

CRIMINAL BAR ASSOCIATION OF NEW ZEALAND INC.

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Ministry of Justice
Legal Aid

Attention: Tracey Baguley
By email: tracey.baguley@justice.govt.nz

16 May 2024

Dear Ms Baguley

- 1 The **enclosed** letter from the Legal Services Commissioner has come to the CBA's attention. The relevant references have been removed for privacy reasons. The letter responds to an application for an amendment to grant to obtain an alcohol and other drug (AOD) assessment report for a client who has a drug addiction.
- 2 The Legal Services Commissioner's letter suggests that funding should be prohibited for AOD reports in the event that some or all of the information contained in the AOD report may otherwise contain information that would also be used in a (cultural) report obtained under s 27 of the Sentencing Act 2002.
- 3 In the CBA's view, the Legal Services Commissioner is mistaken as to the interpretation of s 99(4)(ca) of the Legal Services Act 2011 (**the Act**). As you know, the Act was amended by the Legal Services Amendment Act 2024 by including s 99(4)(ca). Section 99(4)(ca) prohibits legal aid funding for disbursements in relation to reports and statements called for by an offender under s 27 of the Sentencing Act 2002.
- 4 The CBA considers that the Legal Services Commissioner's apparent interpretation stretches the meaning and intent of s 99(4)(ca). It also ignores ss 8(i) of the Sentencing Act 2002 where in sentencing or otherwise dealing with an offender the court **must** take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.
- 5 On the relevance of an AOD report for the purposes of sentencing, the Court of Appeal in *Zhang v R* said: "... we consider addiction may logically give rise to a discount of up to 30 per cent of the sentence depending on the extent to which it mitigates moral culpability for the offending."¹ There can be no doubt in the case we have highlighted that drug addiction is a significant mitigating factor in terms of s 9(4)(a) of the Sentencing Act 2002 and warrants the obtaining of an AOD report.

¹ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [149].

- 6 Anecdotally, members of the CBA have been advised of other cases where AOD reports have been rejected and further information of the type sought above requested.
- 7 The request for further information, as the above letter demands, only serves to increase the administrative burden of legal aid practitioners, when AOD reports are properly justified where a nexus exists between the offender and the offending. As you know, the legal aid model operates a “trust model” where lawyers are trusted to provide relevant information upon which legal aid can rely in order to approve funding. A request to provide information such as “a detailed explanation of how s 27 of the Sentencing Act 2002 is not applicable” undermines the foundation of the trust model and puts to one side the fact that an offender’s personal, family, whanau, community, and cultural background will always be relevant to sentencing as a mandatory consideration under s 8 of the Sentencing Act 2002.
- 8 On that basis, please confirm that future requests for AOD reports will not be rejected on the grounds that information contained in such reports may also contain information that might have been included in s 27 reports. It seems to the CBA, that unless there is express reliance on s 27, AOD reports should always be approved (provided alcohol and drugs is relevant to the case where an approval is sought).
- 9 Please can you discuss this matter with your legal team, and let us know your position.

Yours faithfully,



Adam Simperingham
President
Criminal Bar Association