FAMILY LAW SECTION

New Zealand Law Society

SUBMISSION ON

LEGAL SERVICES BILL

Introduction

1. The Family Law Section (the Section) of the New Zealand Law Society (the Society) welcomes the opportunity to make a submission on the Legal Services Bill. The Section has existed as a group with voluntary membership since 1997 and represents the interests of approximately 840 family law practitioners, many of whom are legal aid providers. The Section understands the Society is making its own submission, which the Section endorses.

2. Legal aid is a key foundation stone of a humane and just society. It enables vulnerable members of society to have access to legal assistance that is essential for the understanding and assertion of individual rights, obligations and freedoms under the law. This is particularly so in the area of family law, where not only the interests of the individuals themselves are in issue, but often, and more importantly, the interests of their children. The Section is strongly of the view that any legal aid system needs to be flexible enough to recognise and accommodate the unique attributes of family law.

3. The submission sets out some general comments pertaining to the overall Bill and then makes comment and recommendations for proposed amendments to specific clauses.

General comments

Lawyer of choice

4. Family law is unique from other jurisdictions as it deals in predicting a future event and finding sustainable solutions to resolve an issue, rather than dealing with a past event as in the criminal law jurisdiction. While many cases may start off relatively straightforward, they often evolve into complex cases as several new issues emerge. It is not always easy, at the outset, to predict the complexity of a case. Aided people involved in family law proceedings often find it distressing as they are dealing with their most personal and intimate affairs. It is essential that the client has a good working relationship with their lawyer and having the right to choose their own lawyer to represent them is fundamental to this relationship. The value of continuity of counsel in family proceedings cannot be overstated. One of the hallmarks of difficulty in cases is where there has been a succession of counsel involved. Any system which has as a

consequence changes of lawyer other than at the instigation of the client must be avoided. The Section accordingly submits that family law proceedings should be distinguished and excluded from any proceedings referred to in the Bill where the Commissioner has the function to assign a provider of legal aid services (clause 71(c)), or where that power is delegated under clauses 72 and 73.

The right of review

5. The most significant change to the review provisions in the Bill is the absence of the listed providers' rights of review. In the interests of natural justice, the right of a provider to apply for a review should be preserved where a decision has been made on an issue directly affecting the provider. In some instances (refer to comments under clauses 101 and 103), that right should allow a provider to make submissions and be heard at any review. There may also be circumstances where a review 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 a 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.

Time limits

6. Under the Legal Services Act 2000 (the current Act), issues are determined on the merits of the case and the principles of justice. The Section 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 in the interests of natural justice. The timeframes themselves must also be reasonable and, in the Section's view, consistent throughout the Bill.

Repeal of the Legal Services Act 2000

7. 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.

Regulations

8. 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 and efficient. It is therefore imperative that the Section and the Society is consulted and is given the opportunity to comment on the draft regulations before they are promulgated.

Clause by clause analysis

Part 1 - Preliminary Provisions

Clause 4 - Interpretation

Clause 4(1)

9. 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

10. 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)

11. 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, are inclusive of GST. Disbursements, which are costs incurred from a third party, for example, DNA testing in paternity cases, 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

12. That clause 4(5) be amended to show that references to such things as fees, charges, disbursements, grants, and rates are inclusive of GST. Alternatively, clause 4(5) should be amended to show that disbursements and any other out of pocket expenses, are GST inclusive.

Part 2 – Legal Aid

Subpart 1 – When legal aid may be granted

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

Clause 10(3)

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

Recommendation

14. 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 aid

Clause 14(2)

15. 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 Section'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 Section is also of the view that 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

16. 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 extension of time.*

Clause 16 – Decision on application for legal aid

Clause 16(3)

17. 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. In the interests of natural justice, the Commissioner should also be required to provide reasons if a decision to cease payments is made.

Recommendation

18. That clause 16(3)(a) be amended to:

(a) provide for factors the Commissioner must take into account when considering whether it is appropriate that payments should cease; and

(b) require the Commissioner to provide reasons if a decision to cease payments is made.

Clause 17 – Commissioner to notify applicant when aid declined

19. 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

20. 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

Clause 18(4)

21. 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 to have numerous charges registered in favour of the Agency over a specified property of the 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 met by the Legal Services Agency, are unnecessary. 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

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

Clause 18(7)

23. 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).

24. 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.

25. 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 6-month review pursuant to s 72, which is considered by the Family Court, including recommendations that 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.

Recommendation

26. That:

(a) clause 87(7)(b) be amended to include a patient as well as a proposed patient in proceedings under the MHCCR Act; and

(b) 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

27. 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

28. 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

29. 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 15 working days is not long enough for the reasons referred to in the submission on clause 14(2). The Section 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

30. 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

Clauses 45 – liability of aided person for costs

31. Further consideration needs to be given to the issue of costs being awarded against an aided person. There should not be a statutory presumption that an award of costs cannot be made, when it is warranted, against an aided person in Family Court proceedings. 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).

32. 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.

33. 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 for 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

34. That clause 45 be amended to provide that:
    (a) 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
    (b) 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)

35. Clause 51(2) provides that an application for a reconsideration 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.

Recommendation

36. 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)

37. 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

38. That clause 51(4) be either:
    (a) deleted; or
    (b) 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(6)

39. Clause 51(6) provides that the Commissioner may decline to reconsider a decision if the Commissioner has already considered that decision or a decision relating to "substantially the same issue". The right of review is an important mechanism to challenge decisions. Where essentially the same decision maker is involved, there should be some mechanism to enable that decision to be reviewed. Although the Section takes no issue with the Commissioner's ability to decline to reconsider if the decision relates to exactly the same issue, the Section is of the view that there should be a right of review if the decision relates to "substantially the same issue", as that is a matter of substance not procedure. Accordingly, there needs to be a mechanism which permits the issues raised to be fully explored.

Recommendation

40. That clause 51(6) be amended to remove the Commissioner's ability to decline to reconsider a decision where the decision relates to "substantially the same issue".

Clause 51(7)

41. 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

42. 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(1)

43. Clause 52 does not allow a listed provider the right to apply for a review. 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.

44. 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.

45. 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

46. That clause 52(1) be amended to allow 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.

<u>Clause 52(2)</u>

47. The Bill should allow for any decision on a reconsideration to be reviewed, and should not be limited to specific types of decisions. To limit and restrict the decisions that can be reviewed is a breach of natural justice. Clause 52(2) should therefore be deleted to enable all decisions on reconsideration to be reviewed by the Tribunal.

Recommendation

48. That clause 52(2) be deleted**.**

<u>Clause 53</u>

49. 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

50. 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.

Part 3 – Administration of legal services system

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

Clause 68 – Functions of Secretary for Justice

Clause 69 - Methods of delivery of legal services

51. Clause 68 establishes the functions of the Secretary for Justice (the Secretary) in the new role of administration of legal aid, which was previously undertaken by the Legal Services Agency. The clauses provide the Secretary with the ability to restructure the way legal aid services are provided and would enable the bulk funding of firms or groups of lawyers and/or expand the provision of legal aid services to Community Law Centres and non-lawyers. These clauses have potential to severely limit a client's right to engage a lawyer or firm of their choice. The Section remains firmly opposed to any provisions which remove an aided person's right to lawyer of choice in family law matters. The Section's view is that any references in the Bill to the restructuring of the way legal aid services are provided should exclude the provision of those services in the area of family legal aid.

Recommendation

52. That the Bill be amended to exclude all areas of family legal aid from any provisions which have the effect of removing lawyer of choice.

Clause 71– Functions of Commissioner

Clause 72 -Commissioner may delegate powers, functions, or duties

Clause 73 – Powers of delegate

53. 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).

54. It is of significant concern that the function of "assigning a provider to an aided person" is not limited to certain areas of law. It leaves open the possibility of an aided person in the family law jurisdiction being allocated a lawyer in a similar way to the rotating allocation system in the criminal jurisdiction. This would be a significant and unwelcome change to the current system where family clients choose their lawyer and then the application for aid is made. It is important for people dealing with their most personal and intimate affairs, which is often distressing, to have a good working relationship with their lawyer. Having the right to choose is fundamental to this. The value of continuity of counsel in family proceedings cannot be overstated. One of the hallmarks of difficulty in cases is where there has been a succession of counsel involved.

Recommendation

55. That the Bill be amended to exclude all areas of family legal aid from any provisions which have the effect of removing lawyer of choice.

Subpart 2 – Quality assurance system for providers

56. The Section notes that separate submissions have been called for on the discussion document which sets out the draft legal aid quality framework and the proposed entry criteria and practice standards. The Section will be making a submission on the discussion document. However, the following comments in respect of certain clauses in the Bill are made.

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

Clause 77 – Approval

57. 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 the approval.

Clause 77(2)

58. The conditions that the Secretary may impose under clause 77(2) will be prescribed in the regulations and as such, the Section is unable to comment on any potential impact.

Recommendation

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

Clause 77(4)

60. 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 6 months after the commencement of the new Act. The approval process needs to be prompt and completed within the 6-month timeframe. If there is a delay in processing an application for listed provider status, i.e. longer than 6 months, current providers may not be funded and/or authorised to provide services. The temporary approval should be extended beyond 6 months after the commencement of the new Act to cover situations where applications have not been processed with the 6-month period. This extension will be necessary to "meet a need for those services" as stated in clause 77(4).

Recommendation

61. That clause 77(4) be amended to allow a temporary approval to extend beyond the 6-month timeframe, where an application has not been processed and to continue pending a decision.

Clause 78 – Selection committees

62. 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

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

Clause 79 – Performance review committee

64. 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 detail of the term of appointment, removal, and remuneration of committee members and how the performance review committee will operate is 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 Conveyancer's Act 2006. 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.

Recommendation

65. That:
    (a) the Section is consulted and is able to comment on the draft regulations before they are promulgated;
    (b) the clause be amended to make clear how the relationship between the performance review committee and the Society as the regulator of lawyers is to interrelate; and
    (c) clause 79(5) be amended to provide that the Chair of the performance review committee be nominated by the Society.

<u>Clause 82 – Review of decisions of Secretary regarding approvals</u>

66. 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. Clause 82(1) does not provide that the Review Authority can review decisions made by the Commissioner.

67. A person is unable to apply for a judicial review of any decision made under Subpart 2, unless the person has applied for a review of a decision from the Review Authority. The combination of these two provisions means that there is no right of review in any forum against some decisions made by the Commissioner and/or Secretary. That, in the Section's view, is a fundamental breach of natural justice. All decisions of an officer acting in a statutory or official capacity must be able to be reviewed. The 20 working day timeframe should also be able to be extended, in exceptional circumstances at the Review Authority's discretion.

Recommendation

68. That clause 82(1) be amended to include a person's right to apply for a review of all decisions made by the Commissioner and/or 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

69. 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 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 in 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.

70. If clause 82(1) is amended as recommended by the Section, then clause 83 requires no amendment. The Section accepts that where the Review Authority process is available, it should be exercised before judicial review is sought.

71. 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

72. 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.

Clauses 84 – Review Authority established

Clause 84(2)

73. 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

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

Clause 84(3)

75. Clause 84(3) states that the person appointed as the Review Authority must be a lawyer with at least 7 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, practical, and jurisdiction specific to ensure that the person appointed as the Review Authority has actual, current experience in the area they will be dealing with.

Recommendations

76. That clause 84(3) be amended to provide that:
    (a) "legal experience' is amended to "practical legal experience";
    (b) "practical legal experience" is defined, either in this clause or in clause 4; and
    (c) the person appointed as the Review Authority is required to have "practical legal experience" that is jurisdictional specific to the area of law they will be dealing with.

Clauses 85 – Function of Review Authority

Clause 85(1)

77. Clause 85(1) as currently drafted does not give the Review Authority the ability to review decisions of the Secretary to decline a temporary approval or to suspend payments to a provider under clause 92(4).

Recommendation

78. 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).

<u>Clauses 86 – Decisions of Review Authority</u>

79. Clause 86(2) provides that every determination by the Review Authority must be accompanied by a brief summary of the reasons for it. Lawyers should be entitled to receive full reasons why the Review Authority has made their determination.

Recommendation

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

<u>Clause 90 – Aided person may request examination of cost of services</u>

<u>Clause 90(2)</u>

81. 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 in the clause.

Recommendation

82. That clause 90(2) be amended to read 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 persons delay in applying).*

<u>Clause 92 – Compliance with audits</u>

<u>Clause 92(3)</u>

83. 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 powers conferred to the Secretary under clause 92(4) to suspend all payments due to a lead provider, and 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. A right of reply is a fundamental requirement to ensure that natural justice is complied with.

Recommendation

84. That clause 92(3) be amended to allow the provider a right of reply that must be considered by the Secretary before the decision is made to suspend payment that is currently owed to the provider, or to impose a fine under clause 113, and that notice will only be given after consideration of the provider's reply.

Clause 92(4)

85. 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 co-operating 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 Section's recommendation, then there is no issue with clause 92(4) remaining as currently drafted. If however, clause 92(3) is not amended as per the Section's 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

86. That if clause 92(3) is not amended as suggested in the Section'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

87. 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 Section is unable to comment on what impact this might or might not have.

Recommendation

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

Clause 98 – Time frame for claiming for payment

89. Clause 98 is new and relates to the timeframe for making claims for payment for legal aid or specified legal services. 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 Statue of Limitations allows a 6-year timeframe for submitting claims for payment of services. The Section 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 Section submits that a timeframe of 6 months would be reasonable.

Recommendation

90. That:
    (a) a timeframe of 6 months would be reasonable; and
    (b) the Section is consulted and is able to comment on the draft regulations before they are promulgated.

Clause 99 – Secretary to refer claim to Commission for decision

Clause 99(4)

91. 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 Section 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

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

Clause 101 – Interim restrictions that may be imposed by Secretary

93. 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 to.

94. The Section'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, at least in the area of family law.

95. 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.

96. The Section recommends that clause 101(3) is amended to provide 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.

97. 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.

98. It is unclear as to what rights a provider has in relation to the performance review committee. Part 2 of the 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 they are currently drafted.

Recommendation

99. That:

    (a) clause 101(3) be amended to change “must” to “may”;

    (b) 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

    (c) the Section is consulted and is able to comment on draft regulations before they are promulgated.

<u>Clause 103 – Cancellation</u>

100. 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 that would otherwise have been imposed:”*

101. 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, whereas the current Act allows a provider to seek a review of any decision of the Legal Services Agency and to make a submission and to be heard at any review. 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.

Recommendation

102. That:

    (a) clause 103(1) be amended to provide that the Secretary's power is discretionary rather than mandatory;

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

    (c) clause 103 be amended to allow a provider to seek a review of any decision of the Secretary and to have the ability to make a submission and be heard at any review.

Subpart 5 – Miscellaneous provisions

Clause 114 - Regulations

103. Clause 114 enables the Governor-General to make, by Order in Council, regulations for stated purposes under the new Act.

Recommendation

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

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

Clause 135(1)

105. 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 6 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 1 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

106. That clause 135(1) be amended to:

    (a) clarify whether the timeframe is 6 months, as shown in the clause, or 1 year, as shown in the Explanatory Note; and

(b) 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

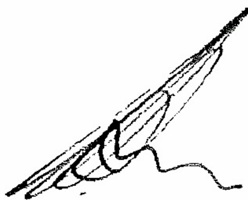
Clause 140 – Notice of determination

107. 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 of 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 which 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

108. That clause 140 be amended to provide that the Standards Committee need only provide the Secretary with any 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.

109. The Section wishes to be heard.



Antony Mahon
Family Law Section Chair
8.10.10