likely total costs and disbursements and any potential additional costs and disbursements.

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