

New Zealand Law Society

LEGAL SERVICES ACT (QUALITY OF SERVICE) REGULATIONS 2011

The New Zealand Law Society (the Society) welcomes the opportunity to make submissions on drafting instructions for the proposed Legal Services Act (Quality of Service) Regulations 2011 (proposed Regulations).

GENERAL COMMENTS

Lack of flexibility and discretion

There appears to be little flexibility in the mandatory requirements set by the proposed Regulations. Currently the Legal Services Agency (Agency) has a discretion and can approve applications that do not meet the requirements in exceptional circumstances. A similar provision needs to be included in the proposed Regulations for applicants who, due solely to their particular circumstances, do not fit precisely within the criteria but are able to clearly demonstrate their competence in other ways.

There is no ability to dispense with the requirements in appropriate cases. For example, a person with ten years' trial experience who takes some time out of practice for family or other reasons, appears to be treated exactly the same as a person straight out of law school with more limited experience.

Applications should be viewed as a whole; the Secretary needs to be given an overall discretion to approve applications that do not meet the specific requirements set out in the Regulations (and any policies or guidelines made under the Regulations). It is recommended that a discretion should be retained in the Regulations to address this situation.

Operational policies and guidelines

There are a number of references in the Regulations to "*operational policy*" and "*guidelines issued by the Ministry*". We do understand that it would not be practical for the operational policies and guidelines to be in the Regulations themselves because it would be difficult to update the policies/guidelines to reflect ongoing operational changes. However, the proposed policies/guidelines will contain significant detail and the Society seeks to have input into their content, in order to give legal aid providers a level of certainty. Ideally the Regulations should require consultation with the Society and stipulate the minimum standards for consultation.

It is important that any practitioner seeking to comply with the proposed Regulations can easily and readily see exactly what is required of them. In our view, this is an opportunity for the Ministry of Justice to put together comprehensive Regulations that make it clear to practitioners exactly what will

be required of them. There is a high administrative burden on legal aid providers. If the Ministry wants to attract good legal aid providers then having one clear document which sets out all the requirements to be a legal aid provider would alleviate some of the concerns about the high administrative burden. The Regulations will need to be readily available on the Ministry website, along with all accompanying forms.

PROPOSED REGULATIONS

Regulation 3: Interpretation

“**Experience**” is defined in Regulation 3 as “detailed dates and examples of matters, which will demonstrate particular skills, knowledge and practice in an area of law”. It needs to be clear whether the experience required is “post admission”. The Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 define “legal experience”¹ with a reference to “legal work”². There is no requirement for this to be post admission. If it is intended that this is post admission experience, then the Regulations should be changed to reflect this intention.

The term “recent experience” is used throughout the Regulations. Recent experience is not defined in Regulation 3, but it should be given a liberal interpretation. We suggest that a definition consistent with the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 is adopted. Rule 12 of these Regulations requires a lawyer to have three years experience within the last five years before practising on own account.

Whatever definition is used, it needs to be made clear that the Secretary has a general discretion to approve an application, including where the applicant does not meet experience requirements. Provision needs to be made for special circumstances, such as a period of time off for childcare.

'Recent Experience:' Means active experience in the relevant practice area of law gained over the past 5 years.

The Ministry should also consider in its definition whether it is prepared to take into account overseas experience. It is our view that experience criteria should be limited to experience in New Zealand Courts only, but there could be provision for a separate category of exceptions where overseas jurisdiction could be taken into account. This is consistent with the Society’s consideration of

¹ Rules 12-14 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008

applications to practice on own account.³

It is also important that lawyers who change to a different area of practice have the ability to take advantage of the valuable experience that they achieved in another area of law. Otherwise that valuable experience might be discounted.

“**Work samples**” is defined in Regulation 3 as “documents”. Lawyers often take the term “document” to mean only documents that are filed in court. We would not want this to be the definition. In some cases, particularly in civil or family law areas, a complicated opinion may be a better work sample.

PART 1: CRITERIA FOR APPROVAL

Regulation 4: Qualifications and restrictions on practice

Paragraph 10 states that applicants must provide evidence of their qualifications to be a legal aid provider. It is unclear what evidence the Ministry requires. It could be interpreted as any of the following:

- a copy of the degree certificate; or
- evidence of attending a professional course; or
- the certificate of completion from the Council of Legal Education (which states that they have met the qualification requirements to be admitted); or
- a practising certificate; or
- a full curriculum vitae.

We see this as an unnecessary administrative burden. This information is contained in the Register of lawyers which is required to be kept up to date under the Lawyers and Conveyancers Act 2006. In addition, new providers are required to obtain a certificate of standing from the Society, which states the mode of practice and any restrictions (as well as complaint and discipline information).

Regulation 5: References

Regulation 5 proposes that an applicant must provide a minimum of two references. These references must be based on the referees’ direct and relevant knowledge of the applicant’s skills to provide legal aid services.

² Section 6 of the Lawyers and Conveyancers Act 2006

³ Rules 12 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008

We propose that one of the referees should be able to attest to having observed the applicant directly. For example, one referee should be able to provide details of having observed the applicant's actual involvement in Court.

However, this can only be an ideal and we strongly encourage flexibility regarding this requirement. At times practical issues might arise in situations where a referee with the relevant knowledge cannot be obtained. For example, the requirement to provide two references is problematic for applicants in the areas of refugee claims, mental health hearings and youth court advocacy; these are generally non-adversarial and it is only the claimant and their lawyer present in the hearing. Generally there will therefore not be any other lawyers who have first hand experience of an applicant's representation. For a number of senior litigation lawyers, the only party to observe them in court is the Crown or the judiciary who are unlikely to give a reference. While we agree that it is necessary to have references, sometimes flexibility might be needed regarding direct knowledge of the applicant's skills in relation to the relevant area. It may be sufficient to submit additional references relating to direct knowledge in another area of law (for example an immigration lawyer's references relating to direct knowledge or appearances before the Human Rights Review Tribunal).

Regulation 6: Service delivery systems

Regulation 6 proposes that applicants must provide information about the systems that they have in place to deliver legal services to clients.

The Regulation pre-supposes that applicants will either be sole practitioners, barristers or principals of a firm. Given that a number of applicants are likely to be employees, we see efficiencies in the Ministry being able to waive this requirement if they have already approved a principal/partner of a firm as a lead provider. Consequently the firm's service delivery systems have already been considered. An employee has little control over internal complaints processes or indemnity insurance cover. An employee whose supervising partner or principal is lead provider should be required to provide only a copy of the client care information and a standard letter of engagement.

Paragraph 16(i) proposes that applicants "may be asked to provide, without limitation, information on ... the arrangements they have in place to manage scheduling conflicts". In considering the efficacy of such a requirement, it is important to keep in mind that in some smaller provincial areas and smaller practice areas (such as immigration), there are a relatively small numbers of lawyers involved. They generally have close relationships with the local courts or specialist bodies such as the Refugee Status Branch and the Immigration and Protection Tribunal.

With adequate notice, experience has shown that scheduling conflicts can be resolved through negotiation between the lawyer and case manager or registrar involved. Where this is not possible, lawyers will normally arrange for representation from within the pool of local or specialist providers, depending on availability and the specialised expertise of the individuals involved. While we are aware that scheduling conflicts may be an issue for criminal lawyers, for most lawyers scheduling conflicts do not constitute a significant problem at the present time, and there is no need to introduce a regimented solution to a non-existent problem. Whilst the wording of the Regulation is capable of taking this into account we would be very concerned if the Agency were to impose onerous requirements on providers relating to managing scheduling conflicts.

Under paragraph 16(v), an applicant may be required to provide the Agency with a copy of their client care information and standard letter of engagement. There is no need for the additional requirement under paragraph 16(iv) to provide the Agency with information about the applicant's indemnity insurance cover, since this information is included in the client care information and standard letter of engagement.

Regulation 7: Experience and competence requirements for applications to be lead providers

Paragraph 17 proposes that applicants must demonstrate their experience and competence relevant to the area of law for which they are applying to be approved to provide legal aid services. The paragraph appears to be quite widely drafted and may be anticipated as a general introductory sentence but if this were to be the only reference it may need expansion.

There are problems in relation to the current proceedings categories (as discussed later, in relation to the Schedule).

Paragraph 18 proposes that applicants must provide work samples supporting their statements about their recent experience in the relevant area of law. Providing work samples might assist the Agency's assessment of an applicant's suitability for a particular category. However, there are limited opportunities for category 1 lawyers to provide written work samples as most category 1 work is orally based. Not all criminal lawyers are concerned about this as long as there is sufficient flexibility to allow for provision of transcripts or decisions. We understand that this is widely defined but the Ministry should clarify what samples would be acceptable in the operational policy/guidelines which accompany the Regulations.

Another issue with paragraph 18 that may not have been contemplated is that lawyers are encouraged to use precedents wherever possible. Submissions can be prepared, within a firm or a set of chambers, on a collaborative basis and would not necessarily be the applicant's "solo" work. In fact, rather than

discourage this practice, the collaborative approach (with appropriate supervision) should be encouraged. Employees often do not sign out their own work and most opinions and correspondence would be signed out under the name of a partner. It should be open to the employee to submit work signed out by a partner if the partner states that the employee did the work.

Regulation 8: Supervision requirements for applications other than for lead provider status

Paragraph 20 proposes that applicants other than lead providers must provide evidence of arrangements they have in place for supervision of their work, or their employment arrangements.

The information set out in paragraph 20 needs to be clarified in terms of what is sufficient, particularly in relation to paragraph 20(ii). Secondary providers can only work under the supervision of a lead provider. The lead provider must be stated in relation to each assignment. This should be sufficient as the lead provider has overall responsibility for the case. A secondary provider might still be an experienced lawyer practising on own account but may not have sufficient experience in a particular area of law. In these circumstances they may not have general supervision arrangements in place but rather if they want to work on a particular case the supervision arrangements would depend on who the lead provider was for that case. We would not want someone in these circumstances to be refused secondary provider status.

**PART 2: SELECTION COMMITTEES AND THE PERFORMANCE REVIEW
COMMITTEE**

Selection Committees

It is critical that Selection Committees' membership includes members who have expertise in the area of law that relates to the particular application.

Paragraph 25 proposes that, where the Secretary establishes a selection committee, the Secretary must appoint one Law Society nominee and such other persons that the Secretary thinks suitable. It is recommended that there be a pool of lawyers covering a number of areas of law. The nominee that sits on a particular selection committee should depend on whether they are considering criminal, family or civil provider applications. This how the Lawyers and Conveyancers Disciplinary Tribunal functions: at any one time there is a subject area expert relevant to the case under consideration.

Paragraph 25(iii) is vague and "such other persons that the Secretary thinks suitable" should be clarified.

Performance Review Committee

The same rationale applies to the Performance Review Committee, where it is even more critical that the committee considering a provider's performance is experienced in that particular area of law.

The relevance of paragraph 29(iii) is unclear and the implications of its inclusion without context is somewhat concerning. It is particularly unclear why any financial management expertise would be limited to the state sector. It would make more sense for the committee to ask for expert advice from the secretariat if issues of financial management were raised, particularly given that the committee can set its own procedure and should be able to obtain expert advice if necessary.

Regulation 13: Selection committee to assess applications

Paragraph 35 proposes that a selection committee will assess complete applications on the basis of the information provided in the application and members' knowledge of the applicant. While the reasoning for this is understandable, it raises several significant concerns. These concerns should be addressed in the procedure of the committee if they are not addressed in the Regulations.

There is no guidance given as to how that knowledge of the applicant is to be used in performing the selection committee's task of assessing the applicant against the entry criteria. The potential for bias or prejudice raises concerns. While there is an obligation for a selection committee member or chair to advise of any conflict of interest with an applicant (paragraphs 43-44), no further action is required once this advice is given and a conflict will not automatically invalidate the decision (paragraph 31).

It is important that an applicant has a right of reply to a member's preconceived notions about him or herself. This is an issue of natural justice.

It is of concern that there is no indication in paragraph 41, or elsewhere, that a selection committee must provide detailed reasoning for its recommendations. The Justice and Electoral Select Committee recommended that the Secretary must provide reasons for his or her decision to give or decline approval (clause 77(3)(A) of the Legal Services Bill). This means that the Committee will need to provide reasons for its recommendation to the Secretary. If this is not addressed in the Regulations it should be addressed in the committee's procedure, which should be publicly available.

Regulation 16: Conflict of Interest

Regulation 16 is not precise and does not specify what happens when there is a conflict of interest. For example, it does not state whether the applicant is to be notified of the conflict. This should be addressed in the procedure of the selection committee and performance review committee.

Regulation 17: Disclosure Information

We believe the references under Regulation 17 to “a person” is an error and should be “applicant”. The selection committee does not have statutory authority to compel anyone other than the applicant to provide information. The right to compel a third party to provide information would have to be clearly expressed in the Legal Services Bill. This would be far reaching and if the selection committee, performance review committee or the Review Authority were to be able to compel other persons, then the Bill would need to confer some of the powers of a Commission of Inquiry on those bodies.

PART 3: THE REVIEW AUTHORITY

Paragraph 51 proposes that the Review Authority is to be a one-person authority, with a minimum of seven years’ legal experience, appointed by the Minister of Justice for a period of three years. We understand that this is taken from Clause 84 of the Legal Services Bill. It would be ideal if the Review Authority comprised more than one person (even if only one person reviews an application), to ensure that the Authority has a clear understanding of all areas of law practised by legal aid providers. If the position comprises just one person then problems are likely to arise in relation to conflicts of interest – for instance, if the person appointed as the Review Authority is faced with an application for review by his/her sibling.

Paragraph 53 proposes that the Review Authority’s decision is binding on the Secretary and the person to whom the decision applies. For clarification, decisions may be binding on the applicant and the Secretary, but cannot exclude judicial review.

Regulation 21: Disclosure of information

With regard to Regulation 21 there is again an issue, in our view, as to how the Review Authority could compel information to be provided by anybody other than the applicant/appellant or Secretary. We believe this is an error and should refer to “applicant” and not “a person”.

SCHEDULE**General**

While the need for criteria for experience and competence is accepted, there also needs to be a clear understanding and definition of competence. We hope that the detail relating to competence expectations will be set out in the operational policy. In particular, the general view is that more

detailed experience and competence in the areas of criminal proceedings categories 1 & 2 should be a requirement for approving provider status.

Proceedings categories

For some time the Society has strongly advocated for a review of the criminal proceeding categories. Preliminary discussions with the Agency about amending the proceeding categories have already taken place. Issues with the current categories have been further highlighted with the implementation of the Agency's rotational policy. In particular, the breadth of category 2 is of concern, as a number of lawyers listed in category 2 are not the best lawyers to be doing the complex top end. In addition, a number of category 2 lawyers have retained their category 2 provider status because they are interested only in the top end of indictable case such as complex fraud.

The Society's Criminal Law Committee has done some work on potential changes to the case categories and a summary can be found in Appendix 1, attached. The Society is very open to further discussions around change to the categories and believes this needs to occur before the criteria are finalised. Some of our recommended changes to the criminal criteria would work well with the potential changes in Appendix 1.

A number of submissions we received covered issues to do with proceedings categories. For example, proceedings category 1 can cover cases up to a maximum of ten years' imprisonment (most of which have an election). A category 1 provider, who will likely have had limited or no trial experience, is expected to be giving advice to a client regarding election of trial by jury. The other consideration is that should the client elect trial by jury, then the category 1 provider would no longer be able to act for that client. Proceedings in category 1 currently include High Court Appeals yet it would seem that a number of category 1 lawyers do not have the experience or competence to undertake a High Court appeal. This can be detrimental to a client, particularly as appeals are not just related to conviction and/or sentence. For example, if a client is denied bail, they have a right to an appeal to the High Court and should be advised about a potential appeal. Some category 1 providers who are not experienced in appeals might not provide this advice and in any event if they were not prepared to conduct the appeal, the client could be prejudiced by having to change lawyers for that one purpose. These are just a sample of comments we received around the problems with the current categories.

We do not see it as necessary for the categories to be specified in the Regulations. If they need immediate amendment, setting the categories in Regulations would make this problematic. If

amendments to the categories were to occur it would follow that criteria for the categories would also be amended.

Training, supervision and mentoring

Under conditions of approval there is reference to supervision, training and mentoring. There are no details regarding the requirements, including who will be responsible for providing access to supervisors, training and mentoring, and how this is to be mentored. Access to supervisors, training and mentoring could be difficult outside of the main centres. The majority of training seminars and workshops are held in the main centres. Attendance requires significant additional travel and accommodation costs on top of the actual cost of the seminars and workshops. It is important the needs of rural and small town practitioners are taken in account.

In the Society's submission on the Legal Services Bill, we advocated the funding of junior lawyers who wish to apply for higher categorisation so they can be appropriately trained and exposed to experience. We have commented below on the large leap between proceedings categories 1 & 2 and we are aware that at the present time some areas of New Zealand (such as Queenstown) have no category 2 providers.

Focus on defended hearings

The schedule has a strong focus on defended hearing experience. However, there is a risk that this focus ignores the reality that in civil, employment and family law there is a clear emphasis (in law and policy) on alternative dispute resolution. It is important that this is recognised in the relevant criteria for legal aid applicant approval and experience.

Proceedings Category 1

Paragraph 2(i) of the schedule proposes that an applicant must have a minimum of 18 months' recent criminal law experience.

There is disagreement amongst lawyers, particularly in some of the rural areas or smaller urban areas, regarding the minimum 18 months' recent criminal law experience. It has been pointed out that where the Courts do not sit on a daily basis, there is less opportunity to gain practical experience.

The majority of our members are of the view that 12 months' post admission practical experience is sufficient to be a category 1 legal aid provider. If the categories were to be changed as we recommend in Appendix 1, then we believe there would be a general consensus in favour of 12 months. It is difficult for firms to cover the cost of junior lawyers if they cannot even be category 1

legal aid providers after one year. We have been told that the experience requirement of 18 months might make lawyers hesitate to employ juniors to undertake criminal work.

The focus for category 1 on defended hearings is too narrow. It is our view that applicants for this category should be able to demonstrate a number of other skills to be a lead provider in this category, in addition to their ability to undertake a defended hearing. Work undertaken by lawyers within this category is more extensive than just defended hearings and includes opposed bail applications, electronically monitored bail applications, status hearings, appeals and legislation other than the Crimes Act and the Sentencing Act.

Appropriate referees should be encouraged to comment on an applicant's competence and experience outside of a defended hearing. At the very least a referee should be able to advise the Agency that the applicant has attended Court with them on several occasions for different types of proceedings and have been actively involved in particular cases.

Proceedings Category 2

The experience referred to in paragraph 3(ii), of *substantive and active involvement in at least three trials where the most serious charge carries a maximum penalty of not more than 10 years imprisonment*, is too limiting. It is our view that the reference here (and in paragraph 8 of the schedule relating to the PDLA criteria) to the maximum penalty should be removed altogether.

It seems wrong to penalise an applicant for being involved in a case or cases involving a penalty of more than 10 years' imprisonment and not being able to use that as qualifying work. It should not be a disqualifying factor that the applicant took a more active role in a more serious trial.

Applicants wanting to undertake PC2 (Proceedings category 2) work should also be able to demonstrate additional procedural knowledge; for example being involved in pre-trial applications such as section 344A, 347 and severance. Experience here should include (as a minimum) involvement in the written documentation required for pre-trial applications and attendance at Court observing (if not actively involved) in such hearings.

In line with our strong recommendation that the categories be reviewed, the comments received from lawyers indicate that the breadth of the proceedings category 2 itself is of great concern. It is generally considered a large leap from proceedings category 1 to category 2. There is a significant difference between doing summary work and appearing in a jury trial (PC 1 to PC2).

Proceedings Category 3

Paragraph 4(i) proposes that an applicant must have a minimum of 36 months' recent legal experience working on category 2 cases. We believe this is appropriate if category 1 is reduced to 12 months.

If our recommendations are followed, then to reach proceeding category 3 a lawyer would have three years' post admission experience. This would be more than adequate. Once again most of the comments received dealt with the proceedings categories and the need for change. For example, there can be very complicated indecent assault or historic sexual offences that fall within category 2 and a less complicated case in category 3 with a maximum penalty of 14 years or more.

Proceedings Category 4

Paragraph 5(ii) states that the applicant must have appeared as counsel for the defence with a substantive and active involvement in at least four category 3 or 4 proceedings.

It is unclear why this category requires counsel to have experience for the defence when such experience is not specified for the other categories. A senior Crown Prosecutor should not be excluded from being able to be a category 4 provider simply because they have been prosecuting, rather than defence counsel, for 10 years.

Again it is our view that the experience gained by a complicated proceedings category 2 trial is just as much an indication of an applicant's abilities as some proceedings category 4 matters. Unfortunately, some murder charges are only distinguishable by the fact that someone has died; the legal issues themselves may be no more complicated than a serious assault charge. Often the most complicated cases are sexual cases falling within proceedings category 2 and 3.

Duty Solicitors

Paragraphs 7(i) and (ii) propose that the applicant must have a minimum of 18 months' recent criminal law experience and appeared as counsel with substantive and active involvement in at least three defended hearings. This reiterates the requirements for proceedings category 1.

From a practical point of view it would be difficult to have many lawyers added to the duty solicitor roster if they were required to undertake 18 months' prior criminal law experience, and even less likelihood if they were expected to have a substantive and active involvement in three defended hearings, as there is limited private criminal work available in many areas.

It should be sufficient to obtain duty solicitor listings when applicants have a minimum of *12 months'* recent criminal law experience and have completed a relevant course. This is in line with our recommendations for the requirements for proceedings category 1.

Police Detention Legal Assistance Scheme

The indictable experience for category 2 and PDLA should not be limited to offences where the penalty is less than 10 years.

It is our view that the reference here to the maximum penalty should be removed altogether. We reiterate arguments made regarding proceedings category 2. It seems wrong to penalise an applicant for being involved in a case or cases with a maximum penalty of more than 10 years' imprisonment, and not being able to use that as qualifying work. It should not be a disqualifying factor that the applicant took a more active role in a more serious trial.

We query why the words "*including committal hearing*" have been included given that there are very few oral evidence hearings (in fact none in the Otago area that we are aware of). Most committal hearings are done on the papers.

We understand that there is already some degree of flexibility in permitting proceedings category 1 lawyers to provide PDLA services. If this was not permitted then, in some areas, there would be very few, if any, providers available for PDLA services.

Civil

Paragraph 9 states that an applicant must have appeared as counsel with substantive and active involvement in at least three civil proceedings and assisted in the preparation of at least five civil proceedings where at least one matter has involved a witness giving oral evidence.

This is a considerable 'step up' from what is currently required for being approved as a civil legal aid provider. However, the Society submits that the minimum legal experience is pitched at the appropriate level. The only query relates to the criteria under 9(iii) "*where at least one matter has involved witnesses giving oral evidence*": is this realistic, given the way in which civil cases are now managed and the recent amendments to the Rules? In addition, a lawyer who had significant cross-examination and witness experience in the criminal area (for example in fraud cases) should not be penalised because they have not been involved in a civil hearing involving a witness giving oral evidence.

Family

Paragraph 10(ii) states that the applicant must have had substantive and active involvement in at least five family cases including interlocutory hearings, mediation conferences and judicial conferences.

It is recommended that paragraph 10(ii) be amended to state the applicant must have “had substantive and active involvement in at least five family law matters, which may include participation in mediation conferences or counsel-led mediation, participation in judicial conferences, and/or demonstrable involvement in matters which are settled short of Court proceedings”. A large number of family matters do not result in court proceedings and this is more likely with the advent of the Early Intervention Process adopted by the Family Court.

However, in some of our rural and smaller urban areas, even in an 18 month period, some appropriately qualified counsel might struggle to have a substantive and active involvement in three Family Court proceedings with witnesses giving oral evidence. It is our view that there needs to be some flexibility in the criteria to reflect the actual practices in areas without daily/weekly Court hearings. Adopting our recommendation to include a general discretion and look at the applications as a whole would help to alleviate this issue.

Mental health

We support the proposed criteria for mental health provider status.

Refugee and Immigration

General

The Society is aware that few lawyers are willing to do refugee work on legal aid. The Society understands that only a handful (possibly as few as six regulars) of legal aid providers conduct the majority of refugee claims before the Refugee Status Appeal Authority (RSAA), now the Immigration and Protection Tribunal (IPT), and that handful is diminishing. We have no reason to believe the situation will be any different now that the new IPT has taken over the RSAA’s role. This is putting significant pressure on the few lawyers still doing this work and creating difficulties for the IPT.

The entry criteria require further consideration. In particular, the Society submits that the criteria should enable the Agency to exercise discretion (see our earlier recommendation for a general discretion, in the introductory section ‘general comments’).

Refugee and protected persons entry criteria

The proposal in paragraph 12 of the Schedule that an applicant must have 18 months' recent experience in refugee cases, and have substantive and active involvement in at least five cases at the Refugee Status Branch (RSB) level and two Immigration and Protection Tribunal (IPT) proceedings, will be an insurmountable bar for new, and in particular young, providers.

We recommend that paragraph 12 of the Schedule be redrafted. Paragraph 12(i) needs to refer to refugee and "protected persons" cases. We assume the reference to "protection" or "protected persons" was omitted by accident.

The introduction of an equivalent of a criminal category 1 listing should also be considered, to enable younger practitioners or experienced practitioners in other areas of law to demonstrate their competence before being granted a full category 2 listing.

The entry criteria regime proposed in paragraph 12 regarding refugee/protection providers should have the following features:

To obtain a **Category 1 listing** as a refugee and protected person case provider an applicant shall be required to have:

- a minimum of 6 months' legal experience; and
- had substantive and active involvement in at least three cases before the RSB, the IPT or the RSAA; and
- been nominated by a registered lead provider who shall be required to certify the competence of the applicant and supervise him/her over a period of not less than 6 months; and
- completed any relevant course as set out in operational policy.

To obtain a **Category 2 listing** as a refugee/protection provider an applicant shall be required to have:

- a minimum of 18 months' recent legal experience in refugee and/or protection cases; and
- substantive and active involvement in at least five cases at any of the RSB, IPT or RSAA, DRT (Deportation Review Tribunal) or RRA (Removal Review Authority), or in cases involving "comparable" humanitarian issues in the High Court, the Court of Appeal or the Supreme Court; or
- acted as leading counsel in at least one proceeding during the previous 18 months before the IPT, RSAA, DRT, RRA, or the High Court, the Court of Appeal or the Supreme Court in a refugee protected person case or a case involving comparable humanitarian issues; or

- provided evidence of at least three years of relevant experience and competence practising immigration and/or refugee law or related areas of law including administrative law, international law or other areas of human rights law.

When considering an application to grant full category 2 provider status the supervisor's reports can be taken into account.

It is necessary to include the RSAA because it ceased to exist only on 29 November 2009 and its refugee role is substantially replicated in the IPT. It is necessary and desirable to include DRT and RRA experience because of the scope for overlap between those issues (and in particular the "exceptional circumstances of a humanitarian kind" test in DRT, RRA, and in deportation appeals under the new Immigration Act 2009) and the new "protection" grounds. The new "cruel, degrading or inhuman" protection grounds (section 131 Immigration Act 2009) are the obvious areas for such overlap to arise. It is likewise necessary and desirable to include High Court, Court of Appeal and Supreme Court cases (in immigration matters) because those cases to date have very largely concerned "humanitarian" grounds in which there is the same potential for overlap with the new "protection" grounds.

Having regard for the need to recognise competence and to attract experienced practitioners from related areas of law (including administrative law, international law and other areas of human rights law) it is submitted that the appropriate Selection Committee be empowered to approve the listing of any other practitioner with at least 5 years of "relevant" experience. Such an approach may be seen as analogous to that taken in the ANZSCO (Australian and New Zealand Standard Classification of Occupations), namely to state a requirement for a formal qualification but add a degree of flexibility by providing that "at least x years of relevant experience" may substitute for the formal qualification.

Warrant of commitment

Paragraph 12 does not mention immigration warrant of commitment matters. These fall under civil legal aid. Prior to 29 November 2010 very few practitioners would have conducted challenges to immigration warrants of commitment because no legal aid was available. Under the Legal Services Act as amended by Schedule 3 Immigration Act 2009 it is now possible to obtain limited legal aid to challenge detention periods beyond 96 hours (under ss 316 and 324 Immigration Act 2009).

The Society is aware of some lawyers who handle warrant of commitment matters but who do not practice in the refugee and protection area. Warrants of commitments should be able to be done by providers on both the Civil list and the Refugee and Protected Persons list.

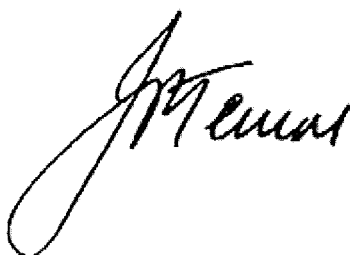
Maori Land Court / Appellate and Waitangi Tribunal

It is currently recognised that Waitangi Tribunal claims include negotiations and that experience in negotiations is relevant for undertaking Waitangi Tribunal legal aid matters. Notwithstanding the changes that will occur as a result of the enactment of s133 Legal Services Bill 2010, it will remain important to recognise this experience in approving legal aid provider status. Accordingly, the reference to “*experience in Maori Land Court or Waitangi Tribunal cases*” should be amended to be “*experience in Maori Land Court or Waitangi Tribunal claims or Treaty negotiations*” to clarify that even though the Agency will no longer be funding negotiations, this experience remains relevant.

Court of Appeal / Supreme Court

There is general overall support for the existence of a separate appellate provider category.

However, the Society believes this could be limited to post-conviction appeals. This is a comment that has recently been made to the Agency in the context of strongly requesting a revamp of the current criminal proceeding categories. This is because if a provider wished to appeal a pre-trial ruling to the Court of Appeal, they would not be eligible to appear. It would be in the Agency’s and client’s interests that the lawyer who knows the file is able to appear in the Court of Appeal particularly given that these appeals are often set down at short notice and as a matter of urgency when a trial is approaching. It would be better if the lawyer seeking proceedings category 2 approval could demonstrate that they are capable of following that case through to all levels, including pre-trial and post-trial appeals to the Court of Appeal.



Jonathan Temm
President
28 March 2011

Appendix 1: Potential changes to criminal proceedings categories

CAT 1

Assigned

0-3 years

Summary

CAT 2

Preferred

3 - 14 years
Violence
Burglary / theft
Drugs C, B

Indictable

CAT 3

Preferred

A.

Sex
0 - Life
PD
(Preventative
Detention)

B.

14 years -
Life

C.

SFO
Fraud

Class A
Murder
Manslaughter
PD (Preventative
Detention)

CAT 4

Preferred

Post-conviction
Appeal