

# Three possible legislative responses

By Chris Patterson

*"...as long as litigation, access to the courts, remains expensive, then anyone who has a right that stands in need of vindication should be able to obtain funding from anyone willing to offer it on whatever terms it is offered. The public policy rationale is simple in [Jeremy Bentham's] opinion: access to the courts is a right, and the State should not stand in the way of individuals availing themselves of that right."*

Improving access to justice is far from a new issue. As a profession we are obliged and have good reason to take positive steps to tackle the ongoing and growing problem of the lack of access to justice.

Improving access to justice is far from a simple matter. The answer will never be found with simplistic responses such as lawyers doing more pro bono work.

I do, however, believe that the profession does have an obligation to provide an appropriate level of pro bono assistance. Certainly we could follow the lead of other jurisdictions in terms of their approach in encouraging and managing pro bono schemes.

In this article I will say no more about pro bono work. Instead, I focus on three barriers which impede access to justice that will require legislative intervention. Specifically, the exclusion of the right to enter into conditional fee arrangements for certain areas of work; the restriction of charging legally-aided clients supplementary fees; and the absence of a class action regime.

## Conditional fees

Conditional fees are regulated by ss 333 to 336 of the Lawyers and Conveyances Act 2006 (LCA) as well as Rules 9.8 to 9.15 of the Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC).

Section 335 of the LCA prohibits lawyers from charging conditional fees in respect to a number of areas of prac-

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proceedings. The majority of the excluded areas of practice can readily be justified on policy grounds.

However, in my view, the general exclusion relating to proceedings within the Family Court jurisdiction cannot be so easily justified, if at all. In particular, relationship property and Family Protection

Act claims are two areas that access - or more aptly a lack of access - to justice, is a growing problem.

The exclusion in respect to relationship property claims is hard to justify on policy grounds alone. It creates an obvious absurdity where a lawyer is prohibited from acting for a client on a conditional fee arrangement in respect to relationship property but not in respect to disputes between a husband and wife or de facto partner over assets which are not relationship property.

The exclusion not only discourages access to justice through limiting the number of lawyers willing to act for parties in relationship property matters, but it also leads to a great inequality of arms in such disputes. In my experience it is the norm, rather than the exception, that one party in a relationship property dispute will have a greater capacity to meet legal costs.

Again in my experience, it is not uncommon for one party to a relationship property dispute to have limited

same time not qualify for legal aid. It is these individuals who struggle and in some cases are unable to secure the services of the lawyer of their choice. It is exactly those individuals who are thereby unjustifiably disadvantaged by the exclusion.

The same arguments equally apply to some parties in Family Proceedings Act claims. An applicant with a meritorious claim but without the ability to pay for legal services, will be faced with the reality that accessing justice is often easier said than done. This is especially so when faced with a well-resourced opposing family member or members with a significant financial incentive in ensuring that the terms of the will under challenge are upheld.

Many relationship property and Family Protection Act claims relate primarily, if not exclusively, to an economic contest. The resolution of how a fixed pool of assets is to be distributed does not involve any policy which could reasonably justify excluding a party from being able to freely contract with a lawyer on terms involving a conditional fee arrangement.

While I can obviously only speak for myself, I suspect more lawyers would be willing to act for those who are not in a position to pay legal costs on a strict time and attendance basis if the exclusion was removed.

## Legally aided parties

Many lawyers have either never had or have decided to cease acting for civil legal aid clients.

One of the main reasons why civil legal aid lawyers are now a rare species is because for many lawyers undertaking civil legal aid work, the work is not at all profitable. Civil legal aid rates are divorced from the reality of the costs of running an efficient and effective legal practice.

Recently I was somewhat alarmed and concerned to learn that in the Auckland region there are only 11 solicitors who are approved to undertake legal aid matters before the Court of Appeal and the Supreme Court.

I do find it somewhat frustrating having to explain to an intending client who is seeking help with an appeal to either the Court of Appeal or the Supreme Court and requires legal aid that their non-legal aided approved solicitor cannot instruct me.

After explaining the reasons imposed by Legal Services I then have to start ringing through or emailing the list of 11 to ask if any of them are willing to take yet another reverse brief. While a relaxation of Legal Services requirements regarding instructing solicitors would help, a more important area is that in respect of supplementary fees.

The Legal Services Act (LSA) does not

lawyers entering into supplementary fee arrangements with legally-aided clients. Rather, s 105 of the LSA prohibits lawyers from taking payments such as conditional fees unless they are "authorised by the Commissioner". The LSA does not prescribe the process for obtaining authorisation or the factors that the Commissioner must or may take into account.

Despite a couple of attempts, I have yet to successfully persuade the Commissioner to provide approval for the charging of a supplementary fee on a contingency basis. In particular, I have unsuccessfully sought approval to charge a fee that covers the difference between my legal aid and ordinary hourly rates in the event of a successful outcome for my legally-aided client. I have even offered to cap the success fee to the amount awarded for costs less repayment of the legal aid grant. Still no approval.

When it comes to costs, the rule that costs follow the event places an unsuccessful non-legally-aided defendant in a better and lower risk position than if the successful party *Continued on next page...*

## Expert Advice and Evidence

Ian Haynes ONZM is available to advise in respect of claims against law firms or to provide expert evidence. Ian routinely accepts instructions to provide expert opinions on professional and property issues and has frequently given expert evidence in such cases.

Ian has a wealth of experience to draw on when advising. He has been in practice for many decades, is a long-standing member of the NZLS Property Law Section Executive Committee, and has been involved in the drafting of the Rules of Professional Conduct and other professional rules and regulations.

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was not legally aided. This is due to the rule that an award of costs cannot be greater than a party's actual costs.

Legal aid grants are often less than scale costs, particularly in the High Court. I fail to see any justifiable reason why a successful legally-aided party cannot have a supplementary conditional fee arrangement whereby the lawyer is entitled to charge the difference between any legal aid grant and the costs that would have otherwise been awarded had they not been legally aided.

One way of encouraging more lawyers to undertake legal aid work would be for the LSA to be amended to provide conditional supplementary fee arrangements with a cap that the supplementary fee did not exceed any award that the court would have made but for the client being in receipt of legal aid.

I fail to see why an unsuccessful non-legally-aided party should escape ordinary costs consequences simply because the other party's lawyer was willing, often at a loss, to act on legal aid. It appears to me that legal aid lawyers are not only subsidising their clients' legal costs but also those who are not legally aided and unreasonably refuse to settle, necessitating the intervention of the Court.

### Class actions

New Zealand is very much the exception in that it does not have a class actions regime. One of the primary policy drivers for having a class actions regime is to promote and encourage access to justice.

New Zealand, like Australia, has had a long history of representative actions. However, in my view, the shortcomings in the representative action regime fail to fully promote and encourage access to justice. The interlocutory warfare that plagued the Feltex litigation exposed some of the shortcomings associated with the representative proceedings process.

Class actions enable individuals to have access to justice that they would otherwise not have due often to the small size of their respective claims and the large costs of

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The absence of a class actions regime results in otherwise meritorious claims simply not being brought due to economic considerations.

The individuals who would benefit from a class actions regime have to wear the loss that they have sustained due to the wrong committed against them. Regulatory watchdogs such as the Commerce Commission, the Financial Markets Authority and the Serious Fraud Office cannot be expected and are unable to effectively prosecute every meritorious claim where large numbers of individuals have suffered losses.

Since the introduction of a class action regime in Australia during 1992<sup>2</sup> there have been over 320<sup>3</sup> class actions which have returned approximately AU\$6 billion to class members that they would have otherwise not have received.

I fully accept that our economy is smaller than Australia and I would like to believe that we are more law abiding. What I cannot accept is that High Court Rule (HCR) 4.24 provides an effective substitute for a class action regime in terms of promoting access to justice. HCR 4.24, all 63 words that make up the rule, is not designed nor could it ever carry the weight of a modern class action.

Twenty-first century New Zealand society expects mass production and instantaneous service where it is efficient and effective to do so. We, as a society, are entitled to have procedural mechanisms that can efficiently and effectively

by individual members is so small that it makes their rights practically unenforceable. Only having the option of HCR 4.24 is like restricting communications to the use of smoke signals while denying that the internet even exists.

During 2007 and 2008 the Judicial Rules Committee provided the Ministry of Justice with discussion papers in respect to the introduction of a class actions regime which included draft legislation.

On 10 November 2009 the then Minister of Justice received a briefing paper in respect to the Rules Committee's recommendations. No substantive work has been carried out on the draft Class Actions Bill and Rules since then.

While I accept there are competing priorities for the Government, the talk of promoting access to justice has been around for a long time now such that it is hard to understand the apathy on this front.

The argument for the introduction of a modern class action regime could repeat the comments of a now retired Australian Judge who once, extra judicially, commented:

*“[W]e cannot be content with a legal system which prides itself on fair substantive laws, but laws which are not, in reality, available for enforcement by the ordinary citizen. If he does not know the law, is not informed of it, has no realistic access to legal advice, is too timid, apathetic or ignorant to enforce his rights, then the Rule of Law may become a cliché; or a shibboleth.”*

Lawyers doing more pro bono work is not the answer. We do it now and have been doing so well before I started practising during the mid 1990s. Increased funding of legal aid is unlikely to occur if the pattern of the more recent Government is anything to go by. Lets immediately stop talking about such “solutions”.

Introducing a class action regime, changing the rules that relate to conditional fees and legally-aided parties are ready solutions to increase access to justice. Those

immediately. The removal of those barriers will not cost the tax payer nor require the profession to do even more work for no fee in return.

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- 1 Lord Neuberger, “From Barretery, Maintenance and Champerty to Litigation Funding”, Harbour Litigation Funding First Annual Lecture, Gray's Inn, 8 May 2013, 4.
- 2 The Australian Law Reform Commission (ALRC) issued a discussion paper in 1997 discussing the possible introduction of a class action regime. In 1988 the ALRC made a specific recommendation supporting a class action regime over continuing with representative proceedings. The ALRC took the position that a class action regime would reduce the cost of court proceedings to each individual class member, would enhance access to justice, would promote efficiency in the use of court resources, ensure consistency in determination of common issues and would make the law more enforceable and effective.
- 3 Between 4 March 1992 to 3 March 2014 there were 329 class actions filed – refer Prof Vince Morabito, An Empirical Study of Australia's Class Action Regimes – Third Report, November 2014.
- 4 Kirby M, Reform the Law – Essays on the Renewal of the Australian Legal System (Oxford University Press, 1983), at 169.



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