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Cabinet Legislation Committee

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Chair
Cabinet Legislation Committee

**GOVERNMENT RESPONSE TO THE LAW COMMISSION REPORT
“DELIVERING JUSTICE FOR ALL”.**

PROPOSAL

- 1 This paper seeks approval for the Government’s response (“the Response”) to the Law Commission’s report NZLC 85 “*Delivering Justice for All*”, which was tabled in the House on 16 March 2004. The recommendations made by the Commission are included in Appendix A. A single page summary of the Response is attached in Appendix B.

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Tenancy and Disputes Tribunals

Recommendation

46 The Law Commission reported general satisfaction with the Residential Tenancy and Disputes Tribunals but recommended that Disputes Tribunals hearings be recorded. It also recommends that proceedings in the Disputes Tribunal should generally be open to the public.

Response

47 The Response indicates the Government agrees that proceedings in the Disputes Tribunal should be open to the public and that those proceedings should be recorded and directs the Ministry of Justice to report back on the operational implications and costs involved. It also indicates that consideration will be given to whether there is a need for a wider review of the Disputes Tribunal.

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ISSUE/AREA	SUMMARY OF LAW COMMISSION RECOMMENDATIONS	WORK PROPOSED (NOT ON WORK PROGRAMME)	WORK CURRENTLY UNDERWAY & WORK PROPOSED (ON WORK PROGRAMME)	COMMENT & AREAS WHERE RECOMMENDATIONS NOT SUPPORTED
out of scope				
Disputes Tribunal	Disputes Tribunal hearings should be recorded. Proceedings in the Disputes Tribunal should be open to the public	• Report on operational impacts and costs involved with opening the Disputes Tribunal and recording hearings Possible review of Disputes Tribunal		

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GOVERNMENT RESPONSE TO

LAW COMMISSION REPORT

ON

REPORT 85: DELIVERING JUSTICE FOR ALL

Presented to the House of Representatives

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**GOVERNMENT RESPONSE TO
LAW COMMISSION REPORT ON DELIVERING JUSTICE FOR ALL**

INTRODUCTION

1. The Government has carefully considered the Law Commission's report NZLC 85 "*Delivering Justice for All*" which provides an independent, comprehensive and detailed look at the structure, jurisdiction and processes of New Zealand's system of courts and tribunals. The Government thanks the Commission for its report and acknowledges its extensive consideration of the issues examined. The Government responds to the report in accordance with Cabinet Office circular CO (O1) 13.

BACKGROUND

2. The Law Commission report is in response to a government reference, made in May 2001, for an examination of all state-based adjudicative bodies in New Zealand (apart from the Court of Appeal and the Supreme Court). In particular, the Commission was asked to consider the following:
 - (a) The volume and nature of work requiring attention;
 - (b) The appropriate form, nature, and operation of the Courts and Tribunals required to meet all current needs and expectations;
 - (c) The original jurisdiction of the District and High Courts and associated Tribunals;
 - (d) The appellate relationship between the District and High Courts, including the form of the appellate regime for appeals from specialist Courts and tribunals, particularly the Family Court and the Environment Court;
 - (e) The interrelationship of the Employment Court, the Māori Land Court and the Māori Appellate Court, with the District Court and the High Court;
 - (f) The relationship between the District Court and the High Court and administrative tribunals and other quasi-judicial bodies with regard to both appeal and review;
 - (g) The role and function of Masters and Registrars within the total Court structure;
 - (h) The overall structure of how less serious criminal and civil matters may be dealt with in the District Courts; and
 - (i) The rights of appeal from the District Court and the High Court to whatever appellate structure exists above them.
3. Access to the law, and to the courts and tribunals where it is upheld, results from the satisfactory balance of contributing factors which the Commission also considered during its review. These factors include legal information and advice, representation, cost, acknowledgement of diversity, the availability of dispute resolution processes that take place outside of the court system, and the principles of open justice.
4. The report represents a three-stage review of New Zealand's courts and tribunals. The Commission released two earlier discussion papers "*Striking the Balance*" in April 2002 and "*Seeking Solutions*" in December 2002 before releasing its final report "*Delivering Justice for All*".

LAW COMMISSION REPORT

5. The Commission groups its recommendations into the following main areas:
 - Making legal information and initial advice more available;
 - Frameworks for cases dealt with outside the court by infringements, police diversion, restorative justice and mediation;
 - Reorganising 'first instance' courts into a primary courts structure, with specifically warranted judges;
 - Creating, as a primary court, the Community Court to deal with the work that currently represents the less serious and highest volume of the District Courts' caseload;
 - Reinforcing the constitutional role of the High Court;
 - The creation of uniform appeal rights;
 - The creation of an umbrella framework for the operation and administration of tribunals; and
 - Open justice.
6. The Commission's vision is one where courts are responsive and accountable to court users, and are efficient, fair and accessible. The primary themes raised by the Commission include:
 - That courts are not accessible to most New Zealanders;
 - That courts fail to deliver justice for all; and
 - That courts do not meet the needs of the majority of the community.
7. In addition, the Commission identifies that people find that courts are costly, slow, complex, are not transparent, do not allow meaningful participation, and lack proportionality between the problem, process and possible outcome.

SUMMARY OF GOVERNMENT RESPONSE

8. Government notes that, while the Law Commission notes that in general we have a justice system we can be proud of, there are some real concerns about the operation and administration of the court system.
9. The Government accepts improvements are necessary to ensure that people feel their cases are dealt with quickly and efficiently, that they have had a chance to argue their point, and that they achieve resolution.
10. The Government has carefully analysed the Commission's recommendations to ensure that any changes maintain New Zealanders' confidence in the court system, while improving access for all.

11. The Government shares the vision articulated by the Commission and the justice sector more broadly. This is reflected in the justice sector outcomes agreed in 2003/2004. These outcomes are:
- *Safer communities*
Being communities in which there is reduced crime and in which safety and well-being is enhanced through partnerships; and
 - *A fairer, more credible and more effective justice system*
Being a system in which people's interactions are underpinned by the rule of law and justice services are more equitable, credible and accessible.
12. While sharing the same vision as the Commission, the Government agrees with some, and disagrees with other, of the recommendations on how best to achieve that vision. The Law Commission recommends structural change to achieve part of its vision. However, before making decisions about structural changes the Government intends to focus on systemic initiatives to improve the effectiveness and efficiency of New Zealand's Court system.
13. The Ministry of Justice is currently undertaking a review of its baseline funding. The purpose of the review is to ensure the Ministry has an adequate level of appropriation to enable a robust, sustainable service and strong foundations (including training, skills and infrastructure) for future development. The review has been initiated for a number of reasons, including:
- The merger of the Ministry and the Department for Courts on 1 October 2003 is driving new expectations of the organisation in terms of the quality of overall service delivery;
 - The baseline funding of the former Department for Courts has not been reviewed since the Department's inception in 1995. Since this time, the volume, nature and complexity of cases coming into the Court system have changed considerably placing pressure on the courts system; and
 - There are many new services and initiatives either in progress or anticipated for the Ministry, placing additional pressure on the infrastructure of the organisation and its overall service delivery capability.
14. Phase one of the review is an examination of the cost of delivering the Ministry's services to the standards expected, the continuing appropriateness of services being delivered and any issues associated with those services. It is expected to be finalised in December this year. A second phase of the work is planned for January to June 2005 to examine the service delivery and operational performance aspects of the Special Jurisdictions Group.
15. In order to ensure that focus is maintained on the issues identified by the Law Commission, and the outcomes sought, the Government has directed officials to invite the Law Commission to be represented on the group overseeing the review of baseline funding
16. The Government has already made substantial improvements in the justice sector to achieve the outcomes identified above. These improvements include the recent merger of the Ministry of Justice and the Department for Courts to create a new

Ministry of Justice. The new Ministry is placing a strong emphasis on service delivery improvement and capability building in the immediate term in order to achieve the outcomes identified above, and to develop its strategic vision for the future.

17. There are a number of projects and initiatives already underway, which are intended to address the issues raised by the Commission. These projects and initiatives include:

- The Summary Courts Strategy Group and initiatives that this group is overseeing including the List Court Pilot in the Wellington District Court;
- The Court referred Restorative Justice Pilot;
- The Public Defence Service piloted by the Legal Services Agency;
- The Legal Services Agency Community Legal Services Strategy;
- The Legal Services Agency Law-Related Education and Legal Information Strategy;
- The Justice Sector Information Strategy and Communications Strategy which aim to increase knowledge of, and access to, justice sector information through a variety of channels;
- Changes in the Care of Children Bill relating to restrictions on publication in Family cases;
- Various training, recruitment and support initiatives to improve capability within courts; and
- A comprehensive review of the infringement scheme (by the Ministry of Justice in conjunction with the Law Commission), encompassing all aspects from governance of the infringement system and of individual infringement regimes.

18. Other areas in which the Government is currently taking action that is consistent with the Law Commission's recommendations include:

- Improving legal information and advice;
- Guidelines and frameworks for specific alternative criminal justice schemes;
- Administrative changes relating to the Employment Court and Coroners Court; and
- Simplifying criminal processes.

19. The Government intends to take further action in response to a number of the Law Commission's recommendations and concerns including:

- Reviewing appeal pathways;
- Further improving court processes; and
- Further improving legal information and advice through new initiatives such as a 'meet and greet' service at courthouses, and an 0800 telephone service.

20. The Law Commission has made a large number of recommendations that the Government considers will require further detailed work before deciding how to progress. These recommendations relate particularly to the structural changes proposed for the courts system, and recommendations regarding mediation. The Government has directed officials to undertake additional work to fully analyse these

recommendations. The work will require significant consultation in developing and evaluating options.

21. The Government has carefully considered the recommendations relating to:

- The proposal for one state agency to co-ordinate initial legal advice;
- State-managed mediation;
- Community Consultation Groups;
- Raising the threshold for jury trials; and
- Name suppression in criminal cases.

The Government has decided not to progress these recommendations.

22. Government will monitor and oversee the work outlined above to ensure that a focus is maintained on efficiency and effectiveness improvements in New Zealand's court system.

LAW COMMISSION REPORT AND GOVERNMENT RESPONSE

Recommendations: Legal Information

Law Commission recommendations generally

23. The Law Commission makes a number of recommendations aimed at helping people navigate and understand the court system and the law it maintains. The Commission acknowledges the valuable roles played by existing providers of legal information services but considers that more coordination and integration of these services is needed to assist people to participate meaningfully in our justice system.
24. The Law Commission recommends a state agency should have lead responsibility for developing an integrated and coordinated legal information strategy to assist people dealing with the court system. The Commission recommends the agency should have responsibility for:
- Advising Government in relation to an integrated legal information strategy;
 - Maintaining accessible databases of up to date legal information, where and how to obtain this information, ensuring it is available in community outlets and promoting public awareness of the existence of the information;
 - Liaising with other government agencies, the law profession, information providers and community groups to identify where and how deficits in the provision of information occur;
 - Actively assisting other agencies and organisations with the provision of new information by identifying potential funding sources and providers, and advising on effective communication methods; and
 - Leading new initiatives to enhance the delivery of useful legal information.

Response

Legal Information

25. The Government considers that access to information about the law, courts and court processes is fundamental. The Government considers the recommendations in this

area will enhance initiatives already underway across government to achieve a fairer, more credible and more effective justice system.

26. A variety of organisations currently contribute to the overall provision of legal information including the Legal Services Agency (LSA), Community Law Centres (CLCs), Ministry of Justice, New Zealand Law Society, Citizens' Advice Bureaux, other community organisations (such as Women's Refuge, Victim Support, Salvation Army, and voluntary workers in the court system), and Government Agencies. The New Zealand Law Society is responsible for providing legal information to its members and also produces information for the public.

Work currently underway – Justice Sector Information Strategy and Communications Strategy

27. The Ministry of Justice has led the development of the 2003-2006 Justice Sector Information Strategy, which aims to ensure that the justice sector continuously improves the availability, accuracy, timeliness and delivery of integrated justice information to inform policy development, research and public debate.
28. A communications strategy for the Justice Sector for 2003-2006 has been developed. The Communications Strategy supports the sector's agreed focus toward delivering safer communities and a fairer, more credible and more effective justice system. The Communications Strategy enables sector agencies to promote greater understanding of the wider justice sector. One of the goals of the Communications Strategy is for justice information to be available through a choice of channels to allow improved access to information for the public.

Work currently underway – access to 'civics' information

29. The Ministry of Justice, in consultation with the Ministry of Education, is working with relevant agencies to develop a website that provides access to basic information on the Courts system. Information will be provided in a manner to enable it to be incorporated into the schools' social studies curriculum (years 9 – 11), with guides for teachers along with resources for children. It will be able to be accessed by members of the public, and is to be designed to also be attractive to them. The site is expected to be available for the 2005 school year. Over time, the site will contribute to having a more aware, better informed population.

Work currently underway – LSA Information Strategy

30. In January 2002 the Legal Services Agency (LSA) approved a Law-Related Education and Legal Information Strategy. This Strategy involves developing links with other sectors, organisations, agencies and professions to identify the most appropriate ways to deliver legal information and education. As part of implementing this Strategy the LSA produces information and education resources (itself or under contract) and facilitates access to resources produced by others.
31. The LSA's new web service LawAccess is one key initiative under the Strategy. LawAccess is a website of law-related information and resources with 146 government and non-government organisations contributing to the database so far. Further developments are planned for the service over the next year including looking at the feasibility of developing a 'helpline' section on the website. The LSA

has also started producing education kits to support the delivery of legal information by community educators.

Work to be undertaken – one agency to be responsible for development of a legal information strategy

32. The Government commits to having one agency with lead responsibility for coordinating the delivery of legal information in New Zealand. The Government agrees with the Commission that there will be considerable benefits in a more coordinated approach, including:
 - Ensuring there are no overlaps or gaps;
 - That information is accurate, relevant and accessible;
 - That the quality and content of information is monitored; and
 - That there is greater accountability for ensuring all sectors of society are catered for.
33. The Government considers the agency most appropriate to take on this leadership role is the Ministry of Justice, in consultation with the State Services Commission. There are a number of reasons for this. The Ministry is recognised as the lead agency in the Justice Sector. As the agency responsible for administering the court system the Ministry is also the primary source of court-related information. The Ministry plays a pivotal role in the Justice Sector Information Strategy and also works very closely with a number of law related organisations including those with responsibility for the provision of legal information in New Zealand.
34. The Government has directed the Ministry of Justice to report back by December 2005 with options for the development of a Legal Information Strategy and the associated resourcing and cost implications.
35. The Ministry will work closely with current providers of information such as the LSA, and develop links with other sectors, organisations, agencies and professions to identify new ways of delivering legal information. Development of this new strategy will take account of, and build upon, current justice sector initiatives, including the Justice Sector Information Strategy and Communications Strategy, and work currently being undertaken by the LSA.
36. The Government notes the Commission's recommendations for the responsibilities of the agency and considers those responsibilities provide a useful and desirable starting point for the lead agency. However the Ministry will need to be responsive and flexible in the way that it develops and leads the proposed new strategy.

Production of Information by State Agencies

Law Commission recommendation

37. The Commission recommends that where legislation is passed creating public rights and duties, state agencies should produce, distribute, review and update information that will assist people to understand the new law.

Response

Comment – information produced by agencies

38. To participate meaningfully, people need information to understand their rights and responsibilities. Government agencies already produce information about complying with new laws and the Government considers the current approach to be adequate. In particular, agencies are required to report on any publicity required when legislation is proposed.
39. In addition, policy proposals submitted to Cabinet which require a Regulatory Impact Statement (which examines potential impacts of government action), and which have compliance cost implications for business, must also include a Business Compliance Cost Statement (BCCS). The BCCS must disclose the steps taken to minimise compliance costs for business. An important mechanism for minimising costs is the effective communication of information to business about the new or changed regulatory requirements.
40. As outlined above the Ministry of Justice will report to Government with options for the development of a legal information strategy next year. The issue of how information is updated and disseminated will form part of the Ministry's overall consideration in improving the delivery of legal information in New Zealand.

Information Initiatives

Law Commission recommendation

41. The Commission proposes the Ministry of Justice take the lead in providing information about court processes within courthouses and pilot the use of an information desk in courthouses where staff can answer general questions about court processes, help people find their way, provide access to general legal information, and suggest where people can obtain initial legal advice.

Response

42. The Government agrees that helping people understand and access the court system is a key priority in order to contribute to a *fairer, more credible and more effective justice system*.

Proposed new initiative – 'Meet and Greet' information service

43. The Government is committed to having courthouses where people are assisted and given information and directions to help them while at court.
44. The Government has directed the Ministry of Justice to develop a proposal to phase in the implementation of a 'meet and greet' information service providing a stationary information desk and mobile information officer in the 2005/2006 financial year. The case for any additional funding required will be made through normal budget processes.

45. It is envisaged that this initiative would initially operate in the larger District Courts. It would form part of the Ministry's proposed Legal Information Strategy referred to above.
46. While the details of the actual services to be provided will be developed by the Ministry, it is envisaged that the types of services may include information desks staffed by facilitators who assist and support users, and contain step-by-step, do-it-yourself guides or videos of court proceedings. The function of a mobile information officer may be to:
- Perform the "meet and greet" role;
 - Direct court users to the right place/ people/ services;
 - Distribute forms and assist in completion; and
 - Be an accessible point of contact for individual court users.

Proposed new initiative – information about court processes

47. The Ministry of Justice is already the primary source of court-related information, publishing information booklets and maintaining websites about court processes. The Government notes the Commission's concerns that some court related information is generic, assumes a greater understanding on the part of court users than is sometimes the case, and varies depending on the court or type of process involved.
48. The Government also notes that the LSA publishes "*Appearing in the District Court*" as well as a range of information and education resources on the legal assistance schemes it administers. The content of these latter resources includes information on aspects of court processes.
49. The Government is committed to ensuring information about court processes is relevant, accurate and accessible. It has directed the Ministry of Justice to scope a project to review all of its court-related material, with a view to addressing the concerns raised by the Commission in the 2005/2006 financial year. The case for any additional funding required will be made through normal budget processes.
50. It is envisaged that the Ministry of Justice will develop a Publications Strategy as part of the Ministry's proposed Legal Information Strategy referred to above. This will link to the Justice Sector Information Strategy, the Justice Sector Communications Strategy, and to the Ministry's Communications Strategy, to provide a framework for the audit and review of court related material.

Proposed new initiative - telephone service

51. The Government has considered a variety of ways to improve access to information as part of responding to the Law Commission's concerns and has directed the Ministry of Justice to design and begin a phased implementation of a telephone information service in the 2005/2006 financial year. The scope of the service will be explored as part of the Ministry of Justice's wider Legal Information Strategy, in consultation with the LSA. The case for any additional funding required will be made through normal budget processes.

Work currently underway – Criminal List Pilot

52. The Ministry of Justice is currently piloting an alternative approach to the operation of criminal lists which provides a clear example of assisting people as they enter the courthouse. Further information on this pilot is set out in paragraph 226.

Work currently underway – Customer Service Officers

53. As part of the modernisation of courts, Customer Service Officers were introduced into District Courts. Customer Service Officers are experienced and knowledgeable staff who provide front line customer services to parties to proceedings and members of the public in relation to court processes generally, as well as to specific cases. One significant benefit of redefining this role is that matters can better be dealt with in a single transaction.
54. Customer Service Officers were introduced at approximately the same time as the Law Commission undertook its earlier consultation. The benefits of this role are still being borne out. However, it is anticipated that this role will, in addition to the new initiatives above, address the concerns raised by the Law Commission.

Recommendations: Representation

Law Commission recommendations generally

55. The Law Commission makes a number of recommendations aimed at increasing access to legal representation in court for all New Zealanders, expanding legal advice for those who are unrepresented and improving assistance to those who wish to self-represent. The Commission's recommendations focus primarily on improvements to existing schemes and services. The Government notes that the Commission is particularly concerned with the needs of those who are unrepresented and self-represented and that the international trend of increasing unrepresented litigants may be similar in New Zealand.¹ While there is no specific recommendation to undertake research into unrepresented litigants, the Commission identifies a lack of such research in New Zealand.

Response

Comment – representation

56. The Government considers that access to representation is fundamental to upholding the principles of natural justice and to contribute to its outcome of a fairer, more credible and more effective justice system. The Government considers that lack of representation has a number of disadvantages, including increased vulnerability of the person in court, and the potential for possible conviction, or loss of employment or property. Lack of representation and self-representation also leads to resource and time implications for the courts. Proceedings may be prolonged, requiring judicial and staff time as well as increased costs for parties. It is also possible that a person's limited understanding of the law and procedure could result in judges and juries not being provided with all relevant information to enable the delivery of a just decision.

¹ In their submission to *Striking the Balance* Family Court Judges noted an increasing trend for parties in the Family Court to be unrepresented.

57. The Government considers that the combination of proposed new initiatives, work currently underway as well as longer term work as set out below will improve the availability and quality of representation.

Unrepresented Litigants

Future work- research into unrepresented litigants

58. A project on unrepresented litigants in the Family and Criminal jurisdictions is part of the Ministry of Justice's current research and evaluation work programme. The objectives of the study are to:
- Identify the key characteristics of unrepresented litigants;
 - Investigate the reasons why litigants are unrepresented;
 - Identify the extent to which information and resources (such as community law centres) are accessed by unrepresented litigants; and
 - Identify the effect that lack of representation has on unrepresented litigants, the court process, the judiciary and lawyers.
59. It is intended that this project will begin later this year. This work will provide information that will greatly improve understanding about the needs of court users and the Government looks forward to the results of this timely research to help inform future policy decisions and resource prioritisation. The Government agrees with the Commission that the need to undertake research into unrepresented litigants should not delay other steps being taken that will improve current services and schemes.

Initial Criminal Legal Services

Law Commission recommendations

60. The Commission makes two key recommendations about the provision of initial criminal legal services:
- A requirement for the Police to inform people in their custody of the existence of the Police Detention Legal Assistance Scheme (PDLA); and
 - Reforming the Duty Solicitor Scheme (or a new scheme developed) to ensure minimum standards are achieved for those otherwise unrepresented including:
 - Advice (by appointment) before the day the case is first called in court;
 - Representation for the first call of the case;
 - Advice and continuity of representation for any further matters arising during the administrative phase of the case including disclosure, remand, plea, status hearing and (if relevant) jury trial election and bail; and
 - Continuity of representation where a guilty plea is entered.

Comment

61. The Government is committed to ensuring that legal advice and assistance is available at an early stage for those charged with criminal offences as this is fundamental to ensuring access to justice.

62. The Government notes that the Police Detention Legal Assistance Scheme (PDLAS) provides free access to a lawyer for any unrepresented person who is detained or interviewed by the Police and who wants to consult a lawyer. Generally, people are informed of the existence of this scheme only when they indicate to Police that they want a lawyer but cannot afford one.
63. The Government also notes that the Duty Solicitor Scheme provides some initial assistance, advice and representation to unrepresented defendants in District Court criminal proceedings. The Scheme, administered by the LSA under provisions of the Legal Services Act 2000, involves approximately 900 lawyers across the country. Duty Solicitors can advise and represent defendants on matters such as plea, remand, the right to elect trial by jury (if relevant), legal aid eligibility, bail and sentencing. They can also help defendants arrange for private legal representation or apply for legal aid. The scheme is available to all defendants, regardless of means. For a significant number of defendants the duty solicitor is the only form of legal advice and representation available.

Work currently underway – public defence service pilot

64. The LSA has established a pilot of an in-house legal service providing criminal legal aid services at the Auckland and Manukau District Courts. The five-year pilot began on 1 May 2004. The aim of the pilot is to improve the quality of representation by contributing to a mixed service delivery of public and private practitioners. The service will take up to one third of the expected total criminal legal aid caseload for the two courts. The objectives of the pilot are to:
- Provide high quality, consistent, independent, value for money services to legally-aided persons;
 - Improve system flexibility and provide opportunities to test different approaches to meeting cultural and other needs of clients;
 - Collect benchmarking information to improve the LSA's understanding of issues facing private practice lawyers when providing legal aid services to the public;
 - Provide opportunities to test new and innovative approaches to the management of legal services, and to encourage the development of areas of expertise.

Work to be undertaken – LSA evaluation of initial criminal legal services

65. The Government agrees that the initial stage in a criminal investigation can have profound effects on what happens later in the process and is committed to ensuring that people receive adequate assistance during this time.
66. The LSA plans to review initial criminal legal services as part of its work programme. This will include an evaluation of the existing Duty Solicitor Scheme as well as the PDLA Scheme and will be initiated this year. As the Agency with responsibility for administering the Duty Solicitor Scheme, the Government considers it appropriate that the LSA undertake the evaluation. The Review provides an appropriate opportunity for the LSA to consider some of the concerns raised by the Commission.
67. The Government has also directed the Ministry of Justice to form and lead a working group with the New Zealand Police and the LSA to respond to the particular

recommendation concerning people in custody being advised of the existence of the PDLA Scheme. This work will begin once the LSA has identified any changes needed to the operational aspects of the Scheme.

Community Law Centres (Civil Legal Services)

Law Commission recommendation

68. The Commission recommends improvements for otherwise unrepresented civil litigants by enabling Community Law Centre (CLC) lawyers to represent their clients, without demonstration of unmet legal needs providing there is no double dipping of state funding. The Commission suggests this will improve continuity of representation.

Comment

69. The Government does not agree with this recommendation. Requiring CLC lawyers to represent their clients without demonstration of unmet legal needs is inconsistent with the function of CLC's² and the legal aid system more broadly where funding is targeted towards meeting unmet legal need.
70. Should CLCs offer legal representation through the Legal Aid Scheme without demonstrating unmet legal need within their communities, there is the potential for the relationship between the CLCs and the legal community, on which CLCs often rely for volunteers and other support, to deteriorate. This could have an adverse impact on the other types of services offered by CLCs. It may also be perceived as encouragement to prioritise within the broad range of services that CLCs currently provide, in favour of representative services.
71. The Government also considers that this recommendation will not address the Law Commission's concerns about continuity of representation. CLCs use a mix of employed and voluntary lawyers, community workers, education workers and law students. The lawyer providing the initial legal advice may not necessarily be the best person to continue acting, as their area of expertise may be different from the issue at hand. Continuity for continuity's sake will not necessarily ensure people have the best possible advice. The Government considers that improved consistency of representation throughout a case is not sufficient justification for moving from the policy of funding those initiatives that target unmet legal need.
72. The Government considers that it would be counter-productive to broaden the scope of legal representation services offered by CLCs without a full consideration of the nature of CLCs and the services offered to each community. The LSA is working to establish more CLCs and is also working more broadly on legal needs analyses. In addition, the Ministry of Justice will be reviewing CLC funding arrangements in 2004-2005.

² The Legal Services Act defines CLCs as a body whose primary function is, or includes, the provision of community legal services to communities with unmet legal need.

Lay Representation

Law Commission recommendation

73. The Commission sees benefits in the use of lay assistance and recommends that legislation should establish a presumptive right, within limits controlled by the presiding Judge, for unrepresented litigants in court to have assistance from:
- a) A supporter, such as a kaumatua or elder in the litigant's community, who could address the court on behalf of the litigant at sentencing in summary criminal cases, or within limits to be decided by the judge in other proceedings; or
 - b) A 'friend', who may sit beside the litigant in court, take notes, make suggestions, give advice to the litigant, and propose questions and submissions which the litigant may ask or make (a McKenzie Friend).
74. The Commission also suggests that where lay advocates are permitted in specialist tribunals, the tribunal should be able to stipulate the level of knowledge or experience that is a prerequisite to a general right of audience.

Comment – lay assistance

75. The Government does not agree with these recommendations. Generally only legally qualified advocates are currently allowed to represent a person in court. However, Judges do have discretion to allow lay people to support unrepresented litigants and in some cases to appear and speak if considered appropriate by the Judge. The Court of Appeal has said this discretion should be exercised in emergency situations or cases where counsel assistance is not required by the Court or where it would be unduly burdensome to insist on counsel³.
76. Currently any person may attend as a friend of a litigant with leave of the court, take notes, quietly make suggestions and give advice to the litigant. This is known as a *McKenzie* friend.⁴ Assistance is also permitted through some legislation. In respect of applications under the Guardianship Act 1968, section 27(1) provides that the court can permit any person to be present. Section 83(2) of the Domestic Violence Act 1995 permits an applicant for a protection order to nominate a reasonable number of persons to attend the proceedings to give support.
77. The Government does not agree with the Law Commission's recommendation on lay representation. Lay representatives are not regulated or subject to formal accountabilities. In the absence of professional standards, ethical obligations and disciplinary procedures, unrepresented litigants can be exposed to the risk of malpractice. Proceedings can also become protracted and complicated by people who do not have the same overriding duty to the Court as lawyers have. The Government considers that lay representation should be limited to difficult cases where the failure to do so could compromise the judge's ability to control the hearing.
78. The Government considers that the common law entitlement to a *McKenzie* friend is sufficient to provide the type of support contemplated by the Law Commission in the recommendation referred to in paragraph 73b)

³ *Re GJ Mannix Ltd* [1984] 1 NZLR 309 at 314

⁴ *McKenzie v McKenzie* [1970] 3 ALL 1034

79. The Government may consider in the future the possibility of legislating for the common law entitlements currently available.

Comment – representation in specialist tribunals

80. The Government notes the concerns the Law Commission has about lay advocates in specialist tribunals including that they usually act on a contingency basis which can expose clients to high costs and the pursual rather than settlement of cases.
81. However, the Government does not agree with the recommendation that the tribunal can stipulate the level of knowledge or experience required of lay advocates. It is preferable for the legislation establishing each tribunal to set out these matters. It is commonly recognised that some lay people have the appropriate skills to represent people before specialist tribunals. Examples include employer or trade union advocates before the Employment Relations Authority, or people working with migrants and refugees before certain immigration tribunals.
82. Legislation establishing some tribunals explicitly states who may appear before a tribunal, while other legislation specifically excludes certain representation, for example, legal representation before the Disputes Tribunal.
83. Particular occupational groups in industry regulation may be required to be licensed or meet particular standards so as to be permitted to practise in certain areas.
84. Given the range of skills and experience of tribunal members allowing each tribunal to stipulate the level of knowledge and experience required by lay advocates may result in considerable variation in approach. This would be inconsistent with other recommendations to provide more consistency to the operation of tribunals.

Recommendations: Initial Legal Advice

Law Commission recommendation

85. The Commission recommends that a state agency should have the lead responsibility to create and maintain a national network for the provision of initial legal advice. The Commission suggests the responsibilities of that agency should include:
- Advising Government in relation to an integrated initial legal advice network, including specific initiatives that require new funding;
 - Ensuring there are options for people to obtain initial legal advice face to face or by some other method where questions can be asked and answers given, such as telephone or internet;
 - Ensuring state-funded legal advisers are qualified and experienced in the particular legal areas where they give advice, or properly supervised by senior lawyers with those attributes;
 - Establishing reasonable times and expectations for initial interviews with the objective of clarifying the available options and next step for the client; and
 - Working with the legal profession to explore possibilities for offering 'unbundled' legal services.

Comment

86. The Government is committed to ensuring that people can participate meaningfully in the court process by providing early legal advice to assist people to understand their rights, responsibilities, options, what representation they need and what happens in court. Early legal advice also contributes to the wider goal of a fairer, more credible and more effective justice sector.
87. The state already provides access to initial legal advice through a variety of services. Many of these services are under review at present, or future changes are planned, and this work is likely to improve the availability of initial advice. The Government considers that the problems identified by the Law Commission can be solved by people being made more aware of, and being directed to, these services. As set out earlier in this response, the Ministry of Justice will take lead responsibility for developing an information strategy which raises awareness of initial legal advice services. In addition, the LSA is undertaking work to quantify and cost the gaps in community legal services as part of its community legal services strategy. This work will also inform advice to the Government on funding options for CLC's referred to in paragraph 91.
88. As the Law Commission points out, the assertion that the state has responsibility to ensure access to the law is qualified. It must be balanced against the Government's duty to use public funds responsibly and against the recognition that disputing parties bear some responsibility in resolving their disputes.

Initial Legal Advice Services

Comment – overview of services in New Zealand

89. The main schemes that offer initial legal advice are administered or funded by the LSA. Community Law Centres provide legal advice to communities with unmet legal needs. The Duty Solicitor scheme provides assistance and advice for unrepresented defendants in District Court criminal proceedings and is available to all, regardless of means. The Police Detention Legal Assistance Scheme provides free access to a lawyer for any unrepresented person who is detained or interviewed by the Police and who wants to consult a lawyer. In addition to these schemes, the Citizens Advice Bureaux offers free initial legal advice.
90. The LSA also administers the Legal Aid Scheme through which eligible people can access legal advice and representation funded by the LSA.

Work currently underway – funding for Community Law Centres

91. CLCs are funded from income received by the LSA from the New Zealand Law Society's Special Fund. As a result of a forecasted drop in funding generated by the fund, a transitional funding plan was put in place from 2002/03. The Ministry of Justice will report to Government by October 2005 on funding arrangements for CLCs. Following this work the Government will be in a position to determine whether further work on the scope of community legal services provided is required.

Work currently underway – accessibility of Community Law Centres

92. The Government notes the Commission's concerns that the geographical distribution of CLCs means they are not accessible to all New Zealanders. The LSA has a goal to ensure maximum coverage of services throughout the country. The LSA is working with community representatives to cover off two major gaps: West Auckland and Bay of Plenty. In addition the LSA has a number of initiatives that aim to reach those communities not directly serviced by a CLC. For example in response to an identified need for legal services on the West Coast (where there is no CLC) the LSA has led a project to put in place a sustainable structure for the delivery of legal information and law related education. To support the availability of legal information on the coast the Nelson and Christchurch CLCs deliver programmes of law related education seminars. The LSA's community legal services strategy aims to address these issues through better assessment of unmet legal needs, reducing barriers to access for existing services and establishing funding needed for possible new service development.

Summary

93. Work is already underway across government to improve access to initial legal advice. Many of the services that contribute to the provision of initial legal advice are under review or there are plans for their review. Until the outcome of these reviews is known, the Government does not consider it appropriate for one agency to be responsible for the provision of initial legal advice.

Recommendations: Cost

Law Commission recommendations generally

94. The Law Commission makes a number of recommendations to improve the way the legal services market works by making sure litigants have as much information about cost and options as possible to help them make informed decisions. These recommendations focus on the responsibility of the Government and the legal profession to provide information about all relevant legal and court costs as well as encouraging Government's wider commitment to accessibility, simplification and minimal compliance costs for the public of new legislation and court practices.

Response

Comment

95. The Government is committed to ensuring that court proceedings do not unnecessarily increase the expense to litigants and prohibit access to justice. There will always be costs associated with going to court and the provision of legal services. Like any other professional business, legal services entail many costs. The Government considers that businesses, other organisations and private individuals should not incur more compliance costs arising from Government decisions than necessary.

Compliance Costs

Law Commission recommendations

96. The Commission recommends that accessibility and simplification in order to reduce costs to the public should be recognised as a priority in all law reform initiatives, including changes to court practice and new legislation. It also recommends that a report on the direct and indirect compliance costs to the public of new legislation should be required by Government as a matter of course.

Comment – impact on community

97. The Government is committed to ensuring that accessibility and simplification to reduce costs to the public are recognised in law reform initiatives, including changes to court practices and new legislation. The Government considers these factors are already adequately addressed as part of the policy development and decision-making processes as set out below.
98. Policy proposals submitted to Cabinet which result in government bills or statutory regulations must be accompanied by a Regulatory Impact Statement (RIS). A RIS examines potential impacts arising from government action and communicates that information to decision-makers and helps provide the government with an assurance that new or amended regulatory proposals are analysed as to the impact on community welfare.
99. Policy proposals submitted to Cabinet which require a RIS, and which have compliance cost implications for business, must also include a Business Compliance Cost Statement. This helps ensure that business compliance costs are given upfront consideration in policy development.
100. The impact on the public is also considered when court fees are set. One of the principles for setting court fees is that the cost of civil courts should be shared roughly equally between taxpayers and court users, in recognition of the public and private benefits associated with the resolution of disputes. Furthermore, whenever a fee is charged, provision is made to waive the fee if the person is genuinely unable to pay it.

Obligations on Lawyers

Law Commission recommendation

101. The Commission recommends amendments to the Rules of Professional Conduct for Barristers and Solicitors to place requirements on the amount of information about costs that lawyers must give to their clients. The Commission suggests that failure to adhere to these standards should result in censure. It is also recommended that law firms be required to operate an internal complaints handling procedure. The Government notes that lawyers are not currently required to provide detailed information about how much their work will cost and that improvements can be made.

Work currently underway – Lawyers and Conveyancers Bill

102. The Government has a strong interest in ensuring competent legal practice as law practitioners play a key part in the justice system. The Lawyers and Conveyancers Bill (the Bill), which repeals the Law Practitioners Act 1982 was introduced into Parliament in June 2003. The Bill is designed to maintain public confidence in the provision of legal services, protect consumers of legal services, provide a more competitive and flexible professional environment, and encourage a more responsive regulatory regime. The Bill contains a number of measures that will address the Law Commission's concerns in relation to cost.

Work currently underway – disciplinary provisions in the Bill

103. The Bill provides for a Disciplinary Tribunal to hear charges against lawyers for matters including misconduct and unsatisfactory conduct. The Tribunal's powers include the ability to fine, suspend and strike off lawyers. Failure to adhere to the fees disclosure requirements (eg a breach of practice rules), is capable of amounting to unsatisfactory conduct or misconduct. This measure addresses the Commission's recommendation that lawyers should be censured for failure to adhere to cost-related disclosure standards.

Comment – Practice Rules provisions in the Lawyers and Conveyancers Bill

104. Clause 83(g) of the Bill requires the New Zealand Law Society (NZLS) to have rules that provide for lawyers to inform clients in advance about fees, including the basis on which fees will be charged. This will address the Law Commission's concern that lawyers do not disclose sufficient information about fees to consumers before providing legal services.
105. The Government does not agree with the recommendation that the current Rules of Professional Conduct be amended to provide for specific disclosure requirements on lawyers. The Government considers it unnecessary to provide for that level of prescription as this would be inconsistent with the general approach of the Bill. The Bill provides the NZLS with the flexibility to make prescriptive disclosure rules. Given the Bill's consumer protection objective and the ability for the Minister to amend the practice rules, the Government considers it unlikely that the NZLS would fail to impose strict fees disclosure requirements on lawyers through the practice rules.

Comment – complaints procedure

106. The Government does not agree that law firms should be required to operate internal complaints mechanisms. The NZLS encourages people to approach law firms in the first instance if they have a complaint. It makes good commercial sense to have internal complaints schemes in place to then deal with such complaints, however there is no need to provide regulation for this aspect.
107. The Lawyers and Conveyancers Bill provides greater incentives for lawyers to deal more effectively with complaints internally. It exposes lawyers to increased competition in the legal services market and introduces more robust complaints and disciplinary procedures (including an independent statutory complaints review function) as well as higher penalties. The Government considers this provides