REVIEW AUTHORITY NEW ZEALAND **[2012] NZRA 000007**

Applicant	**AF**
Respondent	**Secretary for Justice**
Date of Decision:	**16 May 2012**

DECISION

INTRODUCTION

[1] The applicant seeks a review of the decision of the Secretary for Justice dated 14 March 2012.

[2] In that decision the Secretary gave approval for the applicant to be a lead provider for legal aid services under the Legal Services Act 2011 for Criminal PC 1 and Duty Solicitor.

[3] The Secretary declined approval as a lead provider for Criminal PC 2, PDLA, Family and Civil.

[4] The Secretary deferred approval for the Waitangi Tribunal and Maori Land Court pending assessment by the relevant Selection Committee.

[5] In declining approval for the categories referred to in para [3] above, the Secretary had regard to the recommendations of the Selection Committees which considered the application of the applicant. The Secretary considered that the applicant had not demonstrated experience and competence in Criminal PC 2, PDLA. Family and Civil areas of the law for the following reasons:

- The applicant had not appeared as counsel with substantial and active involvement in at least three trials on indictment before a jury or judge alone within the specified period of time and had not submitted PC 2 case examples to demonstrate that ability before a jury.

- The same reasons applied for declining approval in respect of PDLA.
- The applicant had not appeared as counsel with substantive and active in involvement in at least three civil proceedings.
- The civil examples provided by the applicant did not demonstrate competence in civil proceedings.
- Although the applicant had met the minimum criteria for Family, he had not demonstrated competence and experience in that area of the law. The Secretary took into account that the applicant had been the subject of an audit, the result of which, among other matters, reported that he had not complied with prescribed forms and formatting. The Secretary's opinion was that this indicated that the applicant was not undertaking sufficient work in that area to improve his competency.

BACKGROUND

[6] The applicant is a barrister and solicitor who practised on his own account in Northland until September 2011. He then moved to Nelson where he now practises. He was admitted in May 1997. His application shows that over the relevant time he has been actively involved primarily in the District Court's summary jurisdiction. He has experience in the indictable jurisdiction. His application for approval as a lead provider shows that he has not had experience of trials in that jurisdiction for at least five years. His application shows that his civil and family involvement has been significantly less than in the criminal jurisdiction.

[7] The applicant has been a provider of legal aid services under the previous legislation and has relevantly held approvals in respect of Criminal Proceedings Categories PC 2, Duty Solicitor, PDLA, Civil – General, Family, Mental Health, Waitangi Tribunal, Maori Land Court and Maori Appellate Courts.

THE APPLICATION

[8] The applicant argues that he should have approval as a legal aid provider for Criminal Proceedings Category 2, Police Detention Legal Assistance and for Family. He has submitted lengthy, prolix and at times repetitious arguments in support of his application for review. I have distilled the essence of them to be as follows:

- He has, since the filing of his application for approval on 1 September 2011, now had substantial and active involvement in three trials on indictment before a jury or a judge alone in which he was sole counsel.

- He has had active participation in the PDLA scheme over the previous five years which should have been considered as part of his PC 2 experience.

- That his experience in Parole Board work should likewise have been considered as part of his Criminal PC 2 work and experience.

- That criticism of his work examples as being of 'poor quality' is unjustified when measured against the results he has achieved. There should not be a preference for form over function.

- That 'people skills' are more important than 'law skills' particularly in criminal and family law matters. Arising out of that he asserts that his involvement in indictable sentencing matters which involved early guilty pleas should benefit him in the assessment of his suitability for Category 2 matters.

- That two members of the Northern Selection Committee had a conflict of interest by reason of their professional association with a named barrister against whom the applicant has made a number of complaints about untoward conduct towards him.

- That his untidy writing skills are not to be construed as an absence of a good mind or lack of understanding of the law.

- That he has not been the subject of complaint by a client or of court sanction for non-compliance with standard forms or format.

- That in respect of Family Law the assessment process concentrated on 'form over function', whereas consideration should have been given to the current court climate of encouraging the use by the public and counsel of pro-forma forms which require filling out in a less formal or structured manner.

- He has not been the subject of any complaint from the judiciary.

- That the report of the audit by the then Legal Services Agency into his work in March 2011 did not fall into the definition of "justified complaint". His failure to mention it in his application should not therefore be held against him as displaying a lack of integrity.

- That the Director, Provider and Community Contracts, was wrong to decline PC 2 and Family categorisations merely because the Southern Selection Committee had agreed with the assessments of the Northern Selection Committee. He asserts that the Southern Committee thereby showed a lack of credibility and possible self-interest by wanting to ensure that the pool of legal aid work was not diminished by *"sanctioning a new kid on the block to share in that work"*

- That the one year limit on the category for which he was given approval is less than fair having regard to the previous years of service he has provided.

The Secretary's Response

[9] The Secretary responded to the applicant's arguments by letter dated 26 April 2012. The Secretary has addressed each of the points advanced as follows:

- In respect of the applicant's assertion that he has had substantial and active involvement in three trials on indictment, the Secretary responds that although the Ministry's assessment was completed before the applicant had undertaken the work referred to, the further information supplied was added to his application and fell for final consideration. His application was considered by both a southern and northern selection committee because the applicant

had recently relocated and therefore to ensure that local knowledge of the applicant was properly brought to any recommendation to be made in respect of the application for approval.

- That on consideration of the late information that the applicant supplied, he had not met the requirement of clause 3 of the Legal Services (Quality Assurance) Regulations 2011 in that he had appeared as counsel with substantial and active involvement in only two trials on indictment. The applicant had argued that a third matter, namely a disputed facts hearing fell within the regulation. The Selection Committee agreed with the Ministry's assessment that it did not.

- That in respect of approval for PDLA, the requirements for approval are the same as for PC Category 2 and therefore he had not met the requirements of the regulations. Experience in Parole Board work does not fall within the requirements of clause 3 and could not be used as examples of PC 2 work.

- In respect to the argument that the applicant makes about preference for form over function, the response is that the examples that the applicant provided did not give confidence that the applicant was suitable to appear on serious criminal charges under Category PC 2.

- That the argument about peoples skill over law skills was irrelevant.

- That the Selection Committee members did not discuss the issues that the applicant had with the barrister he has named. There was no conflict of interest to declare, it being a requirement of the regulations that the Selection Committee consider the application for approval on the basis of the information supplied in the application and the Committee's knowledge of the applicant.

- That the applicant's complaints about the named barrister are a matter for the Legal Complaints Review Officer or for the New Zealand Law Society.

- The Secretary notes that the applicant's points made about writing skills, upbringing or vocabulary are not relevant to the assessment of his application for approval.

- That in respect of the applicant's argument that he has not been the subject of complaint by a client or a court does not mean that the audit and first and final warning of the then Legal Services Agency is not to be categorised as a complaint given that Part 1 of the application and the application guidelines ask applicants to disclose any information relating to upheld or substantiated complaints from NZLS, Legal Services Agency or Ministry complaints. The applicant received a first and final notice in March 2011 as a result of his poor audit by the Legal Services Agency. He did not make mention of that fact in his application for approval as a provider of legal aid services.

- That the applicant's criticism of the Southern Selection Committee is unjustified as the Committee comprises qualified lawyers who practise in the same areas of law as he does and have been nominated under the Act and Regulations by the New Zealand Law Society based on their experience. In any event, the application was sent as well to the Northern Selection Committee to ensure fairness to the applicant and best possible advice to the Secretary.

- As to the applicant's dissatisfaction with the one year limit on the category for which he was given approval, section 77(3) of the Act requires the Secretary to state the duration of the approval. In the applicant's case the period of one year was fixed because the Ministry will undertake a further audit and will, as part of that, review the period of approval.

The Applicant's Response to the Secretary

[10] By letter of 3 May 2012, the applicant has replied to the submissions of the Secretary. The reply is lengthy, rambling in many parts and repetitive of what he has earlier set out. For reasons which appear later in this decision, I do not need to set out his responses in detail. Suffice it to say, he repeats his

criticism of the Ministry's assessment process and of the work of the selection committees. He uses terms such as the 'autocratic assessment process', 'unrealistic criteria', an assessment process 'that is flawed before it starts' and focus on 'form over function'. He does not address the specific requirements of the Quality Assurance Regulations under which the selection committees and the Secretary must work.

DISCUSSION

[11] Clause 1 of the Legal Services (Quality Assurance) Regulations 2011 defines Category 2 criminal proceedings to mean any trial or indictment

- Before a jury or before a judge alone; and
- Where the person charged may be liable to a penalty of up to 10 years' imprisonment.

[12] Clause 3 of the regulations requires that an applicant for Category 2 criminal proceedings **must have-**

- At least 24 months' recent experience working on Category 1 criminal proceedings; and
- Appeared as counsel with substantial and active involvement in at least three trials on indictment before a jury or before a judge alone.

[13] As at 1 September 2011, (the date of his application for approval), the applicant had not met the requirements of clause 3 of the Regulations in that he had not appeared in at least three trials on indictment. He did, however, appear in two scheduled jury trials in October/November 2011 and again in December 2011. Each of those trials was credited to him as having met the requirements of the clause. On his own admission the applicant had not appeared as counsel in a trial on indictment in the five years prior except in respect of a matter which he contends falls within the definition of 'trial on indictment' and which the Secretary has determined does not so fall.

[14] In September 2010, the applicant appeared in the High Court at Whangarei for **A Disputed Fact Hearing and Sentence** in respect of an offender. The documents which the applicant presented with his application for

approval as a provider of legal aid services show that the offender had pleaded guilty to offences on indictment relating to cultivation of drugs. The purpose of the disputed facts hearing was to mitigate the seriousness of the circumstances of the matter and thus argue for a less serious sentence than might otherwise have been the case.

[15] The applicant argues that such a hearing was a trial on indictment and therefore was the third matter that gave him qualification for approval in respect of Category 2 proceedings.

[16] I do not agree with that submission. I find that 'trial on indictment' must mean the hearing of evidence, examination and cross-examination of witnesses before a judge alone or a jury for the purpose of determining the guilt or innocence of a defendant. That was not the case for the defendant. His guilt had been determined by his plea of guilty. The subsequent dispute of facts was directed to mitigation of the offending and determination of an appropriate penalty. My finding fits with the recognition, in relation to indictable trials, of such expressions as a defendant appearing for sentence 'after trial' or the remark that 'at trial' a defendant was found guilty of the offence/s.

[17] It follows that the applicant has not met the experience and competence requirements for Category 2 criminal proceedings.

[18] The experience and competence requirements for the Police detention legal assistance scheme are identical in every respect to the requirements for Category 2 criminal proceedings.

[19] It follows therefore that the applicant has not met those requirements for the same reasons I have given in para [16] of this decision.

[20] It is accordingly unnecessary for me to comment any further on the other matters that he has raised in his application for review of the decisions that the Secretary has made in respect of those two matters.

[21] I now consider the applicant's application for review of the Secretary's decision to decline approval for him to be a provider in respect of Family Law.

[22] I note that the assessment of the Secretary, on the advice of the selection committees, was that, while the applicant had met the minimum criteria for Family, there was a lack of confidence that he had demonstrated competence and experience in that area of the law.

[23] Regard was had to the substantiated complaints of the Agency audit in March 2011 and that there appeared to be nothing to show that those concerns had been addressed or improvements made.

[24] The applicant was critical of the audit by saying that form over function had become an overarching focus on the irrelevant or miniscule and that the requirement to observe font size, margin width and other matters which he considered had little impact on the end result of any application or defence to any applications. He considered that the sanction of a first and final warning was a bureaucratic overreaction to the matters considered in the audit. He did acknowledge the short-comings identified by the audit. But he asks the Review Authority to take a wider view and consider the number of cases he has completed over a five year period and that he has not been the subject of complaint by a client or from the courts or judiciary.

[25] In his application relating to Family Law, the applicant has submitted examples of his work carried out in 2009 and 2010. Those examples pre-date the Agency audit report. There is nothing evident in his application that supports any changes made as a result of the report or to evidence continued engagement in the Family Law area during 2011.

[26] Clause 11(2)(a) of the Quality Assurance Regulations requires a selection committee to assess the application on the basis of the information provided in the application and committee's knowledge of the applicant. The applicant cannot be heard to complain now that he did not pay attention to clause 6(4) requiring the production of work samples of recent experience.

[27] The Regulations require the applicant to show experience and competence in the areas of law for which approval is sought. There has to be satisfaction that the applicant meets the criteria prescribed, before the Secretary can exercise the discretion granted by section 77(1) whether or not to grant approval as a provider of legal aid services.

[28] I emphasise that the Secretary has a discretion regarding the granting of approval. That discretion has to be exercised fairly having regard to all of the information provided and as well to all the circumstances.

[29] I do not consider that the Secretary has exercised the discretion unfairly or inappropriately and accordingly I do not find that I should exercise the

discretion I have under section 86 of the Legal Services Act to reverse the decision under review.

Decision

[30] I therefore confirm the decision under review pursuant to section 86(1) of the Act.

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BJ Kendall
Review Authority