National Council of Women of New Zealand
Te Kaunihera Wahine O Aotearoa

National Office
Level 4 Central House
26 Brandon Street
PO Box 25-498
Wellington 6146
(04) 473 7623
www.ncwnz.org.nz

28 February 2001 S01.21

Submission to the Law Commission on Preliminary Paper 43: Subsidising Litigation: A Discussion Paper

Introduction

The National Council of Women New Zealand (NCWNZ) is the co-ordinating body for women's organisations with a membership of 43 societies which are nationally organised and 34 branches in all parts of the country at which over 150 different organisations are represented.

Through its February circular, NCWNZ asked for comments on specific aspects of the discussion paper. The questions were based on some of the questions posed on pages 10-11 of the discussion paper (paragraph 16). Responses were received from 6 branches, 1 national society (Divorce Equity), and several individuals (including members of the NCWNZ Justice & Law Reform Standing Committee). The individuals included lawyers and lay people. The issues, and the responses received, are summarised below.

A few responses also commented on additional questions which the discussion paper asked but which NCWNZ did not include in its circular. Those responses are also summarised below, but are obviously less representative than the answers to the more widely circulated questions.

NCWNZ policy

There is no specific NCWNZ policy on matters discussed in this preliminary paper. In general, NCWNZ supports any moves that promote women's access to legal services.

Executive summary

Those who commented were divided on several questions posed (details below):

- what percentage would constitute an appropriate cap on a "success uplift"
- whether contingency fees would assist matrimonial-property proceedings

On the other hand, those commenting agreed (sometimes with 1 or 2 dissenters) on:

- the desirability of permitting "speculative" fees that did not include a success uplift
- the potential merit of permitting "speculative" fees that did include a success uplift
- the need to exclude "family" litigation (especially involving children, or domestic violence) from any contingency fees
- the undesirability of permitting fees that were a percentage of the amount recovered.

General comment

The responses received often seem to reflect an underlying mistrust of how the legal profession operates now, and how it would operate if contingency fees were made lawful. Any provisions to permit or limit contingency fees will need to take these concerns into account.

Comments on specific questions and issues

Which, if any, types of conditional/contingency fees should be permitted in New Zealand law? (paragraph 16(c))

- All responses were in favour of allowing a "speculative" fee that was a definite amount, and no higher than a normal fee, but charged only if the claim was successful. Comments included a view that this would enable low-income people to pursue litigation and "will also ensure that the legal profession will encourage litigation only when there is the possibility of success". (A qualifying view came from a different branch: if this were the only option permitted, there may be a "reluctance for lawyers to take any case but those which are seen as having a very high chance of success. Some people who may nevertheless have succeeded in a claim may be denied access to justice if they cannot find a lawyer willing to take on their case.")
- Most responses also supported the principle of allowing a fee that included an additional specified "success uplift". Several commented that this would reflect what already happens in practice, especially in employment law.
- Most were opposed to the principle of allowing a fee that was some fraction of the recovered amount. This reflects a concern that lawyers would discourage clients from settling matters if the lawyers had a direct interest in the amount of the settlement figure. It should perhaps be noted, however, that such a proportionate figure could in some cases mean a lower fee than under the other options (if the sum awarded to the successful litigant was comparatively small), and would ensure that a successful litigant did retain a known percentage of the proceeds. Under the other "speculative" options, a successful litigant could still face legal costs that equalled or exceeded the proceeds obtained.

Perhaps a specified percentage fee should be permitted as an option for claims below a specified dollar amount (for example, 40% for claims under $30,000, and 20% for claims between $30,000 and $100,000) where the likely costs could otherwise exceed a reasonable proportion of the proceeds of success.

Several responses (and not from lawyers) mentioned that any provisions should cover not only lawyers but also para-lawyers.

If remuneration is based on a share of the recovered amount, should that entitlement be capped? (paragraph 16(d))

This question was not specifically canvassed with the NCWNZ membership, but a few responses included comments on their own initiative. It may also be inferred from the express support for the cap on a "success uplift", that NCWNZ membership would logically also support a cap on the more controversial option of remuneration based on a share of the recovered amount.

One lawyer's response also expressly commented that a cap on this form of contingency fee would be essential. "Many clients would not be in a position to know if the percentage the lawyer is negotiating is fair or unfair. Clients tend not to shop around for the best deal when instructing solicitors and would not contact several solicitors to find out the percentage each is offering. This leads to the possibility of abuse."

Another lawyer drew the Committee's attention to a difficulty for those who do "shop around": a quoted percentage may sound attractively low compared with the percentage charged by other lawyers, yet that lower percentage may be outweighed by the lower skill level of the lawyer involved. The competence is more important than the percentage, but it is doubtful that most clients would be able to assess this. Any statutory cap will not prevent a lawyer charging a lower percentage than the statutory cap. For example, a client who pays 30% in fees, of a $100,000 outcome, still ends up better off than a client who pays 10% in fees, of a $50,000 outcome in the same dispute. In the former scenario, the client retains $70,000 of the proceeds. In the latter

scenario, the client retains only $45,000 of the proceeds. A statutory cap will not prevent this occurring.

Should a "success uplift" be capped? (paragraph 16(e).
All but one response said a statutory cap was desirable or essential. Reasons for this included: "to prevent greed"; "the principle of value for service needs to be applied"; "prevent a preferential choice of service being directed only to cases handling large amounts of money"; "without it we could be encouraging lawyers on the make and depriving genuine claimants of what is theirs rightfully".

Suggested limits ranged from 10% to 100%.

What should be provided to the client by way of disclosure? (paragraph 16(f))
This question was not specifically canvassed with the NCWNZ membership. One branch commented that many litigants were unaware of the likely costs, and should be given regular statements of account. (This raises additional issues that go beyond the scope of the discussion paper.) Certainly if there is no statutory cap, there needs to be careful and plain-language disclosure.

Should any classes of litigation be excluded from what is proposed? (paragraph 16(g))
Several responses agreed that family proceedings (especially custody, access, domestic violence), and criminal proceedings, should be excluded.

It is not clear whether, in this context, "family" would include proceedings involving estates (Family Protection Act, Law Reform (Testamentary Promises) Act). Some responses wanted contingency fees excluded from "family" proceedings but able to apply to matrimonial-property proceedings.

The key relevant principle (from the express comments received, and from NCWNZ policy, as well as statute) is the paramountcy of the welfare of the child and the consequent need for win/win resolution between parties in anything involving children. Yet a reasonable matrimonial-property settlement can also favour children, and it is in the area of matrimonial property that several commentators in previous years considered that women had most to gain from contingency litigation. As one response commented, this is because it would "encourage lawyers to work harder for their women clients", and because "unreasonable men who delay settlement in the hope that costs will increase to such a level that women will give up will be encouraged to co-operate with settlement".

On the other hand, if contingency funding is permitted, lawyers may be less likely to draw clients' attention to available legal aid entitlements, especially where the client has a strong case. This is because the lawyer will be paid more at a non-legal-aid rate, as long as the case is successful.

Other responses made no comment on this question. None stated positively that all classes of litigation should be open to contingency funding.

One response specifically suggested that for family law, including disputes about wills, parties should try mediation first.

Should there be a cooling-off provision (time for the client to reconsider)? (paragraph 16(j))
Although this was not a question specifically canvassed with the NCWNZ membership, two responses still addressed it on their own initiative, and favoured a cooling-off provision. One specifically supported 5 days.

Should agreements have to contain dispute-resolution machinery? (paragraph 16(l))
Although this was not a question specifically canvassed with the NCWNZ membership, one response favoured detailed regulations, and a mechanism to resolve complaints.

Conclusion
NCWNZ responses to this preliminary paper reflected a concern that lawyers' services should be accessible to genuine claimants unable to risk the financial consequences of failing in their claims, and that lawyers' fees for such services should be prevented from being unpredictable or excessive. Views on how to achieve this varied.

- All responses agreed that speculative fees that were no higher than "normal" fees should be allowed. Most also agreed that a speculative fee comprising a base fee plus a "success uplift" should be allowed, and that the percentage of "success uplift" should be limited by legislation.
- Most were opposed to allowing fees that comprised a percentage of the proceeds of the claim. Such fees may however have a place for claims below a specified monetary level (perhaps $100,000), to ensure that fees do not exceed a reasonable proportion of the claim proceeds.
- Most wanted to exclude contingency fees from family proceedings.

NCWNZ appreciates the opportunity to comment on this preliminary paper, and would appreciate being informed of future developments and proposals.

Barbara Glenie
National President

Cheryl Simes
Convener, Justice & Law Reform Standing Committee