

**Applicant**

**AM**

**Respondent**

**Secretary for Justice**

**Date of Decision:**

**18 September 2012**

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**DECISION**

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**INTRODUCTION**

1. In a decision dated 1 June 2012, the Secretary for Justice (“the Secretary”) declined approval of the Applicant to provide legal aid services in respect of Category 4 criminal proceedings. The Applicant was granted approval to provide legal aid services as a lead provider in respect of Categories 1 – 3 and as a Duty Solicitor and also in respect of the Police Detention Legal Assistance scheme.
2. The Secretary determined that the Applicant had not met the criteria outlined in cl 5(2) of the Schedule to the Legal Services (Quality Assurance) Regulations 2011 (“the Schedule”). He determined that the case example that the Applicant gave in support of Category 4 criminal proceedings did not fulfil the requirement of the Schedule as the Crown had not indicated prior to trial that a sentence of preventive detention would be sought on conviction. Because of that the trial example was categorised as a category PC 3 proceeding. The matter did come up for sentencing as a PC 4 matter as a result of the trial judge In the District Court deciding to refer the matter of sentencing to the High Court so that a sentence of preventive detention could be considered.
3. The Applicant seeks a review of the Secretary’s decision
4. I note that the Application for Review was filed on 10 August 2012 and was therefore outside the time limit of 20 working days provided for by s 82(2) of the Act. I exercise the discretion conferred by s82(3) to accept a

late application given that a medical condition prevented the Applicant from making an application within the time specified in the Act.

### **Background**

5. The Applicant at the time of her application for approval as a provider of legal aid services held approvals under the previous legislation as a provider of Categories 1 – 3 Criminal Proceedings, Duty Solicitor, Civil and Family.
6. She was admitted as a Barrister and Solicitor in New Zealand on 21 February 1992. She had employment as a staff solicitor from April 1992 until December 1999. She has since then practised as a self employed Barrister and Solicitor.

### **The Application**

7. The Applicant seeks a review of the Secretary's decision declining to approve her as a provider in respect of Category 4 criminal proceedings for the reasons set out in her review application where she argues:
  - a. that the Secretary was in error to hold that her involvement in a Category 3 Trial which became Category 4 at time of sentencing was not sufficient to meet the test of active and substantial involvement.
  - b. She submits that it was illogical to base the decision to decline on the initial categorisation of the trial and to ignore the fact that it was re-categorised as a PC4 matter because of sentencing options including preventive detention.
8. The Secretary responded to the application in writing on 29 August 2012 and made the following points:
  - a. He defines a PC4 matter as a jury trial in either the District or High Court where the accused is liable to receive a sentence of life imprisonment or preventive detention.

- b. That the applicant must demonstrate substantial and active involvement in at least 1 category 4 proceeding.
  - c. That appearance at sentencing in a PC4 matter does not of itself demonstrate substantial and active involvement, but is only one aspect of PC4 experience.
  - d. That the case example that the applicant provided as evidence of a PC4 proceeding was in respect of an offence that fell into a PC 3 category. The accused was found guilty and remanded for sentence. It became a PC4 category matter only after the trial judge declined jurisdiction at sentencing and remanded the accused to the High Court for consideration of a sentence of preventive detention.
9. The Applicant has responded to the submissions of the Secretary by letter of 12 September in which she made the following points:
- a. She referred to the definition of Category 4 criminal proceedings as set out in the Schedule to the Regulations.
  - b. The Secretary has incorrectly defined a PC4 matter by recognising it as such when an accused is liable for the sentence of preventive detention.
  - c. That matters where an accused person's previous record indicates that she/he may be liable to preventive detention if convicted, are PC 4 matters according to the legislation.
  - d. The criteria for the imposition of preventive detention are set out in s 87 of the Sentencing Act 2002 which in subsection 2 specifies –
    - i. A person being convicted of a qualifying sexual or violent offence,
    - ii. The person being 18 years of age or over at the time of committing the offence
    - iii. The likelihood of committing another qualifying offence if released at the sentence expiry date of any sentence which the court might otherwise impose.

- e. The accused was charged with a qualifying offence and was serving a sentence for another qualifying offence at the time of the offending. Thus the matter was incorrectly classified as a Category 3. criminal proceeding
- f. Having conducted the trial from the outset through to conclusion at sentencing she had satisfied all the criteria for approval at Category 4. criminal proceeding

## **Discussion**

10. The Schedule to the Regulations defines Category 4 criminal proceedings as meaning any trial or indictment –

- a. Before a jury or a judge alone; and
- b. Where the person charged may be liable to a sentence of –
  - i. Life imprisonment; or
  - ii. Preventive detention.

11. In respect of trials under Categories 1 – 3 and Category 4(b)(i), liability to the stated penalties is related to the offence with which a person is charged.

12. In respect of the sentence of preventive detention, liability for the imposition of that sentence depends on the person having committed a qualifying sexual or violent offence and being of or over the age of 18 years and being likely to commit another qualifying offence.

13. It follows that if a person charged already has a conviction for a qualifying offence, then that person may be liable for preventive detention. That likelihood of liability arises by reason of the conviction history of the defendant and the nature of the offence charged.

14. It is not therefore necessary for the Crown to indicate that, if a person is convicted, it would likely seek a sentence of preventive detention.

15. Section 87(3) of the Sentencing Act provides that the High Court may, on the application of the prosecutor or on its own motion, impose such a sentence.
16. Categorisation is not therefore a matter of whether the Crown seeks such a sentence or the High Court of its own motion determines to impose same.
17. Liability for preventive detention exists at the outset of the trial so long as the qualifiers are present. Categorisation does not alter along the way or because the judge at sentencing decides that a sentence of preventive detention should be considered.

### **Decision**

18. I find that the case example that the Applicant provided, where her client was transferred to the High Court so that a sentence of preventive detention could be considered, was in all respects a Category 4 criminal proceeding
19. The Secretary was in error to hold otherwise for the reasons that I have set out.
20. The Applicant has satisfied all the other requirements for approval as a lead provider of legal aid services in respect of Category 4 criminal proceedings
21. Accordingly, pursuant to s 86(1), I reverse the decision of the Secretary declining approval of the Applicant as a lead provider in respect of Category 4 criminal proceedings.

BJ Kendall  
Review Authority