

New Zealand Law Society

Submission on Legal Services Bill

Introduction

1. The New Zealand Law Society (Society) welcomes the opportunity to make a submission on the Legal Services Bill (Bill).
2. Legal aid is central to a just and democratic society founded on the rule of law. It enables vulnerable members of society to have access to justice through legal advice and representation. The Bill introduces fundamental change to New Zealand's established system of legal aid, and will impact first and foremost on legal aid applicants, as well as on practitioners through the legal aid scheme.
3. In view of the Bill's significance, this submission has been prepared with the assistance of several of the Society's specialist committees – including the Legal Services Committee, Civil Litigation and Tribunals Committee, Public and Administrative Law Committee, and Immigration and Refugee Law Committee – and the Society's Family Law Section (Section). The committees and Section have undertaken a comprehensive review of the Bill, and this submission reflects legal aid practitioners' perspectives across the various civil (including family) and criminal jurisdictions. The Section has also made its own submission.
4. The submission comments on a number of policy settings and specific drafting issues in the Bill, and where appropriate recommends proposed amendments to enhance the Bill's practical application and workability.

The Society wishes to be heard.

General submissions

Regulations

5. The Bill makes fundamental changes to the structure of the current legal aid system. Regulations will provide the framework and the detail of new processes and procedures that will enable the new legal aid system to work efficiently and effectively. The content and detail of the regulations will be crucial in ensuring that the new legal aid system is effective, fair, and efficient. Often policies and regulations are developed by officials not involved in the provision of legal services and this can mean that some policies are not feasible in practice or are

unnecessarily burdensome. Consulting the Society and the profession leads to a system that is more practical and often less onerous for everyone involved. It is therefore imperative that the Society is consulted and is given the opportunity to comment on the draft regulations before they are promulgated.

The right of review

6. The most significant change from the current scheme is the absence of the listed providers' rights of review.
7. There may be circumstances where a review to the Legal Aid Tribunal (Tribunal) when a grant has been refused will be necessary and more appropriately made by a provider, independent of the aided person. The aided person may be unable or unwilling to apply for a review when it is clear to the provider that they should. In order to discharge a legal obligation to a client, a provider must be able to apply for a review of decisions that are manifestly unreasonable or wrong in law, without relying on the approval of the aided person to do so, particularly when the decision to be reviewed impacts on the client's ability to commence or continue to fund legal advice and/or proceedings. Lawyers must also have the right to seek review in order to have their reasonable costs met, in circumstances where the aided person is themselves unconcerned about that, or is unable to be contacted.
8. In the interests of justice, the right of a provider to apply for a review to the Tribunal should be preserved where a decision has been made on an issue directly affecting the provider (such as reasonable costs).
9. In some instances right of review of a provider's approval should be extended to a provider to making submissions and to being heard by the Review Authority at any review. See comments below in relation to clauses 101 and 103.

Time limits

10. Under the Legal Services Act 2000 (the current Act), issues are determined on the merits of the case and the principles of justice. The Society understands a balance needs to be achieved between these principles and establishing a streamlined process by imposing timeframes and set rules. Streamlining a process to make it more efficient should not be to the detriment of those using the legal aid system. The Bill should therefore include discretion for the decision maker to extend timeframes, in circumstances where there may be a delay for reasons beyond the reasonable control of the provider or the applicant, or where to do so is in the interests of natural justice. The timeframes themselves must be reasonable and consistent throughout the

Bill and where there is no discretion these must allow for vagaries of methods of communication and other unforeseeable circumstances.

Pilot plans for the delivery of legal aid schemes

11. Pursuant to s 80 of the current Act, the Agency may develop, trial and evaluate pilot plans for the delivery of schemes by listed providers. Before setting up a pilot in any locality, s 80(5)(a) provides that the Agency must consult with representatives of local lawyers and the community. The Bill contains no provision to govern the establishment and evaluation of any pilot scheme, nor the requirement for consultation with the legal profession or the community. Consideration needs to be given to including provision in the Bill, for the establishment and evaluation of pilots, and the need to consult with the legal profession and community as is provided for in the current Act.

Approval versus contract for services

12. We understand that the new legislation allows the Secretary for Justice (Secretary) to contract for delivery of legal services in any way the Secretary sees fit (clause 69). This may be important in ensuring the Secretary can look at flexible funding methods of legal services delivery, such as bulk funding. Ministry officials have stated that this extends to an individual provider potentially going through the approval process and being approved to provide services but not actually being offered a contract for services by the Secretary.
13. There does not appear to be a valid reason for a lawyer deemed competent to be approved, not to be offered a contract for services. The approval process is time consuming and involves significant resources. Lawyers have indicated that the potential to not be offered a contract after going through the approval process will act as a significant deterrent, particularly for senior lawyers who may not provide regular legal aid services. This may mean a shortage in specialist areas such as family law which already struggle to retain experienced legal aid providers. In a number of provincial areas there are shortages of legal aid providers and it is important to ensure that there are not any additional disincentives for them to apply under the current system. It is better to cull non-performing providers than restrict offering contracts. Changes under the Bill should endeavour to attract more senior and experienced lawyers back to being providers of legal services through the legal aid scheme.

Lay involvement in the administration of legal aid

14. The Bill disestablishes lay involvement in the administration of legal aid. It is the first time in the history of New Zealand legal aid that there will be no lay involvement in the administration

of legal aid. A brief review of the legislative history of the provision of legal aid in New Zealand is attached (Appendix 1), to put this point in context.

15. As recently as the Legal Services Act 2000, lay involvement in the administration of legal aid was retained through lay membership of the Legal Services Board and the Public Advisory Committee. The rationale for the Public Advisory Committee was to retain lay input, which was lost with the disestablishment of the District Legal Services Committees.
16. The Bill currently has no provision for lay involvement. Dame Margaret Bazley's review of Legal Services, *Transforming the Legal Aid System – Final Report and Recommendations*, raised no issues in respect of lay input into the administration of legal aid warranting the removal of lay representation.
17. It is the Society's view that the new Legal Aid Tribunal should involve lay representation. Lay opinion on what constitutes legal services and unmet legal needs can provide a different perspective to a lawyer's view. Lay members of the current Legal Aid Review Panel have added to the decision making process.

Clause by clause analysis

Part 1 - Preliminary Provisions

Clause 4 - Interpretation

Clause 4(1)

18. The definition in clause 4(1) of "aided person" does not provide for an aided person's representative to represent that person where the aided person has commenced proceedings, but dies or becomes incapacitated before the proceedings have been concluded.

Recommendation

19. That the definition in clause 4(1) be amended to provide that in the event that the aided person dies or is incapacitated, the aided person's representative may represent the aided person.

Clause 4(5)

20. This clause provides that references to such things as fees, charges, disbursements, grants, and rates are references to those things *exclusive* of GST. Under the current legal aid system, fees, charges, disbursements, grants, and rates are references to those things *inclusive* of GST. Disbursements, which are costs incurred from a third party, for example, interpreters' fees, are paid for by lawyers from the grant of legal aid. Disbursements are invariably charged to the lawyer at a GST-inclusive rate. Reference to disbursements at a GST-exclusive rate could lead

to lawyers having to cover the GST content from their own resources. It is not understood that this is the intention behind the Bill.

Recommendation

21. It needs to be clear that the legal aid provider is not expected to carry the burden of any GST and that the Agency will pay any required GST separately from any fixed hourly rate, fee or disbursements.

Part 2 – Legal Aid

Subpart 1 – When legal aid may be granted

Clause 6 - Proceedings for which legal aid may be granted: criminal matters

22. Clause 6 of the Bill contains an anomaly where criminal legal aid is available for certain matters before the New Zealand Parole Board (Parole Board), and civil legal aid is available for other appearances before the Parole Board.
23. There is a distinction, in that in respect of civil legal aid an applicant would have to satisfy the Legal Services Commissioner (Commissioner) in terms of clause 7(1)(e) of the Bill. In respect of criminal legal aid, the Bill (like the current Act) does not make it clear whether an applicant for aid before the Parole Board is automatically granted aid, if financially eligible, or whether the applicant has to satisfy the “*interests of justice*” requirements in terms of clause 8(1)(ii).
24. There is no reason why there should be this distinction. The Parole Board has more in common with an administrative tribunal or judicial authority than a criminal court, and a grant of civil legal aid is more appropriate. The Parole Board is of sufficient importance that it should be specified as a body for which civil legal aid is available, under clause 7(1).

Recommendation

25. That proceedings before the New Zealand Parole Board are specified as proceedings for which civil legal aid is available pursuant to clause 7(1). Conversely, Parole Board proceedings are not to be regarded as criminal legal aid proceedings.

Clause 7 - Proceedings for which legal aid may be granted: civil

Civil matters – Waitangi Tribunal

26. Clause 7(1)(f) provides that legal aid may be granted in respect of proceedings before the Waitangi Tribunal. Rather than providing for financial assistance for these proceedings under the Bill, it would be more appropriate for such financial assistance to be governed by specific legislation.

27. Waitangi Tribunal claims and proceedings are a unique and distinct class of proceedings when compared against other judicial proceedings for which legal aid is available. One distinction is that rather than being individual actions, Waitangi Tribunal proceedings usually involve a claim by one group (often iwi) against the Government. These proceedings are heard as a commission of inquiry not a court. These proceedings do not involve individuals against individuals, or individuals against the state. In addition Waitangi Tribunal actions are often lengthy and are the highest cost claims. For these two reasons alone it is submitted that Waitangi Tribunal funding ought to be considered separately from legal aid matters.
28. The vast majority of legal aid providers are not involved in Waitangi Tribunal actions. Accordingly the vast majority of legal aid providers are not in a position to influence legal aid expenditure on Waitangi Tribunal claims. However, legal aid statistics on expenditure reflect the significant cost of Waitangi Tribunal claims. If legal aid expenditure did not include grants of aid for Waitangi Tribunal matters they would more accurately reflect what the vast majority of legal aid providers are in fact costing.
29. It is also noted that whilst other recipients of legal aid must satisfy a merit test (for example, does the proceeding for this individual have merit?), no such test exists in respect of Waitangi Tribunal proceedings. It is also noted that legal aid is generally available for those who are not able to afford legal representation. In respect of Waitangi Tribunal proceedings no similar financial analysis is undertaken. Further, no debt recovery action is undertaken in relation to these grants of legal aid, even when significant settlement payments are made. Given the differing rules that apply to Waitangi Tribunal proceedings, it is submitted that financial assistance for such claims should be dealt with separately and transparently. The best way of achieving that is for separate provision to be made for these special claims under its own legislation rather than inclusion in the Bill.

Recommendations

30. It is strongly recommended that clause 7(1)(f) be deleted and consideration given to separate funding for Waitangi Tribunal claims. Perhaps this could be done through another government department such as the Office of Treaty Settlements.
31. If this recommendation is accepted then *Subpart 6 – Legal Aid grants for Treaty of Waitangi claims* (clauses 47 to 49) and all other references in the Bill to Waitangi Tribunal claims should be deleted.

Civil matters – Immigration

Drafting errors (clauses 7 and 12)

32. Clauses 7(1)(j-m) and 7(5)(f-g) of the Bill state that legal aid may be granted in certain immigration matters. The clauses refer only to the Immigration Act 1987 (IA 1987).
33. However, a new Immigration Act 2009 (IA 2009) comes into force on 29 November 2010. Schedule 3 of the IA 2009 substitutes sections 7(1)(j-m) and 7(5)(f-g) of the Legal Services Act 2000 (the current Act). The Schedule 3 substituted clauses 7(1)(j-ma) and 7(5)(f-g) should be replicated in the Bill.
34. There is a similar drafting error in clauses 12(1) and (2) of the Bill. They also do not reflect the current Act's substitutions that are set out in Schedule 3 of the IA 2009.

Legal aid and detainees under the Immigration Act

Detained asylum-seekers

35. Legal aid should be available to asylum-seekers, who on arrival in New Zealand are refused a permit and detained under the Immigration Act. Under the current regime (the IA 1987) asylum-seekers may initially be detained for 48 hours, then for up to 28 days on a District Court Warrant of Commitment, extendable on a week-by-week basis thereafter.
36. The usual place of initial detention will be “premises approved by” the Department of Labour, in particular the Mangere Refugee Resettlement Centre in Auckland. However, asylum-seekers are also detained in prisons, principally Mt Eden prison, but also the Rimutaka prison. In addition, those who can no longer be accommodated at the Mangere Refugee Resettlement Centre, and who are not considered to be eligible for release into the community “on conditions”, may then be detained in prison.
37. Detention of asylum-seekers raises both legal and practical issues. Article 31(2) of the Refugee Convention states that restrictions on asylum-seekers' freedom of movement shall be no more than “those which are necessary”. This is reflected in the “layered” system of detention provided for in sections 128 and 128AA of the IA 1987 (and more or less retained in sections 319, 320, 330 and 332 of the IA 2009) and in Immigration New Zealand's Operations Instruction policy A16.2. These provisions describe layers of detention, ranging from custody (prison) through to detention at facilities like the Mangere Refugee Resettlement Centre, through to release “on conditions” (including bail-type conditions) into the community. The least restrictive option that is “necessary” should be utilised.

38. However, because of sections 10(1) and (2) of the current Act (now clauses 12(1) and (2) of the Bill), legal aid for Immigration Act matters is limited to the actual claim for refugee status (plus judicial review arising out of it). No aid is available for detention proceedings. The result is that detained asylum-seekers can in practice be detained for long periods in prison, subject to weekly District Court appearances which should be similar in nature to bail applications, but at which they are not represented. In practice, the appearances amount to roll-overs, for example where the detention is rubber-stamped on a week-by-week basis, without any real consideration of whether the asylum-seeker should now be released “on conditions” or released into a less restrictive form of detention.
39. This regime has also created problems for counsel representing asylum-seekers detained in prison. Many immigration lawyers also face a risk in having to fund interpreter costs at the start of the process, without knowing whether legal aid will be approved. Costs for interpreters are high, especially for claimants in detention, where the restrictions on visiting hours and other security measures at prison extend the time required in obtaining proper statements. There is also prejudice to the asylum-seeker’s ability to prepare their claim. In prison they have no access to the internet in order to communicate with persons who may be able to provide evidence in support of their claim, and to gather country information in their own language to support their claim. These tasks therefore fall to the lawyer, increasing the cost of the claim.
40. Substituted clause 7(1)(l) of the Bill, allowing a grant of civil aid for challenging a Warrant of Commitment (s 316 IA 2009) and for review of that Warrant (s 324 IA 2009) would vastly improve the situation.
41. Substituted clause 7(1)(l) states that legal aid will be available for:
“any proceedings before the District Court or High Court following an application made under section 316 or 324 of the Immigration Act 2009”.
42. However, substituted clause 7(1)(l) would not allow a grant of legal aid to a detained person until the point at which a Warrant of Commitment is sought under s 316 IA 2009 to authorise detention for 28 days. By that stage the person (typically an overstayer facing deportation or a detained asylum-seeker) may already have been detained for up to four hours by an Immigration Officer under s 312 IA 2009, or for up to 96 hours by a Constable under s 313 IA 2009.
43. The unavailability of legal aid to detained asylum-seekers breaches the long recognised principle under the common law of liberty for all persons, subject only to such limits as are

imposed by law, for example see *Zaoui v Attorney General*, SC CIV 13/2004, 25 November 2004; [2005] 1 NZLR 557 at paragraph [52]. We consider that it is inconsistent with ss 23(1)(b) and 27 of the New Zealand Bill of Rights Act (NZBORA). It is also inconsistent with New Zealand's international obligations under Articles 2, 14 and 16 of the International Convention on Civil and Political Rights (ICCPR). As mentioned above, article 31(2) of the Refugee Convention states that restrictions on asylum-seekers' freedom of movement shall be no more than "those which are necessary".

Persons brought before the District Court facing Removal Orders under the IA 1987 or Deportation Orders under the IA 2009

44. Legal aid should be available to persons unlawfully in New Zealand brought before the District Court to face Removal Orders under the IA 1987 or Deportation Orders under the IA 2009, for the same reasons as above.

Immigration Detention Legal Assistance Scheme (IDLA)

45. There is an urgent need for a basic specialist immigration version of the Police Detention Legal Assistance (PDLA) scheme to cover persons detained under the Immigration Act 2009.
46. To be most effective, such advice would need to occur before the Record of Personal Circumstances interviews during the unwarranted period of detention prior to execution of a Removal Order under the IA 1987 (soon to become a Deportation Order under the IA 2009). The key focus of the advice is to assess whether the Immigration Officer should exercise his or her discretion to cancel the Removal/Deportation Order on account of New Zealand's obligations under International Conventions it is a party to, for example the Convention on the Rights of the Child.
47. The essential elements of an IDLA scheme would be:
- An IDLA scheme would operate within the Legal Services Agency/Legal Services Commissioner (LSA/LSC), similar to the PDLA scheme;
 - The LSA/LSC would operate a list of approved immigration providers, which would serve as an advice roster;
 - That list would be available to Immigration Officers and provided to detainees;
 - The advice would usually be by phone, but sometimes in person;
 - Interpreters would be required in the vast majority of cases, but as with the PDLA scheme this service could be provided by the Office of Ethnic Affairs' LanguageLine telephone interpreting service www.languageLine.govt.nz.

- Languageline’s system is simple. The agency (Immigration NZ) has an 0800 number for Languageline, which it calls, and the person is dialled into the interpreter. It can be a 2-way or 3-way call. The price is modest and around \$22 a call. The Department of Labour already funds Languageline, so the costs could be borne directly by that Department.

48. The PDLA scheme is considered to be highly cost effective, but an IDLA scheme could not be funded without amendment of ss 10(1) and (2) of the current Act (clauses 12(1) and (2) of the Bill) or section 7(1)(1) of the current Act (clause 7(1)(1) of the Bill).

Recommendations

49. The Legal Services Act 2000 substitutions, set out in Schedule 3 of the IA 2009, should be replicated in clauses 7(1)(j-ma) and clauses 7(5)(5-g) of the Bill;
50. The Legal Services Act 2000 substitutions, set out in Schedule 3 of the IA 2009, should be replicated in clauses 12(1) and (2) of the Bill;
51. Legal aid should be available wherever a person is detained under the IA 2009, and an Immigration Detention Legal Assistance scheme (IDLA) should be established. This could be achieved by amending clause 12(2)(b) to state that “*clause 12(1) will not apply in respect of persons detained under the Immigration Act 2009, and the proceedings specified in section 7(1)(j-ma)*”.

Clause 10 – When legal aid may be granted: civil matters

52. Clause 10(3), as currently drafted, is unclear as to who has to show that the applicant has reasonable grounds for taking, defending, or being a party to the proceedings. The clause requires amendment to make this clear.

Recommendation

53. That clause 10(3) be amended to “the Commissioner must refuse to grant legal aid if the applicant has not shown *that the applicant has* reasonable grounds...”

Subpart 2 – Application and grant

Clause 14 – Application for grant of legal aid

54. Clause 14(2) sets out the circumstances when an application for a grant of legal aid may be made after final disposition. No such application may be made more than 15 working days after final disposition. The Society’s view is that any timeframes in the Bill should be 20 working days. This allows, in most cases, sufficient time to take instructions, obtain copies of

final orders, where made, from the Court, and to take into account the demands of legal practice. The clause should provide the Commissioner with discretion to extend the timeframe in certain and/or exceptional circumstances. An application might be delayed for reasons beyond the reasonable control of the provider or the applicant or there may be factors that affect both the provider and the applicant. The Commissioner should have discretion in such circumstances.

Recommendation

55. That clause 14(2) is amended as follows:

“An application for a grant of legal aid may be made after the final disposition only if –

- (a) the Commissioner receives the application within 20 working days from the date of final disposition; and
- (b) the Commissioner is satisfied that –
 - (i) the application was delayed because of circumstances beyond the *reasonable* control of the applicant *or* the provider.....”
 - (ii)
 - (iii) *there are exceptional circumstances that exist to justify the application.*

Clause 16 – Decision on application for legal aid

56. Clause 16(3)(a)(ii) provides that if the Commissioner grants legal aid on an interim basis to a person, payments under the grant cease if the Commissioner *considers it appropriate* that the payments should cease. The clause defines no parameters, and should be amended to provide for factors the Commissioner must take into account when considering whether it is appropriate that payments should cease. The same factors taken into account for any initial grant (clauses 6-13) should be used to consider whether a grant should cease. In the interests of natural justice, the Commissioner should also be required to provide reasons if a decision to cease payments is made.

Recommendation

57. That clause 16(3)(a) be amended to provide for factors the Commissioner must take into account when considering whether it is appropriate that payments should cease, and to require the Commissioner to provide reasons if a decision to cease payments is made. Consideration should be given to referring to the factors stated in clauses 6-13 (Subpart 1, *When legal aid may be granted*).

Clause 17 – Commissioner to notify applicant when aid declined

58. Clause 17 provides that if the Commissioner has declined an application for legal aid, the Commissioner must notify the applicant in writing and advise the applicant of their right to seek a reconsideration of the decision and a review of any reconsideration of that decision. The Commissioner should also be required to provide, in writing, the reasons why the application has been declined. This would restore the balance of natural justice.

Recommendation

59. That clause 17 be amended to require the Commissioner to provide, in writing, the basis upon which the application has been declined.

Clause 18 – Conditions on grant of legal aid

60. Clause 18(4) provides that the Commissioner may lodge a caveat on property over which a charge could be registered in favour of the Commissioner. Under the current Act, it is not uncommon for the Legal Services Agency (Agency) to have numerous charges registered in favour of the Agency over a specified property of the legally aided person as security for the interim repayment or the repayment or both. The process of registering numerous charges is cumbersome and inexpedient. The costs, which are presently being met by the Agency, are unnecessary. Public cost savings are possible here. As a matter of law, one charge can be registered which then secures all amounts due from the aided person, including amounts incurred after the charge is registered. This is similar to a mortgage, which can secure more than one loan. This process should therefore enable only one charge to be registered that accommodates the original and subsequent amounts owing, any disbursements, and any award of costs.

Recommendation

61. That clause 18(4) be amended to enable one charge that would secure all amounts owing by the aided person under that specific or multiple grants of legal aid, including any disbursements, and/or awards of costs, to be registered in favour of the Commissioner.

Clause 18(7)

62. Clause 18(7)(b) and (c) state that the section does not apply to applications for legal aid by the *proposed patient* in proceedings under the Mental Health (Compulsory Care and Rehabilitation) Act 1992 (MHCCR Act), and applications for legal aid by the *proposed care recipient* in proceedings under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act).

63. There are situations in proceedings under the MHCCR Act in which a “patient” as opposed to a “proposed patient” will be involved and for which legal aid is now available. Examples include:
- (a) an application for an extension of a compulsory treatment order, which will be determined by a District or Family Court Judge;
 - (b) an application for a review of a compulsory treatment order, which will be determined by a Mental Health Review Tribunal;
 - (c) appeals to the District Court against decisions of the Mental Health Review Tribunal; and
 - (d) a High Court Judicial Inquiry pursuant to s 84 of the MHCCR Act.
64. There are similar situations in proceedings under the IDCCR Act in which a “care recipient” as well as a “proposed care recipient” will be involved and for which legal aid is now available. Examples include:
- (a) a six-month review pursuant to s 72, which is considered by the Family Court. Recommendations may be made pursuant to s 76;
 - (b) an application to extend the term of a compulsory treatment order under s 85; and
 - (c) an application to vary any other aspect of the compulsory care order under s 86, including an application to change the level of care from supervised care to secure care.

Recommendations

65. That clause 87(7)(b) be amended to include a *patient* as well as a *proposed patient* in proceedings under the MHCCR Act. That clause 87(7)(c) be amended to include a care recipient as well as a proposed care recipient in proceedings under the IDCCR Act.

Subpart 3 – After legal aid is granted

Clause 24 – Provider in civil proceedings to notify other parties

66. Clause 24 states that the provider must at once give notice of the fact that a party has been granted legal aid to every other party to the proceedings, and to the Registrar of the relevant court. As the new legal aid system will be under the control of the Ministry of Justice, it should be the responsibility of the Commissioner and/or the Ministry of Justice, who make the decision on whether or not to grant legal aid, to notify the parties and the Registrar of the relevant court that legal aid has been granted. This will remove an unnecessary attendance by lawyers, which is currently at the cost of the Legal Services Agency, or takes aid away from other, more essential tasks. The contact details of all parties to proceedings will be readily available to the Ministry as an applicant is required to file an information sheet with each application to the court.

Recommendation

67. That clause 24(1) be amended to provide that the Commissioner and/or the Ministry of Justice must notify every party to the proceedings and the Registrar of the relevant court, that legal aid has been granted.

Clause 28 – Application for amendment to grant of legal aid

68. Clause 28(2)(a) provides that an application for an amendment to a grant of legal aid may be made after the final disposition only if the Commissioner receives the application within 15 working days from the date of final disposition. It is submitted that the period 15 working days is not long enough for the reasons referred to in the submission on clause 14(2). The Society repeats its view that all such timeframes should be 20 working days, with the Commissioner having discretion to extend the timeframe in certain and/or exceptional circumstances.

Recommendation

69. That clause 28(2)(a) be amended to allow 20 working days to make an application to amend a grant of legal aid after final disposition, and to provide the Commissioner with a discretion to extend that timeframe in certain and/or exceptional circumstances.

Subpart 5 – Award of costs in civil proceedings**Clause 45 – liability of aided person for costs**

70. Further consideration needs to be given to the issue of costs being awarded against an aided person.
71. There should not be a statutory presumption that an award of costs cannot be made, when it is warranted, against an aided person in civil (including family) court proceedings. Litigants funded by legal aid may be more conciliatory or open minded to settlement if an award of costs will be payable against them. Clause 45(2) provides for an order of costs to be made against an aided person if the court is satisfied that there are exceptional circumstances. In determining whether there are exceptional circumstances, the court may take account of, but is not limited to, conduct by the aided person, as set out in clause 45(3)(a) to (f). Section 41 of the current Act allows a person who has been awarded costs to apply to the Legal Services Agency for those costs to be met by the Agency. This is reflected in clause 46(2) to (7).
72. When considering whether or not to make a costs award against an aided person, in addition to the matters set out in clause 45(3)(a) to (f), the court should be required to take into account the aided person's ability to meet those costs, and any contributions and/or repayments they are liable for under the grant of aid. If an aided person has a charge already registered over a

specified property to recover a legal aid grant, this charge should be capable of covering any reasonable award of costs if such an award is made. Even if an aided person has no assets, an attachment order could still be obtained over their benefit or future income to enable these costs to be paid.

73. The cases where the greatest injustices arise are where an aided person is causing an increase in costs for another aided person (in cases where only one party has an obligation to repay their grant of aid at the conclusion of the proceedings), or a private paying client. An example of this is where grandparents are required to apply for orders for the care of their grandchildren and are not eligible to receive legal aid because their assets and/or retirement income exceeds the threshold. Often one or both parents of the children are aided persons and may behave in a way which unnecessarily increases the costs of the grandparents who will not only have a significant legal bill but will also have the costs of raising their grandchildren.

Recommendation

74. That clause 45 be amended to provide that the court must take into account the aided person's ability to meet a costs award, and any contributions and/or repayments they are liable for under the grant of legal aid, and the court may make an attachment order over any future income.

Subpart 7 – Reconsideration, review, and appeals of legal aid decisions

Clause 51 – Reconsideration

Clause 51(2)

75. Clause 51(2) provides that an application for a reconsideration of legal aid decisions must, subject to subsection 3, be made within 20 working days after the date on which notice of the relevant decision is given to the person. The clause does not provide any discretion for the Commissioner to extend the timeframe of 20 working days.
76. There can be very good reasons why it is not appropriate to immediately seek reconsideration of decisions. In ongoing proceedings, it often makes sense to wait and see how the matter is progressing, before applying for a reconsideration. Imposing a rigid time limit is likely to have the effect of simply increasing the number of applications the Commissioner has to deal with.

Recommendation

77. That clause 51(2) be amended to allow the Commissioner discretion to extend the timeframe of 20 working days in exceptional circumstances.

Clause 51(4)

78. This clause interfaces with clause 17. If an application for legal aid is declined, the Commissioner must, in writing, advise the applicant of his or her right to seek a reconsideration of the decision under section 51. Clause 51(4), however, effectively takes away the right of an applicant to be advised of the right to seek a reconsideration. Clause 51(4) should be deleted, or alternatively amended to provide that if the failure of the Commissioner to advise a person of his or her right to seek a reconsideration does not amount to exceptional circumstances, some other form of redress is available to the applicant. This is consistent with the requirement of agencies such as Work and Income NZ to proactively advise clients of their entitlements.

Recommendation

79. That clause 51(4) be either deleted or amended to reflect that if the Commissioner fails to advise a person of his or her right to seek a reconsideration, and this does not amount to exceptional circumstances, some other form of redress is available to the applicant, to enable a late application to be made and/or accepted.

Clause 51(7)

80. Clause 51(7) provides that an applicant cannot ask for a review of a decision unless the applicant has applied for and received a reconsideration. If, due to circumstances beyond the reasonable control of the applicant or the provider, a request for a reconsideration has not been made within 20 working days after the date on which notice of the relevant decision is given to the person, an applicant cannot ask for a review of the decision. Provision should be made in the clause to enable the Commissioner to extend the timeframe of 20 working days where the application was delayed because of circumstances beyond the reasonable control of the applicant or the provider.

Recommendation

81. That clause 51(7) be amended to provide that the applicant can apply for a review of a decision provided that the applicant has asked for a reconsideration within 20 working days of the decision being received, "*or such longer period as is permitted by the Commissioner because the applicant has been unable to comply with the timeframe due to circumstances beyond the control of the applicant or the provider*".

Clause 52 - Grounds for review**Clause 52(1)**

82. Clause 52 is a significant change from the current Act, which allows a listed provider the right to apply for a review (see s 54(3) of the current Act). As currently drafted, clause 52(1) only

allows an aided person or an applicant for legal aid to apply to the Tribunal for a review of the Commissioner's reconsideration of a decision on the grounds that (a) it is manifestly unreasonable, or (b) it was wrong in law. Allowing a listed provider the right to apply for a review, allows an application to be made independently of the aided person. There is particular advantage in situations where the aided person is unable or unwilling to apply for a review. The removal of this right places the ability to apply for a review solely in the hands of the aided person and providers' decisions to apply for a review will be dependent upon an aided person's consent and willingness to make the application. This may not be forthcoming, especially if the decision relates to an amount to be paid to the provider for services already performed, and thus having no impact on the aided person themselves. Not allowing a provider to apply for a review could result in breaches of natural justice.

83. There is a distinct disadvantage for those providers who for reasons related to urgency have filed proceedings prior to the application and grant of aid. The aided person may have little or no money and will not be in a position to continue proceedings without the assistance of legal aid. Compensation for work undertaken prior to an unfavourable decision by the Commissioner will be dependent on the willingness of the client to apply for a review of the decision.
84. The providers' rights to apply for review are a minimum entitlement to ensure that providers' applications are not subject to the consent of the aided person but survive as an independent path towards the review of decisions that are manifestly unreasonable or wrong in law.

Recommendation

85. That clause 52(1) be amended to reflect the current Act allowing a listed provider the right to apply to the Tribunal for a review of the Commissioner's reconsideration of a decision referred to in subsection (2) on the grounds that it is manifestly unreasonable; or wrong in law. The provision in the current Act is transferred to the new Act as follows:
- “A listed provider or former listed provider may apply to the Tribunal for a review of a decision relating to the amount payable by the Commissioner to that provider, on the grounds that the decision is—
- (a) manifestly unreasonable; or
 - (b) wrong in law.”

Clause 53 - Application for review

86. Clause 53 provides that an application for review must be made in the prescribed manner within 20 working days after the date on which notice of the relevant decision is given to the applicant.

For the reasons stated in the comments on clause 14(2), the clause should be amended to provide for the 20 working days to be extended where such an extension is justified.

Recommendation

87. That clause 53 be amended to provide discretion for the 20 working days to be extended where the Commissioner is satisfied that the application was delayed because of circumstances beyond the reasonable control of the applicant or the provider, and that there are exceptional circumstances which exist to justify an extension of time.

Clause 55 – Review of decision by Tribunal

88. The Legal Aid Review Panel (LARP) is the independent tribunal established under the current Act. It has sixteen lawyer members (including the convener) and fourteen lay members. When the LARP receives an application for review, the Convenor assigns a team of LARP members to carry out the review. Each team comprises one, two or three members, at least one of whom must be a lawyer. It is important that this practice to be able to allocate to more than one member is continued and encouraged. Currently, the Convenor views and approves all LARP decisions.
89. Clause 55 provides that one member of the new Tribunal constitutes the Tribunal. It is an odd concept that a “tribunal” can be only a single person as its meaning is usually taken to be a group or board of decision-makers. The benefit of a tribunal over a single office holder like the Review Officer lies in the range of experience and expertise of tribunal members and this is negated if only one member can make a final decision. To ensure consistency between decisions, and ensure quality decisions, it is important that the Chair oversees all decisions of the Tribunal. If the Chair is viewing and approving all decisions this would mean that effectively decisions are being made by a minimum of one member plus the Chair. One member plus the Chair must be seen as a minimum, with matters referred to a larger number if they are of a precedential or complex nature.

Recommendation

90. That clause 55 be amended to reflect that a minimum one member plus the Chair of the Tribunal constitutes a Tribunal.

Part 3 – Administration of legal services system

Subpart 1 – Functions of Secretary for Justice and Legal Services Commissioner

Clause 68 - Functions of the Secretary for Justice

Clause 69 - Methods of delivery of legal services

91. Clauses 68 and 69 confer upon the Secretary an unfettered discretion to establish, and disestablish legal services, and to determine the delivery of legal services. However, pursuant to s 80 of the current Act, the Agency may develop, trial and evaluate pilot plans for the delivery of schemes by listed providers. Before setting up a pilot in any locality s 80(5)(a) of the current Act provides that the Agency must consult with representatives of local lawyers and the community. The Bill contains no provision to govern the establishment and evaluation of any pilot scheme, nor the requirement for consultation with the legal profession or the community. Often new policies, pilots and regulations are developed by officials not involved in the provision of legal services and this can mean that some policies are not feasible in practice or unnecessarily burdensome. Consulting the Society and the profession leads to a system that is more practical and often less onerous for everyone involved.
92. Clause 68 refers to the function of the Secretary being *to* “establish, maintain and purchase *high quality legal services* in accordance with this Act”. The difficulty with this phrase is that the concept of “high quality” legal services is not referred to earlier or in any later clause of the Act, even though clause 68 notes it is “*in accordance with this Act*”. A way to resolve this issue is for the phrase “*high quality legal services*” to be included in clause 3, which sets out the purposes of the Act. If the standard by which providers are to be judged is indeed “high quality” then it should be stated implicitly in the purpose section.
93. We understand that the new legislation allows the Secretary to contract for delivery of legal services in any way the Secretary sees fit (clause 69) and that this extends to an approved provider potentially not being offered a contract for services by the Secretary (see also comments under *General submissions – Approval versus contract*). This is likely to act as a deterrent and mean that lawyer may not apply to be approved if there is a risk that the time and resources spent on the approval process are in vain.
94. There does not appear to be a valid reason why if a lawyer is deemed competent to be approved that they should not be offered a contract for services.

Recommendations

95. That consideration be given to including a provision in the Bill, for the establishment, and evaluation of pilots, and the need to consult with the legal profession and community as is provided for in the current Act.
96. That clause 3 of the Bill includes reference to the establishment, maintenance and purchase of high quality legal services.
97. That consideration be given to including a provision in the Bill that a provider be offered a contract for services if they have been approved as provider of legal services through the selection committee. This would be subject to any conditions the Secretary wishes to impose (under clause 75).

Clauses 70 to 73 - Legal Services Commissioner

98. Clause 71 establishes the role of Legal Services Commissioner (the Commissioner) and provides the Commissioner with certain functions including the granting of legal aid; determining legal aid repayments; assigning a provider to an aided person; and deciding the allocation of cases among salaried lawyers, overseeing the conduct of their proceedings and managing their performance. The Commissioner may delegate his or her functions to another person (clause 72), who may also delegate those functions under certain conditions (clause 73).
99. Clause 71(2) provides that “*The Commissioner must act independently when performing any function stated in subsection (1)(a) to (d)*”. However, the Commissioner is subject to direction, both by the Minister of Justice and the Secretary pursuant to clause 70(3) of the Bill, and therefore the Commissioner’s independence is limited.
100. The difficulty that arises is that this may be considered a divergence from the principle of independence and the separation of powers. Traditionally, it has been viewed that the Executive government should not be intervening in the judicial system by determining which individuals are to have access to the Courts in practical terms. Another issue that arises is a potential for a perceived, if not real, conflict of interest. The Crown, or the executive government, is frequently a party to proceedings where legal aid may be granted. This is particularly true in respect of criminal matters, but can also arise in civil proceedings. It would be preferable if the Commissioner was actually a statutorily independent person similar to the Legal Complaints Review Officer (see s.190 - 191 of the Lawyers and Conveyancers Act 2006). The Legal Complaints Review Officer (LCRO) is appointed by the Minister after consultation with the New Zealand Law Society and the criteria for the LCRO is set out in that Act. The

LCRO's secretariat services are provided by the Ministry but the Officer is completely independent.

Recommendations

101. That consideration be given to ensuring the independence of the new Commissioner and that the appointee not be an employee of the Ministry.
102. That the words "and any person advising or assisting the Commissioner or any person who is delegated any powers, functions, or duties under section 72" be inserted in clause 70(3) after the word Commissioner.
103. That a new sub-clause (4) be inserted in clause 70, providing that "Neither the Minister nor the Secretary may give directions to any person advising or assisting the Commissioner, or a person to whom any powers, functions, or duties under section 72 have been delegated, where the Commissioner or person is exercising functions conferred by section 71(1)(a) to (d) of this Act."
104. That a new clause 73(3) be inserted providing that "A person who is delegated any powers, functions, or duties under section 72 must act independently when performing any function stated in subsection (1)(a) to (d)."

Subpart 2 – Quality Assurance System for Providers

105. The Ministry of Justice has released a discussion paper *Legal Aid Quality Framework* that sets out proposed entry criteria and practice standards for legal aid providers. The Society will be making a submission on the discussion paper. However, the following comments in respect of certain clauses in the Bill are submitted here.

Clause 76 – Application for approval to provide legal aid or services or specified legal services

Clause 77 – Approval

106. These clauses permit the Secretary to give a person approval to provide one or more legal aid services or specified legal services with or without conditions for a specific time period and set out the formal requirements of that approval. In the past, some lawyers have been approved as providers over the Society's contrary recommendation through its local consultative committees. Some of these committees have well-established processes for assessing approval.
107. Clause 77 of the Bill does not provide any guidance to the Secretary for the criteria in determining approval of providers. The Society, through its continuing legal education

programme, will continue providing programmes and training for lawyers who wish to be legal aid providers. Given that level of involvement, it ought to be a requirement that the Secretary consults with the Society to establish the necessary standards to be reached before approval to a provider is given.

108. The conditions that the Secretary may impose under clause 77(2) will be prescribed in the regulations and as such, the Society is unable to comment on any potential impact. We understand that the Society will be consulted on these regulations but we believe it is prudent to provide for consultation in the governing Act.
109. Clause 77(4) refers to the temporary approval that the Secretary may give to a person to provide legal services. All lawyers who wish to be approved under the Bill will need to apply, regardless of their current legal aid provider status. Clause 135 provides that a listed provider under the current Act is automatically approved as a provider of legal services for a period of six months after the commencement of the new Act. The approval process needs to be prompt and completed within the six-month timeframe. If there is a delay in processing an application for listed provider status, for example longer than six months, current providers may not be funded and/or authorised to provide services. The temporary approval should be extended beyond six months after the commencement of the new Act to cover situations where applications have not been processed within the six-month period. This extension will be necessary to “meet a need for those services” as stated in clause 77(4).
110. We understand Ministry officials have said that there will be provisions ensuring that all providers who submit applications to be approved under the new system will automatically remain approved until their applications are considered under that new framework. The Ministry have said that this may take up to 18 months. This needs to be reflected in the Bill.

Recommendations

111. That clause 77 be amended so that the Secretary for Justice should consult with the Society about the establishing of standards and regulations for legal aid providers.
112. That clause 77(4) be amended to allow a temporary approval until the application had been processed.

Clause 78 – Selection committees

113. Clause 78 provides for the Secretary to establish one or more selection committees to assess applications for approval to provide legal aid services. The details of the term of appointment,

removal, and remuneration of committee members and how the selection committees will operate is contained in Part 2 of Schedule 3. The Schedule does not state how the procedure of the committees will be conducted and it is assumed that such detail will be included in the regulations.

Recommendation

114. That the Society is consulted so that it can comment on the draft regulations before they are promulgated.

Clause 79 – Performance review committee

115. Clause 79 establishes one performance review committee whose function is to “investigate and advise” the Secretary of “any matter relating to the performance of a provider”. The details of the term of appointment, removal, and remuneration of committee members and how the performance review committee will operate are contained in Part 2 of Schedule 3. The Schedule does not state how the procedure of the committee will be conducted. It is assumed that such detail will be included in the regulations. It is unclear how the role of the performance review committee will sit alongside the statutory requirement of the Society to regulate the conduct of lawyers under the Lawyers and Conveyancers Act 2006. It is vital that the regulator of lawyers, the Society, is consulted as any inconsistencies between the regulator’s procedures and policies and the performance review committee’s procedures and policies will cause problems for lawyers. It is important that Ministry procedures are consistent and complementary with that of the statutory regulator.
116. Because of this statutory requirement, it is unclear why there is no requirement for the Chair of this committee to be nominated by the Society in a similar way to the appointment provisions for the selection committees. The Lawyers and Conveyancers Act 2006 requires consultation with the Society over the appointments for the LCRO (s 190) and the Society appoints the lawyer members of the Lawyers and Conveyancers Disciplinary Tribunal (s 233).
117. Clause 79 provides that the Secretary must establish a performance review committee, and the committee must consist of members who, collectively, have expertise in the “*areas of law*” in which the provider is providing legal aid services. An issue may well arise out of the words “*areas of law*” in clause 79(6)(a). Perhaps the expertise criteria can be expressed in a broader fashion along the lines that the performance review committee must consist of members who, collectively, have expertise in civil, criminal, family and mental health matters rather than the more specific “*areas of law*”.

Recommendations

118. That the Society is consulted so that it can comment on the draft regulations before they are promulgated.
119. That the clause be amended to make clear how the relationship between the performance review committee and the Society as the regulator of lawyers will function.
120. That clause 79(5) be amended to provide that the Chair of the performance review committee be nominated by the Society.
121. That clause 79 be amended so that the established performance review committees consist of members who collectively have expertise in civil, criminal, family and mental health law.

Clause 82 – Review of decisions of Secretary regarding approvals

122. Clause 82 permits a person who is affected by a decision of the Secretary to apply to the Review Authority for a review of a decision by the Secretary. The decisions able to be reviewed are only those that decline an application for approval as a provider; revoke or modify an approval; or impose conditions on an approval. An application for review is to be made within 20 working days of the date of notice of the Secretary's decision. The decisions able to be reviewed by the Review Authority are limited to the three areas above. They do not include the decisions the Secretary is able to make about the duration of the approval or the wider issues regarding methods of delivery of legal services and the need for legal services to be provided to people with insufficient needs.
123. Clause 82 should allow for the review of any decision of the Secretary relating to approval.
124. The 20 working day timeframe should also be able to be extended, at the Review Authority's discretion, and in exceptional circumstances.

Recommendation

125. That clause 82(1) be amended to include a person's right to apply for a review of all decisions relating to approval made by the Secretary, and to provide that the 20 working days in which to apply for review may be extended, in exceptional circumstances, at the discretion of the Review Authority (with the same provisions as are recommended in respect of clauses 14(2) and 53 applying).

Clause 83 – Judicial review

126. Clause 83 prevents a person making an application for judicial review of any decision made under Subpart 2 (quality assurance provisions) until the decision has been reviewed by the Review Authority. Any application for judicial review must be made within 20 working days of the date of the Review Authority's decision. As currently drafted, clause 82(1) limits those matters which may be reviewed by the Review Authority. As a result, the combined effect of clauses 82(1) and 83 is that not all decisions of the Secretary may be judicially reviewed. One example is that clause 82(1) does not permit a decision made by the Secretary regarding the duration of an approval pursuant to clause 77(3)(c), to be reviewed by the Review Authority. This may be problematic if the approval is granted for only a short time necessitating further applications to be made for approval. As currently drafted, the Bill would not allow any redress if such a decision were wrongfully made. This combined effect could result a breach of natural justice. The decisions of a statutory officer exercising a statutory function must be able to be reviewed in some forum. If the Review Authority cannot review such decisions, then the right to judicial review must be available.
127. If clause 82(1) is amended as recommended by the Society, then clause 83 requires no amendment. The Society accepts that where the Review Authority process is available, it should be exercised before judicial review is sought.
128. If clause 82(1) is not amended as recommended, then clause 83(1) requires amendment to ensure that matters which are not able to be reviewed by the Review Authority may still be the subject of applications for judicial review.

Recommendation

129. That either clause 82(1) be amended as recommended above, or that clause 83(1) be amended to permit all decisions made by the Secretary to be judicially reviewed, whether they are able to be reviewed by the Review Authority or not.

Clause 84 – Review Authority established**Clause 84(2)**

130. Clause 84(2) provides that the Minister must appoint one person to be the Review Authority. The clause as currently drafted does not allow for flexibility should there be large number of review applications, and a need in the future to have more than one person acting as the Review Authority at any one time.

Recommendation

131. That clause 84(2) be amended as follows: “The Minister must appoint *at least* 1 person to be the Review Authority”.

Clause 84(3)

132. Clause 84(3) states that the person appointed as the Review Authority must be a lawyer with at least seven years’ legal experience. The clause is unclear as to what constitutes “legal experience” and the phrase is not defined in clause 4. The level of judgment and decision making conferred on the Review Authority may have serious implications for an applicant. The “legal experience” should be current, and practical experience.
133. An example of a definition of experience can be found in Regulation 14 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, which also refers to the definition of “Legal Work” in the Lawyers and Conveyancers Act 2006.

Recommendations

134. That clause 84(3) be amended to provide that: “legal experience” is amended to “practical legal experience”;

“Practical legal experience” means any one or more of the following (consistent with Regulation 14 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008):

- (a) legal work in the office of a lawyer in sole practice, a partnership of lawyers, or an incorporated law firm:
 - (b) legal work as a barrister sole:
 - (c) legal work in any State service (as defined in section 2 of the State Sector Act 1988):
 - (d) legal work in the office of a local authority:
 - (e) legal work as an employee of a company or other body (whether incorporated or unincorporated)
135. “Legal Work” has the meaning given to it by section 6 of the Lawyers and Conveyancers Act 2006.

Clause 85 – Function of Review Authority

Clause 85(1)

136. Clause 85(1) as currently drafted does not specifically give the Review Authority or the Tribunal the ability to review decisions of the Secretary to decline a temporary approval or to suspend payments to a provider under clause 92(4). It could be argued that this could be interpreted as ‘modifying a provider’s approval’ (clause 85(1)(b)) but for the sake of clarity these should be clearly set out
137. As the Bill is currently drafted it appears that a legal aid provider has no rights of review around any legal aid payments or the cessation of payments. This may lead to unnecessary judicial review proceedings.

Recommendation

138. That clause 85(1) be amended to provide that the Review Authority can review decisions of the Secretary to decline a temporary approval or to suspend payments to a provider under clause 92(4).

Clauses 86 – Decisions of Review Authority

139. Clause 86(2) provides that every determination by the Review Authority must be accompanied by a brief summary of the reasons. Lawyers should be entitled to receive full reasons why the Review Authority has made their determination. Providing brief reasons is likely to cause problems in relation to judicial review proceedings. A number of the grounds for reversing an administrative decision under review, such as ignoring relevant considerations or taking irrelevant considerations into account, will not be able to be refuted without full reasons. Brief reasons often mean porous decisions and these will leave the Ministry open to judicial review proceedings.

Recommendation

140. That clause 86(2) be amended to provide that every determination by the Review Authority must be accompanied by full reasons for that determination.

Clause 88 - Ministry may carry out quality assurance checks

141. Clause 88 provides for the Ministry of Justice to carry out quality assurance checks on legal aid providers. However, no guidelines are provided as to how such checks may be carried out.

Recommendation

142. That clause 88 be amended to specify that guidelines must be developed for quality assurance checks.

Clause 90 – Aided person may request examination of cost of services

143. Clause 90(2) provides that an aided person may request an examination at any time before the 20th day (or such longer time as the Commissioner, on application, allows) after the person has received notice of the costs of services. No guidance is given as to the circumstances in which the Commissioner may allow a longer time period. Some provision giving this guidance should be included.

Recommendation

144. That clause 90(2) be amended as follows: “(or such longer time as the Commissioner, on application, allows, where there are reasonable and established reasons that are beyond the reasonable control of the applicant or the provider for the aided person’s delay in applying).”

Clause 92 – Compliance with audits**Clause 92(3)**

145. Clause 92(3) provides that if an auditor considers that a provider who is being examined or audited is not complying, or has not adequately complied with subsection (1), the auditor must notify the Secretary and the provider. There is no provision in the clause for a right of reply from the provider that must be considered by the Secretary before the decision is made to suspend payment that is currently owed to the provider. This is concerning due to the power conferred to the Secretary under clause 113, to impose a fine of up to \$5,000 for a provider who makes a false or misleading representation in relation to any application for, or that relates to an approval to provide, legal aid services or specified legal services.
146. This appears to be against principles of natural justice around procedural fairness. A lawyer faced with suspension of a payment should be given fair warning, should be entitled to refute the evidence of an auditor that they are not cooperating and should be given the opportunity to be heard.

Recommendation

147. That clause 92(3) be amended to allow the provider a right of reply within 10 working days that must be considered by the Secretary before the decision is made to suspend payment that is currently owed to the provider.

Clause 92(4)

148. Clause 92(4) provides that the Secretary may suspend payments of any claim currently lodged with the Secretary by the provider, and the payments may remain suspended until such time as the Secretary is satisfied that the provider is cooperating with the auditor. Suspension of payments to a provider has implications for practices, and the provider's ability to continue to provide legal services to other aided clients. If clause 92(3) is amended as per the Society's recommendation, then there is no issue with clause 92(4) remaining as drafted. If, however, clause 92(3) is not amended as per the recommendation, the Secretary should only be able to suspend payment after giving the provider the opportunity to respond to the matters in the notice given to the provider pursuant to clause 92(3).

Recommendation

149. That if clause 92(3) is not amended as suggested in the Society's recommendation, clause 92(4) be amended to provide that the Secretary can only suspend payment after giving the provider the opportunity to respond to the matters in the notice given to the provider pursuant to clause 92(3).

Subpart 4 – Payment for legal aid work, enforcement, and other matters relating to providers**Clause 97 – Lead provider to claim for payment**

150. Clause 97(1) provides that claims for payment in respect of legal aid services or specified legal services must be made by the lead provider to the Secretary in the prescribed manner “and within the timeframe referred to in Section 98”. As the timeframe is to be set by regulations, and at this stage is unknown, the Society is unable to comment on what impact this might or might not have.

Recommendation

151. That the Society is consulted and able to comment on the draft regulations before they are promulgated.

Clause 98 – Time frame for claiming for payment

152. Clause 98 is new and relates to the timeframe for making claims for payment for legal aid or specified legal services. It is questionable whether a timeframe set in regulations is necessary and whether this is more suitable as a provision in the contract for services, as it is currently.

153. It is unclear whether the clause is an attempt to limit the ability to make an interim claim or whether it is imposing a timeframe on when a provider can claim for payment for legal services. The Statute of Limitations allows a six-year timeframe for submitting claims for payment of

services. The Society accepts that a shorter timeframe is required for the efficient administration of the legal aid system, but submits that this timeframe must be reasonable taking into account the demands of legal practice, the vagaries of accounting systems and other such matters. The Society submits that a timeframe of six months would be reasonable.

Recommendations

154. That a timeframe of six months would be reasonable; and the Society is consulted and able to comment on the draft regulations before they are promulgated.

Clause 99 – Secretary to refer claim to Commission for decision

155. Clause 99(4) provides that the Commissioner may decline some or all of a claim made on various grounds including that “the claim was not made in accordance with the timeframes referred to in section 98’ as set out in clause 99(4)(d). The potential impact of s 98(1) as to the timeframe for submitting a claim, which is to be set by regulations, may be significant, but is unknown and the Society is unable to comment on any potential impact. Possible issues may be the limiting of any interim claims and any restriction on the ability to submit a claim after the timeframe has elapsed. Providers ought not to have any apprehension that they will not receive proper remuneration for work completed.

Recommendation

156. That the Society is consulted and able to comment on the draft regulations before they are promulgated.

Clause 101 – Interim restrictions that may be imposed by Secretary

157. Clause 101 confers power on the Secretary to impose interim restrictions on the provider where the performance review committee is investigating a provider’s performance. These interim restrictions include placing a hold on any payments to be made to the provider that relate to the matter being investigated if the Secretary considers it necessary to do so, and notifying the Commissioner of any pending investigation by the performance review committee if the Secretary considers it appropriate to do so. If such notice is given, the Commissioner must cease assigning the provider to any aided persons, and assign another provider to all of the aided persons that the provider is currently assigned.
158. The Society’s view is that this is too far-reaching a consequence to be mandatory. A provider may be the subject of investigation in respect of one matter only, whilst their performance on all their other matters is not in issue. Assigning another provider on all the investigated provider’s

cases will lead to undue stress and delay for the provider's other clients, and delay in the Court system.

159. The consequences for the provider are also far-reaching. Re-assignment of all legal aid cases, especially in circumstances where the investigation results in a finding of no wrongdoing, but even in those where some wrongdoing on a particular matter is found, will fundamentally and most likely irreparably damage the provider's professional reputation.
160. The Society recommends that clause 101(3) is amended to say that the Commissioner may cease assigning the provider to any other persons, and may assign another provider to the persons that the provider is currently assigned to.
161. Under s 72A(6) of the current Act, there is the ability to suspend temporarily an approval for a provider, whereas under clause 101 the approval is not affected, but the same practical effect is achieved. However, s 72A(6) of the current Act provides that a person who receives a notice of temporary suspension, may seek a review of that decision, and is entitled to make submissions and be heard at such a review. There is no provision in clause 101 for a provider to seek a review of the Secretary's decisions to place payments on hold or to notify the Commissioner, which results in a cessation of assignments. The basic principles of natural justice require that providers should have a right of review.
162. It is unclear what rights a provider has in relation to the performance review committee. Part 2 of Schedule 3 of the Bill sets out some provisions that apply to the performance review committee and clause 16 of Schedule 3 makes it clear that the committee must conduct its procedures in a manner set out in regulations. It is assumed that the regulations will provide for what rights are available to a provider. Regardless of what the content of the regulations might be, this does not overcome the difficulties arising from clause 101, as currently drafted.

Recommendations

163. That:
- clause 101(3) be amended to change "must" to "may";
 - clause 101 be amended to confer a right of review on a provider; and entitle a provider to make submissions and be heard at such a review; and
 - the Society is consulted and able to comment on draft regulations before they are promulgated.

Clause 103 – Cancellation

164. Clause 103 is based on s 73 of the current Act and sets out the circumstances in which the Secretary must cancel a provider’s approval. There are three departures from the current Act. Pursuant to s 73(1), cancellation of an approval is discretionary and may relate to one or more of the approvals in the listing of a provider. Clause 103(1) provides that cancellation is *mandatory*. Clause 103(a) provides for a new ground of cancellation as follows:

“The Secretary must cancel a Provider’s approval if –

- (a) the Provider has made a false or misleading representation in any application for approval –*
 - (i) that has led to the approval being granted:*
 - (ii) that has led to the approval being granted on more favourable conditions than would otherwise have been imposed.”*

165. While cancellation may well be justified in these circumstances, there may be cases where it is not an appropriate response, in particular, where a representation is found to be misleading but there is no culpable intent to misrepresent. It might be a misrepresentation that the aided person has made to their provider. If such a ground for cancellation is to remain then the power conferred should be discretionary rather than mandatory and the sanction should depend upon the degree of the breach. The clause does not allow the provider to apply for a review of the decision. The current Act allows a provider to seek a review of any decision of the Legal Services Agency; in addition, a provider is allowed to make a submission and to be heard at any review.

166. The lack of a right of review breaches natural justice. If the Secretary’s power is to remain mandatory in nature, this justifies a right of review, including the right of a provider to make submissions and to be heard at any review, to be provided for in the clause.

Recommendations

167. That clause 103(1) be amended to provide that the Secretary’s power is discretionary rather than mandatory;

168. That clause 103(1)(a) be amended to “the provider has *knowingly* made a false or misleading representation in any application for approval; and

169. That clause 103 be amended to allow a provider to seek a review by the Review Authority of any decision of the Secretary regarding a provider's approval status and to have the ability to make a submission and be heard at any review.

Subpart 5 – Miscellaneous provisions

Clause 114 - Regulations

170. Clause 114 enables the Governor-General to make, by Order in Council, regulations for stated purposes under the new Act.
171. Clause 114(1)(b) of the Bill contains the only reference to fixing levels of remuneration for legal aid. The clause provides that regulations may be made for prescribing the method for calculating a maximum grant. The clause, however, does not include a requirement for consultation with the legal profession or any other person or body. No provision is made for the level of grants to be reviewed on a regular basis, which is the situation under the present Act.
172. The Bill creates a new category of criminal legal aid for "*prescribed offences*". What a prescribed offence is to be determined by regulations made under clause 114(1)(s) of the Bill. The Bill gives no guidance on what type of offence can be a prescribed offence. It appears from the commentary that these will be offences where the grants are likely to be under a set amount. However, the Bill does not say that.
173. Clause 114(1)(w) proposes that there be a time limit on lawyers sending in invoices.

Recommendations

174. That the Society is consulted and able to comment on draft regulations before they are promulgated.
175. That clause 114(1)(b) be amended to include a requirement for the consultation with a legal profession, body or other person in respect of the calculating of a maximum grant. Further, the clause should also include a requirement that the level of grant be regularly reviewed but which maintains the present situation.
176. There should be a schedule in the Bill, which sets out the prescribed offences referred to in clause 114(1)(s). This would be analogous to schedule 2 of the Bill, which specifies enactments for the purposes of family legal aid. There needs to be statutory guidance for what are to be prescribed offences. As presently drafted, regulations could make murder a specified offence with a grant under a set amount.

177. Any time limit on legal aid providers to send in invoices should be removed from the Bill.

Part 4 – Transitional and savings provisions, amendments to other enactments, and repeals

Subpart 2 – Transition of matters commenced, approvals granted, and funding provided for under former Act

Clause 135 – Listed providers under former Act

178. Clause 135(1) provides that a person who, immediately before the commencement of the new Act, was a listed provider under the former Act, is, on the commencement of the new Act, approved as a provider of legal services for a period of six months after commencement of new Act. The Explanatory Note states the provider will automatically be approved as a provider of legal services for a period of one year from the commencement of the new Act. The Commissioner should have discretion to extend the timeframe if there are delays in the approval process under the new Act, including any review or appeal to a decision of the Secretary to decline an application.

Recommendation

179. That clause 135(1) be amended to clarify whether the timeframe is six months, as shown in the clause, or one year, as shown in the Explanatory Note; and

180. That the clause be amended to provide the Commissioner with discretion to extend the timeframe if there are delays in the approval process, including any review or appeal to the decision of the Secretary to decline an application.

Subpart 4 – Amendments to other enactments

Clause 140 – Notice of determination

181. Clause 140 amends s 158 of the Lawyers and Conveyancers Act 2006 by adding a new subsection (3) that reads “if the person who is the subject the determination is a provider under the Legal Services Act 2000, the Standards Committee must provide a written notice of the determination to the Secretary for Justice.” The Standards Committee should only provide the Secretary with any *adverse* determination that bears on the provider’s fitness to practise and not a determination under s 152(2)(c) of the Lawyers and Conveyancers Act 2006, that no further action be taken.

Recommendation

182. That clause 140 be amended to provide that the Standards Committee need only provide the Secretary with an *adverse* determination which bears on the provider’s fitness to practise, and

not a determination under section 152(2)(c) of the Lawyers and Conveyancers Act 2006 that no further action be taken.

Schedule 3 - Further provisions that apply to Legal aid Tribunal, selection committees, performance review committees, and Review Authority

Clause 13 - Immunity of people who supply information to committee

Clause 23 - Immunity of people who supply information to Review Authority

183. Clause 13 provides that civil proceedings may not be brought against any person who supplies information to a committee on request and in good faith.

184. This provision should also extend to those who supply information in good faith, even where the committee has not requested that.

185. The same issue arises in respect of clause 23 of Schedule 3.

Recommendation

186. That clauses 13 and 23 be amended so that immunity from civil proceedings is extended to those who supply information to either the Committee or Authority in good faith.

A handwritten signature in black ink, appearing to read 'Jonathan Temm', is written over a light grey rectangular background.

Jonathan Temm
President
8 October 2010

Appendix 1 – History of the administration of legal aid in New Zealand

The first legal aid legislation, the Offenders Legal Aid Act 1954, dealt only with criminal legal aid, as the name of the Act indicates. Until 1989, decisions on granting legal aid were made by Judges, s 2(5). In 1989, this was amended to add court registrars, and a provision, s 2A, was added to provide review of registrars' decisions by Judges. This was the process that ended notoriously in *R v Taito* [2003] 3 NZLR 577 (PC). The process was not changed in essence by the Legal Services Act 1991, s 7. The position was in substance the same initially under the Legal Services Act 2000, with court registrars being given delegated power by the Legal Services Agency to make decisions until its own grants officer organisation could grow and be trained. Thereafter, Legal Services Agency staff made decisions on criminal legal aid.

In non-criminal matters, the first legislation was the Legal Aid Act 1969, which dealt only with civil legal aid. District Legal Aid Committees consisting of lawyers whose chair was a lawyer (the High Court registrar was Secretary) made decisions on legal aid. The powers to make decisions on granting and withdrawing legal aid were vested directly in these committees by the Act, ss 20, 22 and 24. They exercised these powers independently of the Legal Aid Board. The Legal Aid Board had power to issue instructions, binding on committees, s 5(3), as to general administration of the legal aid scheme and policies to be followed by committees in carrying out their functions, s 5(2).

The third Act on legal aid, the Legal Services Act 1991 covered both criminal and non-criminal legal aid. The 1991 Act introduced changes in nomenclature and the role of the court registrar (becoming secretary), but the structure for non-criminal legal aid remained the same. Powers were still conferred directly on the now District Legal Services Subcommittees and their relationship with the Legal Services Board remained the same until towards the end of the Act when the Legal Aid Board started providing to the Subcommittees administrative services previously provided by the courts.

As noted earlier, the Legal Services Act 2000 brought all decision-making under its own roof. The Legal Services Agency appoints its own staff, so that decision-making officers and staff advising them are accountable to senior management and thence to the Legal Services Board. The Legal Services Agency is a Crown agent (which must give effect to government policy when directed by the responsible Minister), not an Autonomous Crown entity (which must have regard to government policy when directed by the responsible Minister), Crown Entities Act 2004, s 7. The power of the Minister to give directions is limited by the Crown Entities Act 2004, ss 103. This preserves the restriction in s 98 of the Legal Services Act 2000 (repealed on enactment of the 2004 Act) from directing the outcome of particular decisions. The practical legal experience found previously in the former District Committees and Subcommittees is now supplied by specialist legal advisers, all of

whom are experienced legal practitioners. Five are full-time employees of the Agency and the others are in private practice. The Legal Services Agency also instructs solicitors and barristers in private practice for litigation and specialist opinion or other work.