



19 July 2011

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Dear Sarah

### **Legal Aid for Waitangi Tribunal proceedings**

Thank you for the opportunity to comment on the *Legal Aid for Waitangi Tribunal proceedings* consultation paper. The Law Society has consulted with lawyers working in the area of Waitangi Tribunal legal aid and comments on the key proposals are set out below.

### **Introduction**

The consultation paper states that the cost of legal aid for Waitangi Tribunal matters and associated settlement negotiations has increased from \$11.7 million in 2008/2009 to \$16.4 million in 2009/10.

It is important to note that the government's goal is to settle all Treaty claims by 2014, and the current level of Waitangi Tribunal legal aid cost is temporary. The current costs need to be viewed as a short-term investment in ensuring that grievances are properly heard and resolved. It is also important to note that the cost increase cited includes settlement negotiations, which have now been moved to the Office of Treaty Settlements. Legal aid expenditure for Waitangi Tribunal matters will significantly reduce when negotiation funding shifts to the Office of Treaty Settlements.

The consultation paper makes a comparison between the average cost of criminal or family cases compared to Waitangi Tribunal cases. These cases are not fairly comparable, as Waitangi Tribunal cases are unique. The Waitangi Tribunal is a Commission of Inquiry. Waitangi Tribunal cases are high cost because it can take years to research and prepare for the case and each claim will potentially benefit thousands of claimants.

### **Context**

The consultation paper reflects the large number of lawyers attending hearings as a concern. It states that 30 lawyers might represent 400 or more claimants in a particular district hearing.

The context must reflect that the large number of claimants in an inquiry is a result of hearings being heard in large inquiry districts. This is being done in the interests of efficiency in that one inquiry caters for many separate and distinct claim interests. Each lawyer is expected to be fully aware of each claimant's particular claim issues and interests.

If there are 30 lawyers representing 400 claimants this has already achieved efficiency.

### **Principles for this review**

We agree that principles A and B are important and appropriate principles to guide legal aid reforms.

All the principles use the word “should” meaning the principles are not absolute requirements. However, if too much emphasis is placed on compromise and forced co-operation, as suggested in principle C, there is a real risk claimants will not accept any hearing or settlement process and the process will be undermined. The Waitangi Tribunal is the most appropriate body to guide the extent to which claimants are required to work together.

If principles D and E are key outcomes of the review, it might lead to an undermining of the durability of settlements and an erosion of the claimants’ right to have their grievances heard.

It is unclear what is meant by principle D. If this principle is intended to mean that Ministry staff will be dealing with the administration of grants and case management in this area more efficiently than this is encouraged. Anything that reduces the amount of time lawyers need to spend on administration is welcomed. Like all proceedings if there are delays by the Ministry in the processing of grants this may affect the efficient running of the Waitangi Tribunal.

The requirement in principle E that legal aid services should reflect an efficient use of taxpayer funding should also ensure funding is *effective* and not just low cost.

### **Duplication: Coordinating counsel will cover overarching issues**

Lawyers expressed differing views relating to the suggestion of appointing coordinating counsel. A similar proposal had been supported by the Legal Services Agency in 2004 and was part of the Waitangi Tribunal coordinated Quantum Change process<sup>1</sup>. It was not successful primarily due to claimant rejection. However, the proposal is cautiously supported with the following caveats:

- Ministry staff are not the appropriate people to appoint coordinating counsel. This is a role which more appropriately sits with the Waitangi Tribunal;
- There must be a mechanism for claimants (and other counsel) to raise concerns about an appointment and/or the quality of work being carried out by the coordinating counsel. This is a particular concern if, for example, just prior to the filing date for submissions it becomes apparent that either the coordinating counsel is filing submissions that do not cover all the issues or are of poor quality. It will then be necessary for other counsel to quickly step into the breach and funding will need to be available for this, or else it will delay the entire hearing process. Decisions on any complaints made under this mechanism will need to be determined urgently to ensure that the process is not delayed;
- Sufficient funding must still be made available to all other counsel to address issues specific to their clients or that have not been appropriately covered by the coordinating counsel;
- Adequate safeguards would need to be included in the process to ensure that each claimant group has its own interests recognised and is not unnecessarily restricted from presenting its claim. This means the coordinating counsel balancing the obligation to represent his or her own clients against the need to represent the needs and interests of the wider group.

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<sup>1</sup> See *Proposal for the Appointment of a General Claimant Counsel* attached.

## **Other proposals to avoid duplication and unnecessary work**

### *1. Treaty lawyers must be well-versed in Treaty jurisprudence*

The consultation paper states that legal aid should not be used to fund providers' education and that legal aid policy should make it clear that legal aid funding is not available for Treaty lawyers (or others supervised by Treaty lawyers) to read or re-read Tribunal decisions, case law, Treaty texts, overview reports, or other generic materials.

Treaty claimants are entitled to have a lawyer who will undertake all necessary legal research for them and an ethical, professional lawyer must ensure this is done. The proposal appears to expect Treaty lawyers to memorise all relevant Waitangi Tribunal reports, case law and historical evidence and not to re-read them when required throughout the presentation. Such an approach is inappropriate when counsel is preparing submissions or cross-examination and correct statements of precedents or generic historical evidence are critical.

Lead providers have already proven a certain level of experience and competence through the legal aid provider approval selection process. However, this should not mean that there is no funding available for research that is directly relevant to the case. In the recent practicing certificate renewal round the Law Society sent out a *Professional Legal Education Return* which lawyers were asked to fill in to assist with the development of the new Competency and Professional Development Framework. That return asked lawyers to state how much time was spent on other structured and unstructured education. The form specifically stated that research or reading for specific files does not count as unstructured education.<sup>2</sup>

Criminal, civil and other lawyers would not be expected to, nor do they, memorise all relevant case law and neither should Treaty lawyers. To do so would disadvantage Waitangi Tribunal clients. In addition, it would leave a Treaty lawyer in the untenable position of either doing substantial amounts of work for free, or only doing work that the Ministry will pay for and potentially breaching their duty of care to their client, through providing sub-standard submissions without accurate reference to precedent.

The more balanced position is that all Treaty lawyers must be well-versed in Treaty work. The funding of research and review of Tribunal decisions will be limited to that necessary to properly present submissions and claims to the Tribunal. Legal aid funding directly to educate Treaty lawyers will only exist in rare and specific cases.

### *2. Lawyers will only do the work when it is required*

The consultation paper states that legal aid funding should only be available for work at the time when it is required to be done, which will often not be until hearing dates have been set.

It is accepted that the majority of work will only be required leading up to, during and after a hearing. However, it is critical to note in Treaty claims (given the length of the hearings and the volume of evidence and submissions) counsel will have to commence preparation well before the actual event. For example, the writing of closing submissions in a historical claim would need to be commenced several months before the filing deadline to ensure all the material is covered. This proposition appears to be a contradiction in relation to other areas of law, such as criminal, where early preparation is encouraged.

In addition, there is still a definite need for funding to be available in the years before and after a hearing. This is to provide advice to the claimants on issues relating to what could be termed 'miscellaneous claim issues' including matters such as: monitoring overlapping/adjacent claims and

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<sup>2</sup> The form stated "Please do not include research or reading you do for specific files"

hearings; consideration of potential urgent issues as a result of changes in Crown policy or law; and any steps required to protect assets/land for future settlement (e.g. disposal of Crown assets in the claim area).

Furthermore, claimants often need advice on issues relating to the claimant group organisation, including issues of mandate, to help them ensure they remain focused and to keep the group moving not just through the hearings process but towards the ultimate settlement of the claims.

### *3. Lawyers will work constructively with others to avoid duplication*

This proposal is always valid but should not be taken too far. Attempting to reach agreement on specific wording with a large number of people involved is often difficult, time consuming and frustrating. The reality is that it is often easier and quicker for Treaty lawyers to draft individual memoranda on smaller issues than to spend hours in teleconferences attempting to all agree on the wording of joint memoranda. Options need to be maintained to allow Treaty lawyers to use their discretion and professional expertise as to the best and most efficient approach.

### *4. Lawyers will ensure there is no duplication of effort within the firm*

Any primary Treaty claim is substantial and complex. The variety of issues and length of time that work is required on the file and in the hearing is far longer than most other types of legal cases in New Zealand with a far greater number of people represented by each individual counsel. To ensure that these files are professionally run and the claimants receive the professional ethical representation that they are entitled to, it is often essential that more than one lawyer is involved in the file. Whether at a hearing, preparing for a hearing or at a hui with the claimants there is so much material involved, there is simply not enough time for one lawyer to undertake all the work required on a file. In hearings particularly, even substantive judicial conferences, if the lawyer represents a primary claimant, it is essential there is another lawyer available as well to assist with the preparation and presentation of the material, client liaison, research and to step in if required at different times. When a lawyer is dealing with a large number of claimants, it is essential that two people work on the Treaty files to assist in ensuring that there is generally always someone available for claimants to speak to as it is an ethical obligation that a lawyer “must promptly answer requests for information or other inquiries from the client”<sup>3</sup>

The number of senior and competent Treaty lawyers is now very limited and accordingly almost all Treaty lawyers operate by having a senior counsel and a junior counsel on each active file. This means the senior counsel can impart their expertise in many files as required, but yet the day to day matters and preparation can still be undertaken while the senior counsel may be out of the office. It is simply not possible or efficient for a single lawyer to undertake every task on the file. In the case of senior counsel it would be a waste of resources, and ultimately be more expensive for the Ministry for a senior lawyer to undertake every task on the file that they are responsible for.

While most lawyers and law firms in this area do generally have two counsel on each file, the Law Society understands that there is very little chance of actual duplication as senior and junior counsel have different but complementary roles. This is consistent with the manner in which lawyers generally practise, with senior lawyers taking more of a supervisory role.

It is important to note that the Crown also has the same approach as claimant counsel to treaty claims, having one senior counsel and one (often two) junior counsel working on the file as well. The Crown also always has at least two counsel at a hearing.

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<sup>3</sup> R 7.2, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

It is also important to record that most firms act this way for private clients of the firm; and also when the government are clients. That is, some work is completed at a senior level as appropriate. Other work is delegated to an appropriate level and cost, but with supervision or oversight.

*5. Intensive management approaches may be used to ensure that legal services are efficient, of high quality, and that duplication does not occur*

It is essential that such an approach does not impact on the efficiency of practice or on a provider's ability to represent their claimants' claim.

However, if it leads to a reduction in the amount of administration time that lawyers must spend on legal aid matters then the profession would welcome an intensive management approach.

### **Historical research**

It is agreed that Treaty lawyers should not be funded to undertake historical research. However, legal research is often necessary to present a claimant's claim to the Tribunal. The operational policy should set out that legal research would be funded where it can be shown that the work required is necessary.

An example is where land, which is traditionally the claimants' land, is now in the government or another tribal group's hands. A basic investigation needs to be carried out to find out the identity of the land, whether the claimants have a *prima facie* right to the land, and identify when the land was taken.

### **Urgency applications**

The Law Society understands there are issues with the current legal aid process for urgent applications.

The current process does not allow legal aid to be granted for investigating the background of an urgent application or preparing the application. The reason for this is that legal aid cannot be granted until a claim has been filed and the necessary Waitangi Tribunal legal aid report completed.

Lawyers are therefore in the position of being required to undertake all this preparatory work without funding, and only seeking aid once the urgent application has been filed. When an application is filed with the Waitangi Tribunal, the urgency application will generally proceed far more quickly than the legal aid application. Often the Tribunal, prior to any decision having been made by the Ministry, will have determined the urgent application.

The situation then arises where if the Tribunal turns down a request for an urgent hearing the Ministry argues that there were no prospects of success and with the benefit of hindsight, relies upon the determination of the Tribunal. There is, however, clearly a difference between being unsuccessful in an application for a hearing and having no prospects of success.

If the *Timmins* test for prospects of success were applied to urgent claims it would be met. It is worthwhile to bear in mind what was held by Wild J in *Timmins v Legal Aid Review Panel [2004] 1 NZLR 708*

“[33] ... The assessment invited by the words in s 9(4)(d)(i) sufficient to justify the grant of aid”, involves weighing the likely benefits against the likely costs.

[34] Because assessing “prospects of success” may involve assessing non-pecuniary benefits, the assessment for a particular plaintiff or claimant can obviously be difficult.

[35] ... The question might be framed thus: What, if any, legal action would the applicant (assuming that they were a reasonable individual) take in the circumstances if paying their own legal costs?"

Lawyers are covering the cost of a number of these matters. The Ministry should have a set amount of funding that they provide as soon as a Treaty lawyer receives instructions for a potential urgent claim. This would allow the lawyer to investigate the basis for the claim and determine whether or not to proceed with filing the claim.

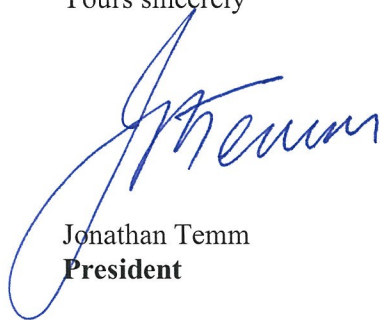
Claimants, like the Crown are entitled to have potential breaches considered and seek advice on these issues. The current system requires counsel to only file urgent claims and apply for aid when all work is completed, as current policy does not allow the Ministry to address the question of aid before that point. Furthermore, to file the legal aid application before the urgent claim is finalised would prejudice claimants.

### **Updating operational policies**

It is noted that there will be an updated operational policy manual by October 2011. The Law Society wishes to be consulted on the new operational policy manual.

The Law Society hopes that the above comments are of assistance to the Ministry of Justice.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Temm', written over a large, stylized blue loop that extends from the signature down to the typed name below.

Jonathan Temm  
**President**

# **Proposal for the Appointment of a General Claimant Counsel**

## **1. Current Issues with Interlocutory/Hearing Process:**

1.1 This proposal arose out of a consideration of the current Tribunal interlocutory process and whether or not improvements could be made. The review team noted that while incremental improvements could be made to the current process to reduce the cost and complexity of the current procedures there was still a fundamental issue created by the constant duplication of generic documentation caused by all claimant counsel having to prepared documents simultaneously while in effect addressing the same issues.

1.2 Specific problems with the current process are identified below.

1.2.1 Repetition – Same issues repeated by different counsel in pleading and submission process.

1.2.2 Variation in pleadings - Crown swamped  
- Complication in identification of core issues

1.2.3 Cost, time and quality issues

1.2.4 Absence of framework for leadership amongst claimant counsel.

1.2.5 Lack of certainty in process

## **2. Position of General Claimant Counsel:**

- 2.1 The review team considers that the current costs of the historical inquiry process, and in particular the interlocutory phase of an inquiry, could be significantly reduced if a General Claimant Counsel was to be appointed to take primary responsibility for reduced addressing the generic issues in any particular inquiry.
- 2.2 Accordingly it is proposed that where appropriate each regional inquiry appoint a General Claimant Counsel to undertake following functions:
- Facilitate procedure in particular inquiry
  - Coordinate generic casebook (if applicable)
  - Prepare generic statement of claim / Identification of issues.
  - Prepare generic opening submissions
  - Brief and lead generic claimant witnesses
  - Cross examine Crown generic witnesses
  - Prepare and present generic closing submissions.
- 2.3 The position would be funded by LSA.
- 2.4 Counsel would be appointed from pool of appropriate senior counsel (criteria / process to be developed e.g. qualifications / termination etc).
- 2.5 Counsel would require assistance of one or more junior counsel depending on size of inquiry.

### **3. Role of other Parties to Inquiry:**

- 3.1 Crown Counsel
- Pleads to generic statement of claim / develops generic issues.
  - Pleads to specific statements of claim / develops specific issues (if necessary).
- 3.2 Claimant Counsel

- File amended Statements of Claim following generic Statement of Claim / response.
- Limited to specific / additional / disputed matters.
- Focus on presenting specific claim evidence and submissions.
- Provide input to General Counsel on generic issues.

#### 4. Example Process:

##### 4.1 Preliminary

- Regional Inquiry established and Presiding officer appointed.
- General Counsel appointed\*/ Crown Counsel appointed.

##### 4.2 Interlocutory

- Casebook prepared (Facilitate coordination of Crown / Claimant evidence).
- General Counsel prepares generic statement of claim.
- Crown response.
- Generic Issues and themes identified.
- Claimant Specific Statements of Claim.
- Crown response to specific claims.
- Specific issues identified.
- Final Statement of issues.

##### 4.3 Hearing

- General Counsel opens on generic issues and leads generic evidence.
- Claim specific evidence presented.
- Crown Evidence – General Counsel xxm on generic issues.
  - Claimant Counsel xxm on specific.
- Closing Submissions – General Counsel prepares and presents generic submissions.
  - Claimant Counsel prepares and presents specific submissions.
  - Crown Response.

\*Note: A General Claimant Counsel can be appointed at any time up to the start of the hearings commencing but the potential advantages are greater the earlier an appointment is made.