

## Transforming New Zealand's Legal Aid system

As Christmas 2009 approached, New Zealand's Legal Services Agency faced rapid and radical change. On 18 December, the Minister of Justice, Simon Power said it was "extremely important the Government move quickly"<sup>1</sup> to implement the recommendations of the recently published report by Dame Margaret Bazley, *Transforming the Legal Aid System*. The report was prompted in part by dramatic increases in legal aid payments in recent years – from \$84 million in 2002 to \$124 million in 2008 – and a predicted blow out to \$140 million by 2010. However its "back to basics" brief unearthed a raft of systemic problems. People of limited means were often poorly represented by incompetent lawyers, some of whom demanded illegal "top-ups" to their legal aid payments. Meanwhile career criminals were gaming the system for their personal profit – as were up to 200 lawyers. These "very worrying" findings posed a threat to the future viability of the legal aid process, and to the integrity of the justice system as a whole. Changes would be implemented by legislation as soon as possible in the New Year, the Minister said.<sup>2</sup>

The Legal Services Agency (LSA), the independent crown entity which administered legal aid, was already operating in a new and different environment. Three days after the report came out on 27 November, four of the six Board members, including the chair, resigned. The Minister had written to each one asking if they wished to continue as Board members, given the significant changes he was proposing for the way legal services were delivered. On 8 December the new chairman announced that a transition manager had been appointed to take over from the current chief executive who would leave before Christmas, his position disestablished. From 2010, legal aid would become

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This case was written by Janet Tyson for Dr Richard Norman, Victoria University of Wellington, from published sources. It has been prepared as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation.

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<sup>1</sup> Hon Simon Power, media release, 18-12-2009, 'Government moves on legal aid'

<sup>2</sup> *ibid*

the direct responsibility of the Ministry of Justice, with a radical rework for service direction and delivery.

## **Legal Aid and the Legal Services Agency**

New Zealand provides two types of legal aid for people unable to afford a lawyer: civil or family legal aid, and criminal legal aid. Criminal legal aid was first legislated for in 1912, while civil legal aid, also available for some tribunals and specialist courts, was first offered in 1969. From 1975, legal aid was also available to people making claims to the Waitangi Tribunal.<sup>3</sup>

The Legal Services Agency was established by the *Legal Services Act 2000*. It was set up to centralise and professionalise the administration of legal aid, replacing the Legal Services Board, under which decisions on the granting of legal aid were taken at a district level, often by volunteers. The LSA also funded and administered other legal assistance such as the duty solicitor scheme.<sup>4</sup> It was required to support, monitor and provide some funding to community law centres, which provided general legal advice, legal information, and law-related education to their communities.

The LSA started operation on 1 February 2001. By 2009, it employed 245 staff and as well as its head office in Wellington, had offices from Whangarei to Dunedin, in centres with the ten busiest courts. Its founding chief executive, Tim Bannatyne, was a career public servant from the justice sector, most recently at the Department of Corrections. As a crown entity,<sup>5</sup> the LSA was responsible to the Minister of Justice but operated at arm's length to ensure independence in decision-making. Its other key partnership was with the legal profession, principally through the New Zealand Law Society, the professional body representing New Zealand lawyers. Members of the legal fraternity were involved with the LSA and its activities at all levels, from chairing the Agency's six-person Board to providing basic legal information through the 27 community law centres or the 90 Citizens Advice Bureaux throughout the country.

## **Listed providers and preferred lawyers**

The bulk of the LSA's work, and its most significant interface with lawyers, was deciding clients' eligibility for and entitlement to legal aid grants. The vast majority of these grants were paid for clients to be represented in court by "listed providers", lawyers approved by the LSA and reimbursed on an hourly basis. Under the "preferred lawyer" system, clients could choose their legal aid representative, regardless of where that person was based, as long as that person was listed to offer the appropriate level of service. Providers were listed on a 4-point scale, with a level 4 listing needed to represent a client on serious charges like murder.

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<sup>3</sup> The Waitangi Tribunal was established to hear claims made under the Treaty of Waitangi, New Zealand's founding document, signed in 1840.

<sup>4</sup> Duty solicitors were paid to attend court and provide on-the-spot legal assistance for people who arrived without any such support.

<sup>5</sup> There are three categories of Crown Entity with varying degrees of autonomy. The Legal Services Agency, as a crown agent, came into the least autonomous category, and was "required to give effect to government policy when directed to by the responsible minister."

Once approved, most lawyers remained as listed providers, with no requirement to demonstrate they remained competent to practice. *The Legal Services Act 2000* had mandated that lawyers previously approved to provide legal services should “roll over” as listed providers. By 2009, there were 4492 listed providers, just under half (2135) active in the last twelve months.<sup>6</sup> Of these, an increasing number were “barristers sole” operating in competition with each other, and in isolation. This was most evident in Auckland, where 77 percent of legal aid-funded criminal cases in 2008/09 were taken by barristers sole, but it represented a nationwide problem that impacted negatively on standards.<sup>7</sup> While some large legal firms maintained the tradition of tutelage, using experienced staff to mentor and develop younger lawyers for legal aid work, others had given up their involvement with legal aid, some seeing it as damaging to their reputation. Hourly rates for legal aid work were relatively low, and the Law Society had been lobbying for representatives to be paid on a par with Crown Solicitors.

Clients dissatisfied with the LSA’s decision whether or not to grant them legal aid could apply to the LSA for their case to be reviewed, and if still not resolved, the issue would go to the Legal Aid Review Panel, funded and administered by the LSA, but chaired by and made up of independent practising lawyers. Clients concerned about poor service from, or inappropriate conduct by a legal aid provider could complain to the LSA, which had limited powers to act and in 2007/2008 imposed sanctions (usually temporary suspension) in only four out of 84 cases taken to it.<sup>8</sup> The Law Society, which issued the practice certificates necessary to work as a lawyer in New Zealand, had the principal responsibility to discipline lawyers, through the Lawyers’ Complaint Service. As its name implied, disciplinary action was triggered by complaints. In reality, few complaints were formally lodged.<sup>9</sup>

The *Act* provided for the LSA to trial new ways of delivering legal aid. In 2004 a five-year trial of a Public Defence Service began in the country’s two busiest criminal courts, Auckland and Manukau. Through the Public Defence Service the LSA employed a team of salaried criminal lawyers to take on criminal legal aid cases, in what proved, despite vociferous protest from part of the legal profession,<sup>10</sup> a successful attempt to provide quality legal services at a competitive cost.

## **A surge in claims**

In March 2007, the *Legal Services Amendment Act 2006* expanded the range of people who might be eligible for legal aid (mainly for civil cases), while also increasing the requirement for some recipients to pay back the money advanced. At the same time, applications were increasing in complexity, while a surge in claims over historic sexual abuse put further pressure on the system. When the Government set a deadline of September 2008 for lodging Waitangi Tribunal claims, there was a further spike in applications.

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<sup>6</sup> *Transforming the Legal Aid System*, final report and recommendations, Legal Aid Review, November 2009, p 33. The document will be referred to as Final Report in subsequent footnotes.,

<sup>7</sup> *Final Report*, p75

<sup>8</sup> *Improving the Legal Aid System*, a public discussion paper, Legal Aid Review, September 2009, p 52. To be referred to as “Discussion paper”.

<sup>9</sup> *Final Report*., p 88

<sup>10</sup> Paulin, J and Baehler, K, *The Public Defence Service Pilot Evaluation*, Interim Report One, Victoria University of Wellington, Crime and Justice Research Centre, August 2005.

In 2008/2009 the agency assisted around 64,000 people to access legal services through just over 85,000 grants of legal aid,<sup>11</sup> a significant increase from 53,000 people and 73,000 grants the previous year.<sup>12</sup> As well as lifting the total expenditure on legal aid to \$124 million in 2008-09 these changes raised the demand for and cost of administration, which for the same period was \$20.4 million.<sup>13</sup> Most of this was for personnel, with 140 people involved in grants administration, a process that was still largely paper-based. Following the 2006 amendment, debt management staff increased from 3 to 17.<sup>14</sup> In 2008-09, \$8 million in repayments was recovered.<sup>15</sup>

On 2 April 2009, Justice Minister Simon Power welcomed delegates to the International Legal Aid Group's conference in Wellington, telling them there was special significance in New Zealand hosting the biennial event. He had asked Dame Margaret Bazley to lead a fundamental review of the country's legal aid system.

“Legal aid has a defining role in upholding access to justice. By funding legal aid services, governments give effect to the principles of equality before the law and natural justice,” the Minister said. “This upholds public confidence in the legitimacy and effectiveness of the justice system. As Minister of Justice, I am committed to the goal of ensuring access to justice for all New Zealanders.”<sup>16</sup>

“Our purpose is to consider how the system can best be structured so that it delivers effective legal services to those who need them most, in a way that is cost-effective and sustainable...Quality will be an important focus, as will ensuring that any changes have a positive impact on the wider justice system, especially the way the courts operate.”<sup>17</sup>

Public consultation would shortly begin for the review, which would also consider ways to manage or reduce costs, Simon Power said. “Options need to be fair and effective, but they also need to be affordable, durable and simple to administer.”<sup>18</sup>

Since taking office in 2008, the Minister had earned a reputation as “Parliament's most focussed legislator”<sup>19</sup> regularly introducing reforms to the justice system. Review leader Dame Margaret Bazley was described by *The Press* as “becoming an all-round bureaucratic fix-it woman.”<sup>20</sup> The former public service chief executive retired as Director-General of the Department of Social Welfare in 2001, but continued to chair the Fire Service and had led the 2008 Commission of Inquiry into Police Conduct. She was one of three members of the 2009 Royal Commission on Auckland Governance, which recommended the amalgamation of existing local bodies into one “super-city.”

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<sup>11</sup> LSA media release, 7-12-2009, ‘2009 Annual Report – An eventful year for the Agency.’.

<sup>12</sup> LSA media release 12-12-2008 ‘Legal aid lawyers played a vital role – Legal Services Annual Report’

<sup>13</sup> *Final Report*, p iv.

<sup>14</sup> *Final Report*, p30-31

<sup>15</sup> LSA media release, 7-12-2009

<sup>16</sup> Hon Simon Power, media release, 2-04-2009, ‘Government announces review of legal aid’

<sup>17</sup> *ibid*, downloaded from [http://www.beehive.govt.nz/release/government\\_announces+review+legal+aid](http://www.beehive.govt.nz/release/government_announces+review+legal+aid) downloaded 23-03-2010

<sup>18</sup> *ibid*

<sup>19</sup> ‘Argument for reform proved beyond doubt’, *New Zealand Herald*, , 15-12-2009, A6

<sup>20</sup> ‘Costly legal aid’ *The Press*,, 3-09-09, Edition 2, p 14.

## A fundamental review

The terms of reference for the review were broad. It was to take “a first principles approach” to reviewing New Zealand’s legal aid system, covering all aspects from access to services to containment of costs and contribution to the effective operation of the justice system. It must be “consistent with the principles of natural justice and New Zealand’s international obligations” as well as aligning with Government priorities. It would cover all aspects of criminal, family, civil and Waitangi Tribunal legal aid, eligibility criteria, the payment of providers and operational issues such as the “preferred lawyer” system.<sup>21</sup>

To assess this, between April and August 2009 Dame Margaret Bazley visited all New Zealand’s major courts and most of its provincial and smaller courts, sitting through numerous proceedings. She met nearly 200 individuals and groups representing the range of stakeholders from the Chief Justice to the New Zealand Prisoners Aid and Rehabilitation Society, including representatives of Australia’s national social service agency Centrelink. Dame Margaret was supported by a reference group comprising members of the New Zealand Law Society, the Legal Services Agency, the New Zealand Association of Citizens Advice Bureaux and the Community Law Centres, as well as Ministry of Justice officials.

Findings from this first round of consultation were presented as a 75-page discussion paper, *Improving the Legal Aid System*, released on 1 September 2009. The paper identified a number of issues relating to the legal aid workforce, ponderous court procedures, and the need to keep abreast of changing legal needs, as well as rapidly rising costs. For discussion, the paper posed questions around “the five key elements of an effective legal aid system”: ensuring the right people can access services; providing the right mix of information, advice and representation services; providing high quality legal aid services; supporting an effective and efficient court system, and managing taxpayer funds effectively.<sup>22</sup> For instance, the section *Can the right people access services* asked if services were provided in appropriate ways, whether any people should not get legal aid, and what specific barriers Māori and Pacific people faced.

### “Inefficiency and often poor service”

The Law Society welcomed the paper as providing an opportunity to “contribute to the development of an improved legal aid system.”<sup>23</sup> However, the media focussed on the findings about variable and even corrupt service provided by some lawyers, vying to identify examples of individuals earning high amounts of remuneration from legal aid. The report said the criminal legal aid system, where grants had increased by 51 percent since 2003, was “characterised by inefficiency and often poor service”.<sup>24</sup> Fewer experienced practitioners were prepared to be involved, in part because rates of pay were seen as too low and the reputation of the service was poor. However, there was a rise in the number of “car boot”<sup>25</sup> lawyers, sole operators who often did not have an

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<sup>21</sup> *Discussion paper piv*

<sup>22</sup> *Discussion paper, p v*

<sup>23</sup> New Zealand Law Society, media release, 1-09-09, ‘Law Society responds to legal aid review discussion paper.’

<sup>24</sup> *Discussion paper, p 46*

<sup>25</sup> *Discussion paper, p 47*

office or fixed contact address. Some lawyers took advantage of their clients' limited language skills or understanding of the legal system to demand top up payments in addition to their legal aid grant.

"It appears that the system has got worse almost as fast as its budget has risen," noted *The Press*.<sup>26</sup> Of the total legal aid budget, 45 percent went on 5 percent of the cases, which cost an average of \$45,000 each. The most recent high-profile case on legal aid, David Bain's retrial,<sup>27</sup> cost \$1.15 million. Users of legal aid were often repeat offenders, with 63 percent of the total expenditure going on multiple grants to the same clients – some of whom played "musical lawyers" to prolong court processes. In her introduction to the discussion document, Dame Margaret said

"When I look at the legal aid system, I see a system that has arbitrarily divided legal aid services into categories of information and education, legal advice, and legal representation. In terms of numbers, a large number of people who interact with the legal aid system interact at the information and education end, but the bulk of legal aid funding is spent on representation. In this way, the system is overwhelmingly focussed on the very end of a dispute resolution system.

"I see strong interdependencies between the various elements of the legal aid system, and broader social services that many legal aid clients already access. I consider it may be more useful to see the various elements operating along a continuum, rather than arbitrarily dividing the services along provider or sector lines. Because of those divisions, the legal aid system seems to under-utilise the very valuable services offered by community-based organisations such as Citizens Advice Bureaux, community law centres and the wider social services."<sup>28</sup>

## Dysfunctional relationships

Some 90 people and groups, some but not all previously consulted, took the opportunity to respond to the discussion paper. Over half of them suggested ways to improve the quality and performance of legal aid lawyers.<sup>29</sup>

When *Transforming the Legal Aid System*, the final report with recommendations, was released on 27 November, it did not back down from previous comments about lawyers abusing the system, instead quoting anecdotal evidence that up to 80 percent of lawyers at Manukau District Court could be gaming the system.<sup>30</sup>

Many in the media endorsed the *Bay of Plenty Times*' view that "200 corrupt lawyers in a country of 4.3 million people is rather a lot," and that lawyers ripping off the system should not only be disbarred but face charges.<sup>31</sup> However the legal profession and some media reacted strongly to the use of unproven evidence. "Just the facts first, ma'am" said the *Southland Times*.<sup>32</sup> A group of Manukau lawyers wrote "Dame Margaret's

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<sup>26</sup> 'Costly legal aid', *The Press*, 3-09-2009, Edition 2, p 14,

<sup>27</sup> David Bain, originally found guilty of the murder of his parents and siblings, was found not guilty at a second trial ordered after the Privy Council quashed his conviction, and after he had served 13 years in jail.

<sup>28</sup> Discussion paper, p iv

<sup>29</sup> Final Report, p 76.

<sup>30</sup> Final Report, p viii

<sup>31</sup> 'Another view: Lawyers milking legal aid should face court', *Bay of Plenty Times*, 2-12-09, A8.

<sup>32</sup> 'Just the facts first, ma'am,' *Southland Times*, 4-12-2009 p.8

report unfortunately produces not a shred of specific evidence of corruption. Her comments appear to be based on nothing more than gossip.”<sup>33</sup> The Law Society more diplomatically protested “imbalance”.<sup>34</sup>

The report acknowledged the difficulty of getting people to speak on the record about problems that many people were aware of. However its detail made plain that claims of corruption were the tip of an iceberg of issues linked to dysfunction in the web of relationships, both governance and operational, between the Legal Services Agency and the legal profession. Many obstacles stood in the way of necessary change.

Beset by complaints from key stakeholders, , swamped by increasingly complex requests for legal aid grants, and constrained by provisions of its governing legislation, the LSA had become “profoundly operational” in its focus. It could not take the strategic, sector-wide perspective needed for future planning. The day-to-day focus had “unintentionally left the system vulnerable to an undesirable level of influence or control by the legal profession (which has a vested interest in the status quo). This situation makes it hard to achieve changes to the system with which the legal profession does not agree.”<sup>35</sup>

For its part, the Law Society seemed to be struggling to reconcile its roles of industry advocate and professional regulator. Lacking the commitment or ability to discipline its members effectively, the Society needed to “regain its professional ethos.” The need for this was obvious in the deteriorating quality of service provided by listed legal aid providers, including some experienced practitioners. The LSA seemed reluctant to exercise what powers it had under the *Legal Services Act*: “The LSA tiptoes around lawyers, apparently for fear of legal challenge.” The *Act* itself seemed “overly protective of the market share of the lawyers who provide legal aid services”<sup>36</sup> which added to an already excessive administrative burden, while the emphasis on fee for service payment “encourages lawyers to do more and take longer than is necessary.” Some duty solicitors paid lip service to the requirement to attend court when rostered to do so, while others gave preferential treatment to colleagues in assigning legal aid cases.

Graduates fresh from university could set up as barristers sole and put themselves forward as legal aid providers. Lacking the reputation or the ranking to take high-profile, high-paying cases, they took on multiple minor cases, sometimes scurrying between in two or three courts at once. There was no competency test for them, or for long-serving practitioners, and a lack of “swift and effective mechanisms to eject poorly performing lawyers” who would only be identified if someone laid a complaint.

“While everybody appears to know who the bad lawyers are, nobody will act. Few complaints are made because people are not prepared to be named on complaints to the LSA or to the Law Society...thus the poor performance is allowed to continue, and the people who suffer are the clients, and others who are caught up in the court process.

“These failings combine in a way that leaves the legal aid system open to abuse by lawyers and defendants. There is, unfortunately, a small but significant group of lawyers

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<sup>33</sup> ‘ “Corrupt lawyers” claim undermines profession,’ New Zealand Herald, 4-12-09

<sup>34</sup> New Zealand Law Society, Statement on Legal Aid, 1-12-2009.

<sup>35</sup> Final Report, p 16

<sup>36</sup> Final Report, p17

(and defendants) who are taking advantage of that situation to the detriment of their clients, the LSA, the courts and the taxpayer.”<sup>37</sup>

## **More efficient machinery and better quality people**

Dame Margaret found that the problems with the governance of the current system were “so entrenched” that they might need “fundamental structural change that will enable everyone to begin afresh.” The Chief Executive of the LSA was “fettered”<sup>38</sup> by being answerable to a Board which could influence projects and priorities, having extensive consultation requirements, and by having to administer a system in which the participants “would not take responsibility for the quality of the legal profession.”

The recommendations of the 120-page *Transforming the Legal Aid System* report covered four areas: More efficient machinery for the legal aid system; changing the focus of the legal aid system; people quality, and accountability, and procurement of legal aid services.

The report questioned the value of the crown entity model for a core function of government, recommending that the functions of LSA should be moved into the Ministry of Justice, where it could take advantage of administrative synergies. A new position of Statutory Officer should be established within the Ministry, to take decisions calling for an independent perspective.<sup>39</sup> Contested decisions would be referred to a new Legal Aid Review Tribunal, constituted as one of the Ministry’s Tribunals –and not chaired by a lawyer..

*Changing the focus of the legal aid system* proposed a radical rethink of current service delivery with its almost exclusive emphasis on representation in court. Though told “courts don’t do customer service”<sup>40</sup> the report recommended introducing a client service approach at all stages of the process, starting with a boost to preventive and educational activities carried out by the Community Law Centres, where by far the greatest number of people interacted with the system. Resources should be directed to these “cliff top” centres, currently facing a funding shortfall, rather than being poured into the “ambulance” of representation at court.

## **Client service for the court system**

At court, there should be qualified people to greet clients and explain processes, as well as provision for child care, perhaps along the lines being piloted at Kaitia District Court. Social services were already familiar with many clients of the justice system, so it would save time and make sense to activate links with these agencies. Much time-wasting could be avoided if people convicted of an offence could first meet a duty solicitor a day or so ahead of their court appearance. Overly complex forms, such as the ten-page application for legal aid which currently needed a lawyer to complete, could be simplified so clerical staff could fill them in.

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<sup>37</sup> *ibid*

<sup>38</sup> Final Report, p 19

<sup>39</sup> An example is the Director of Health who is a statutory officer within the Ministry of Health and with ability to make independent decisions.

<sup>40</sup> Final Report, p48.

The report made a number of strong recommendations for quality improvements in the legal aid system, which the LSA and Law Society must work together to implement. A case management system should be introduced for problem clients, who would forfeit the right to a “preferred lawyer”. All lawyers providing legal aid services should go through a new accreditation process, with no roll-over for those currently listed, which must be renewed after three years. New disciplinary measures, not reliant on complaints, should be introduced, with a list of sanctions including reduced payment for poor performance.

Recommended procurement process changes included increasing the role of the Public Defence Service. Already handling 2400 criminal cases a year, at a demonstrated saving of \$985,000 over the five-year trial,<sup>41</sup> the in-house service was made permanent in 2008, and the 2009 Budget had provided \$5.3 million to extend it to four new locations.

The report acknowledged that rates of pay should be competitive to attract and retain top quality lawyers to the legal aid service. But it insisted that quality improvements should be embedded before considering the legal profession’s call for any parity with Crown Solicitors. To lift the overall standard and encourage professional development such as mentoring of new lawyers by more experienced practitioners, incentives should be offered to encourage groups of lawyers to participate in legal aid, possibly through “virtual chambers” While high-cost cases should still be individually case-managed, costs could be cut by streamlining procedures for dealing with multiple minor cases. With some restrictions, the “preferred lawyer” system could remain, but clients should be encouraged to choose a locally based representative to cut travel costs.

### **Immediate impact**

The publication of the final report had an immediate impact. Within three days, the Board had a new look. Former High Court Judge Sir John Hansen took over as the new chair, joined by experienced director John Spencer, and recent appointees Ross Tanner and Jane Huria in what would now be a four-member board. LSA Chief Executive Tim Bannatyne, with 37 years of public service, was told he would be out of a job before Christmas, with no reflection on his calibre and contribution.<sup>42</sup>

On 2 December, Justice Minister Simon Power opened a new Public Defence Service office in Waitakere, describing the PDS as “one of the shining lights of the New Zealand legal aid system” and a “cornerstone” of its future.<sup>43</sup>

If there was any doubt of the Government’s endorsement of the findings, it was dispelled when Cabinet confirmed the report’s recommendations at its 18 December meeting. There was one change: Dame Margaret had given the legal profession three years to improve quality and introduce disciplinary systems, or be answerable to an independent regulator. This was too long, in the government’s view. Justice Minister Simon Power gave the profession just two years to lift quality standards.

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<sup>41</sup> Hon Simon Power, media release, 9-6-09, ‘Government expands Public Defence Service’.

<sup>42</sup> LSA media release, 8-12-09, ‘LSA Board disestablishes Chief Executive Position.’

<sup>43</sup> Hon Simon Power, media release, 2-12-09, ‘Justice Minister opens new PDS office’.

As the Minister said: “Legal aid services are vitally important to our most vulnerable citizens. The changes I am making will allow those using these services, as well as those providing them, to be proud of our legal aid system.”<sup>44</sup>

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<sup>44</sup> Hon Simon Power, media release, 18-12-09, ‘Government moves on legal aid.’