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Dear Mr Johnson

Environment Court Draft Practice Note

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the draft updated Environment Court Practice Note.

Clause 1 – Communication

Clause 1.2 – Communications and co-operation amongst parties

1. Clause 1.2 of the draft Practice Notes states that:

> "Parties and counsel have a duty to the [Environment] Court at all stages of the life of cases to work constructively together to find solutions and narrow issues (whether of process or substance). This duty extends to treating each other respectfully and professionally."

2. The Law Society appreciates the reasons for this provision. However, we recommend draft clause 1.2 should be modified to reflect more closely the duties of counsel as set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules).

3. Counsel's duties as officers of court are set out in Chapter 13 of the Rules. Rule 13 states that "The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer". The Law Society agrees counsel's duty to the Court would extend to working constructively together to ensure the Court's case management objectives (described in clause 4.1 of the Practice Note) are achieved. That may include working constructively together on matters of process, but should not extend to matters of substance. Rule 6 states that "In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties". It is the party's right (and thus counsel's duty) to insist upon a substantive issue being advanced before the Court in a determined and uncompromising way if that is the instruction. Neither parties nor counsel should face criticism if the party's instruction does not extend to working constructively with another party to find solutions. An uncompromising approach may in fact advance the purpose of the Resource Management Act (RMA) where, for example, matters of national importance are involved.

4. The Law Society therefore recommends that clause 1.2 be redrafted as follows:

> "Counsel have a duty to the Court at all stages of the life of cases to work constructively together to ensure that the case management objectives are not undermined. That duty extends to treating each other respectfully and professionally. Counsel must also keep their client advised of alternatives to litigation that are reasonably available, to enable the client to make informed decisions regarding the resolution of the case."

5. The Law Society also agrees that it is sensible to expect the parties to litigation, including any self-represented litigants, to adhere to a similarly high standard of behaviour. It would be helpful to have this stated in a separate clause. Suggested wording for a new clause 1.3, adapted from the current draft clause, is as follows:

> "Parties have a duty to the Court at all stages of the life of cases to work constructively together to find solutions and narrow issues (whether of process of substance). This duty extends to treating each other respectfully."

6. We also note that it is not readily apparent whether the Practice Note is intended to apply in all proceedings under the RMA. Clause 9 of the Practice Note records that RMA prosecutions are managed under the Criminal Procedure Act 2011 and Sentencing Act 2002, and that the Sentencing Practice Note prepared under the Criminal Procedure Act applies. It appears therefore that the duties articulated in clause 1.2 do not apply in those proceedings. If so, there may be merit in a preliminary note being added to the Practice Note to clarify the point.

Clause 3 – Direct referral

7. While the Law Society supports the proposed additions to the Practice Note on the direct referral process, there are a number of aspects of the process that would benefit from further guidance from the Court. We consider that clearer guidance on the process for, and costs of, direct referral would assist applicants, consent authorities and section 274 parties.

   In particular, the Law Society recommends that the Court consider including additional guidelines in relation to the following areas of direct referral:

   A. evidence requirements in a direct referral, in particular when matters are substantially narrowed or settled prior to the Environment Court hearing;

   B. whether parties can reach a settlement prior to a directly referred hearing, and the process that should be followed if there are no outstanding issues between the parties at a directly referred hearing;

   C. the likely costs that would arise from Court-appointed Process Advisors and who would pay for these costs; and

   D. certainty on the costs that may be awarded against an applicant following a direct referral (including costs to the Court, the consent authority and potentially to section 274 parties).

A – Evidence requirements in a direct referral

8. Sections 87D to 87I of the Act set out the process where an applicant elects to have an application for resource consent, or to change or cancel a condition of resource consent, determined by the Environment Court instead of the consent authority. In considering an application for a resource consent, the Court is the first instance decision-maker and must apply sections 104 to 112 and 138A of the RMA "as if it were a consent authority".

9. Part 11 of the RMA applies to direct referral proceedings, including the Court's discretion in section 276 to receive anything in evidence that it considers appropriate, and to call for anything to be provided in evidence that it considers will assist it in making a decision.

10. The material required to be provided to the Court (by the consent authority) includes the consent authority's report prepared under section 87F and a copy of the application, including all information and reports on the application. The most recent amendments to the RMA have clarified that the consent authority is a party to the proceedings, and must attend the hearing to discuss or clarify any matter in its report and give evidence about its report.

11. Given the considerable volume of material required to be submitted to the Court (and the associated cost in preparing that material) the Law Society suggests that additional guidance would be particularly helpful to assist the parties in preparing evidence in a direct referral. Matters which could be addressed include:

    - whether the Court will have regard to the application (and related reports) and the section 87F report in addition to any evidence submitted to the Court;
    - whether the applicant and the consent authority are required to provide full evidence on every aspect of the application, further to the Assessment of Environmental Effects and the section 87F report which will be before the Court; and
    - whether limited evidence can be provided and parties can rely on the Assessment of Environmental Effects and the section 87F report.

B – Settlement of issues prior to hearing

12. Related to the evidentiary requirements are issues around the process to be followed where parties reach agreement on any issues prior to the hearing (either through Court-assisted mediation or other processes).

13. While the draft Practice Note encourages discussion and resolution of issues between parties (i.e. through mediation, expert caucusing and other alternative dispute resolution mechanisms), if all issues are settled prior to a direct referral hearing, there is no guidance on the evidence and procedural requirements at the hearing. The Law Society considers it would be helpful if the Court could provide guidance in the Practice Note on its expectations in such a case, including:

    - whether the applicant and the consent authority can, in those circumstances, rely on the Assessment of Environmental Effects and the section 87F report to address the relevant matters in sections 104 to 112 and provide limited evidence on the matters agreed;
    - if the parties could present a joint case; and/or
    - whether the case could be resolved through a consent order and/or a hearing held on the consent order.

C – Costs of Process Advisors

14. One of the inclusions in the draft Practice Note is that a case-managing Judge may appoint a Process Advisor, to whom parties can have access free of charge for advice about the processes. The Law Society supports this option as a measure to facilitate the efficient hearing of direct referral proceedings where there are potentially a number of unrepresented parties. However, the Law Society observes that there is no guidance given as to the likely costs of the Process Advisor, which would presumably fall on the applicant (although this is not clarified in the draft Practice Note).

15. For large applications which involve numerous submitters, the costs of the Process Advisor are likely to be substantial. If it is intended that the cost of appointing a Process Advisor falls on the applicant, the applicant should be able to elect whether or not they wish a Process Advisor to be appointed. In most cases, applicants consult widely with submitters, without the need for an external advisor.

16. The Law Society therefore recommends that the Practice Note makes clear who is to pay the costs incurred by a Process Advisor. If it is intended that an applicant is to pay these costs, it would be

appropriate for the Practice Note to provide that an applicant can advise the Court whether they wish a Process Advisor to be appointed.

D – Certainty of Costs

Following a direct referral

17. The Practice Note does not seek to introduce any provision in relation to the costs likely to be payable by the applicant to the Court, the consent authority or section 274 parties following a direct referral. We consider it would be appropriate for greater clarity to be provided on these costs.

Court costs

18. Since the direct referral process was introduced, applicants have been exposed to escalating court costs in relation to direct referrals. Following the first direct referral, *Progressive Enterprises Limited & Ors v Rodney District Council* [2010] NZEnvC 232, the Court found that costs can be awarded to the Crown following an application for direct referral, and held that court costs were in the range of $4,000 - $6,000 per day. Following a two day hearing, Progressive was ordered to pay $12,500 to the Crown.

19. In more recent cases, the Court has sought to recover its costs at a much higher daily recovery rate. For example, in *Jackson Street Retail v Hutt City Council* ENV-2012-WLG-48, in which the matter was conducted over a two and a half day period, court costs came to $51,511. More recently, in *Road Metals Company Ltd v Selwyn District Council* [2013] NZEnvC 81, the Environment Court awarded costs of $125,909 to the Crown.

20. As can be seen from the case examples, there is a large divergence in the costs being sought by the Crown following applications for direct referral. These costs appear to be rapidly increasing. As such, there is a lack of certainty for applicants as to the likelihood and quantum of costs that can be awarded against them. The resulting uncertainty means that applicants will be less inclined to apply for direct referral, even if appeals are inevitable, and instead proceed to a Council hearing as they will not then be faced with the burden of these uncertain costs.

Costs to the Council and section 274 parties on direct referral

21. Section 285 of the RMA was recently amended to allow the Environment Court to award "reasonable costs" to a consent authority incurred in assisting the Court in relation to a report prepared under section 87F. Prior to this amendment, case law indicated that costs could be awarded to a consent authority following a direct referral. However, similar to court costs, there is no certainty as to the likely amount of these costs, and amounts have fluctuated.

22. In the recent *Road Metals* case, the Court went a step further and found that section 274 parties might be entitled to costs following a direct referral, awarding $45,000 (approximately 33% of actual costs incurred) to two separate section 274 parties.

23. Applicants are therefore faced with the possibility of having substantial costs awards made against them to the Court, a consent authority and possibly even to section 274 parties. Uncertainty as to the quantum of these costs is a strong disincentive to applicants considering a direct referral application.

24. The Law Society suggests that one option to address this uncertainty would be for the Environment Court to implement a set schedule of costs for direct referral applications. Applicants would then be able to calculate the likely costs of direct referral in advance of making a decision on whether to proceed with that option instead of the more conventional Council / appeal process. This is the case with other courts (such as the High Court) where the scale of costs is known in advance.

Clause 4 – Case Management

Clause 4.1

25. We suggest that the last bullet point be split. The objective "achieve the purpose of the relevant legislation" has significant standing on its own and should be a discrete objective.

Clause 4.9

26. Clause 4.9 states that "The Court will not usually defer the hearing of an appeal against the grant of a resource consent if the successful applicant for that consent opposes the deferment". In doing so, the Practice Note creates a strong expectation that a deferral of a consent hearing will not normally be approved by the Court, unless the applicant for that consent agrees. It is noted, however, that the Court's statutory duty to hear and determine appeals "as soon as practicable" is expressly subject to the proviso that such duty does not apply where "in the circumstances of a particular case, it is not considered appropriate to do so."[1]

27. The Law Society notes that from time to time circumstances do arise where, notwithstanding the desire of a successful consent applicant to have an appeal determined, efficient court practice or the interests of justice may warrant deferral of the substantive appeal hearing. Such situations may include where additional environmental-related statutory approvals are required before the proposed consent activity can proceed, or where substantive landowner approvals are required, and where the outcome is likely to impact significantly the scope of appeals or the ability to exercise any consent obtained. Proceeding to a hearing in such situations may result in an unnecessary use of court and community resources, particularly where the consent the subject of the appeal cannot be exercised without other statutory or landowner approvals that have not been obtained (and that may not be forthcoming). For these reasons the Law Society considers that it would be desirable for the Practice Note to state expressly the Court's statutory discretion to defer hearing of an appeal, in such circumstances as the Court may consider appropriate.

Clause 4.13(b)

28. Clause 4.13(b) notes that persons served with a witness summons are "expected" to prepare a written statement of evidence. While many summonsed witnesses may choose to prepare a written statement of evidence, and this practice is to be encouraged, the Law Society submits that the Court's ability to require a summonsed witness to prepare a written statement of evidence is questionable if it goes beyond the production of pre-existing documents.[2] Any written statement of an expert witness appearing under summons must presumably comply with the requirements of clause 7.3 of the Practice Note, and accordingly any requirement to prepare a written statement of evidence is potentially of some consequence, and in the case of expert witnesses, likely to extend beyond merely producing a previously prepared report or other similar document.

Clause 4.16

29. Clause 4.16 limits rebuttal evidence to matters "which could not reasonably have been foreseen". This restriction may have the unfortunate consequence of encouraging parties to cover off every potentiality in their evidence in chief, thereby unnecessarily lengthening statements of evidence. If all potentially foreseeable issues need to be included in a primary brief, this would appear to conflict with the Court's drive to shorten statements.

30. With regard to the statement that the admission of rebuttal evidence is a matter for the Court's discretion, section 276(2) of the RMA provides that the Court is bound by the rules of law about evidence

[1] Section 272(1) RMA.

[2] See section 278(3)(b) RMA. Note also that the Court has the power to commission a report from an appointed Court expert under s 278(1) RMA.

that apply to judicial proceedings. However, it may be helpful to draw attention in the Practice Note to the provisions of Part 1 of the Evidence Act 2006, which sets out the purpose, principles and matters of general application to the Court's exercise of discretion. In particular, section 8(1) would support the exercise of discretion excluding rebuttal evidence if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding.

Clause 5 – Alternative Dispute Resolution

Clause 5.1(g)

31. The Law Society supports the proposal to have the case-managing Judge decide whether a party may participate other than on the basis of full authority to settle. At present, there is a risk of parties feeling under pressure to agree to representation by a delegate without authority to settle, simply to ensure that the mediation can go ahead. The case-managing Judge, being a step removed from the mediation, would not be placed under the same sort of pressure.

32. The Law Society notes the proposal to retain the presumption that parties will be represented by delegates with full authority to settle, unless notice is given to the contrary at least seven days prior to the mediation. If such notice is issued only seven days before the mediation, significant expense is likely to have been incurred by parties, counsel and the Court (e.g. travel bookings and counsel's preparation time). The inconvenience and expense caused by late cancellation in these circumstances could be avoided by requiring each party to confirm in writing to the Court prior to the mediation notice being issued, that it will be represented by a person with full authority to settle. This should not cause any difficulty since the Court's mediation manager is in frequent telephone and email contact with all parties to make arrangements for dates and venues before the notice is issued in any event.

Appendix 1 – Lodgement and Use of Electronic Versions of Documents

33. Appendix 1 foreshadows that the use of electronic documentation in hearings may become standard practice over time. The Law Society supports the use of electronic documents to facilitate access to the Environment Court and the efficient disposition of proceedings before it. The Court's current practice of using email for filing documents and for communications between parties and the Registrar are examples of current use of technology.

34. However, it is also important that requirements or expectations around the use of electronic documentation do not become a barrier to parties accessing the Court or engaging in proceedings. Use of electronic documents can save parties the costs associated with photocopying and managing paper files; conversely however it can also add to parties' costs in requiring access to litigation support and other software or hardware. Lay parties, community groups, iwi and NGO organisations regularly engage in Environment Court proceedings, and may have limited access to electronic litigation support services. Similarly, many small or medium sized legal practices may have limited information technology support. The Law Society submits that for these reasons, some care and discretion is required in the move towards any mandatory requirements regarding the use of electronic documents in Environment Court proceedings.

Appendix 2 – Protocol for Court-Assisted Mediation or other ADR

35. It appears that new paragraph (j) (under the heading "Settlement") is intended to reflect the practice of holding a hearing to consider a consent order. It records that the Court has a discretion whether or not to make the order. As currently worded, this doesn't acknowledge that consent orders often arise from a mediated solution and that, if modified, may no longer be acceptable to one of the parties (and therefore the matter should have proceeded to hearing).

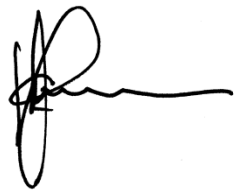
Appendix 3 – Protocol for Expert Witness Conferences

36. The Law Society has concerns about some aspects of the proposed Protocol for Expert Witness Conferences:

    - The proposed Protocol requires a statement of agreed facts and a list of resolved and unresolved issues to be prepared in advance of conferencing. This is a step to be led by counsel. If the expectation is that such a step will be taken in all cases, it would be preferable for it to be moved out of Appendix 3, and into the body of the Practice Note.
    - The appendix also states that experts should "realise the implications for their client of any agreement they might come to". This might be construed as meaning that experts should be careful not to agree if that is not in accordance with the client's theory of the case. Any such interpretation would of course be inconsistent with an expert's overriding duty to the Court, expressed elsewhere within the Practice Note.
    - Appendix 3 provides that conferencing must be facilitated by an independent person, unless the Court agrees otherwise, and that conferencing must be in person unless the Court agrees otherwise. The Law Society questions the practical workability of these requirements, and considers that they should generally be matters for the discretion of the parties, unless the Court makes specific directions in the context of a particular proceeding.

This submission was prepared with the assistance of the Law Society's Environmental Law Committee. If you would like to discuss the submission, please contact the Committee convenor, Phil Page, through the Committee secretary, Jo Holland ((04) 463 2967 / jo.holland@lawsociety.org.nz).

Yours sincerely



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