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Family Legal Support Consultation
Provider and Community Services
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Consultation Paper – New Family Legal Support Service

Introduction

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Ministry of Justice consultation paper (paper) on the new family legal support service. The comments that follow have been prepared with the assistance of the Law Society's Family Law Section and Legal Services Committee.

General comments

The Law Society is pleased that the Government has reconsidered its initial decision to remove legal aid for pre-Court legal advice in parenting and guardianship matters under the Care of Children Act 2004 (COCA) and instead to offer four hours of subsidised legal advice for those who are eligible.

However, the Law Society believes the total fixed fees and four hours of time proposed are inadequate for the activities outlined. The proposal is inconsistent with the current fixed fee rates and time provided for family legal aid, notwithstanding that many of the same tasks will need to be carried out under this new service. The Law Society considers that a minimum time of six hours will be required to complete the activities.

The right to legal advice and support should be available to all New Zealanders, regardless of income. This is particularly so in the area of family law, where not only the interests and protection of the individuals themselves are in issue, but often, and more importantly, the interests and protection of children.

1. **What should the proposed legal support service be called?**

The consultation paper states that the service is intended to cover:

*"... general advice concerning legal rights, responsibilities and options,
guidance concerning the process and possible outcomes, and assistance with
the preparation of court entry form ..."*

The Law Society notes that the service is already referred in the relevant regulations as “Out of Court Legal Assistance”.¹

While the phrase “Out of Court” clearly denotes when the service will be available, the use of the phrase “Legal Assistance” is misleading. The Law Society recommends that the new service should be called “Out of Court Legal Advice” for the following reasons:

- 1.1 The fundamental role of lawyers is to provide legal advice to parties and to represent them in negotiations or Court proceedings. The service is clearly aimed at enabling parties to access legal advice which includes advice about the preparation of Court documents if agreement is unable to be reached. The service does not intend to provide parties with access to representation. This reflects the underlying premise behind the reform of the Family Justice System – that parents should be able to resolve disputes about their children without legal representation in and out of Court. This should also be reflected in the name of the service.
- 1.2 Under the new service, lawyers will provide legal advice to their clients but will not undertake the traditional representation role of writing letters or making calls to the other party or negotiating on behalf of their client. Lawyers will also provide legal advice about what information should be included in the Court forms and affidavits if a matter is not resolved. The name of the service should reflect that.
- 1.3 The concept of legal advice is easily understood by most people. “Assistance” is less well defined. It has connotations of someone (not necessarily a lawyer) helping people through a process in a more generalised support role, and may set up an unrealistic expectation about what assistance will be provided and for how long. The use of the word “assistance” also implies that assistance is required for users of the out of court dispute resolution process, whereas that is clearly not intended.

2. *What, if any, problems do you anticipate around administering the applicant eligibility test?*

The paper provides little detail about the eligibility test and states that the test and its criteria have yet to be developed. The test will be based on an applicant’s income over a specified period of time and the number of dependants they have. The test is not intended to cover assets, liabilities or a partner’s income.

It is difficult to comment on the eligibility test with no detail about what is involved to administer it and the time required to complete it. The process should be straightforward and robust so that it does not result in a significant administration burden. Legal aid providers often complain about the cumbersome administration requirements with the current legal aid system.

Due to the lack of information provided about the eligibility test, the Law Society makes the following comments:

- 2.1 It is unclear what information will be required to confirm eligibility. It will be the duty of the lawyer to sight the information, satisfy themselves of a person’s eligibility and presumably to certify that the person is eligible. Clear rules and/or guidelines will be needed regarding the information required (proof of income and number of dependants), in what form (originals or copies; hard copy or electronic) and what will need to be retained for audit purposes.

¹ Legal Services (Quality Assurance) Regulations 2011, Schedule: Clause 9A – Out-of-court legal assistance on matters relating to Care of Children Act 2004 [inserted on 25 October 2013 by regulation 4 of the Legal Services (Quality Assurance) Amendment Regulations (No 2) 2013 (SR 2013/433)].

- 2.2 It is not uncommon when couples separate that one of the parties does not have any income, for example, they may be waiting for confirmation of a benefit or being supported by the ex-partner. Any eligibility test will need to be flexible enough to cater for this situation and other situations where the lawyer is unable to obtain the requisite information in the usual form.
- 2.3 It is unclear how long the eligibility will be valid for and whether there will be any obligation on the lawyer to make enquiries as to a person's continued eligibility. If a person qualifies for the service the Law Society recommends that the service is able to be delivered at any time during the 12 months from the initial application. When the service is provided will often depend on when the party is best placed to receive it. This may occur incrementally over a period of time as a person adjusts post-separation.
- 2.4 The paper states that the lawyer will be required to check and record information in a shared reporting system. It is important that such a system is easy to access, easy to use and presumably compatible with everyday technology used by lawyers. The Law Society notes the current difficulties with scanning and sending attachments to the Ministry's Legal Aid Services, with emails rejected because the attachments are too big for the Ministry's email system. If difficulties arise with the shared reporting system, there will need to be another backup system available to ensure a quick response.
- 2.5 It is unclear whether a party who also qualifies for legal aid for another legal issue involving the same parties or children, will be eligible for the subsidised service for COCA matters. A common example is where parents seek legal advice and representation about a paternity order under the Family Proceedings Act 1980 and a parenting order under COCA simultaneously. Will a party be eligible for both Out of Court Legal Advice and a legal aid grant? If a grant of aid is sought for another matter will the lawyer or party be required to disclose this? This requires clarification.

3. *Do you have any concerns around entering information into an online reporting system?*

There is little detail in the paper about the online reporting system that will be able to be accessed by other family justice service providers. The lack of detail makes it difficult to comment on the information to be provided and the amount of time required to enter the information into the system. Again, the process should be straightforward and robust so that it does not result in a significant administration burden.

Parties will need to consent to the collection and retention of this information and for it to be viewed by other family justice service providers and potentially Court staff.

How will confidentiality be managed? If one party to a dispute wishes to obtain confidential legal advice using the "Out of Court Legal Advice" service, there may be a possibility that this could be disclosed to the other party at any stage in the process. It is clearly intended that the fact the client has sought advice from a lawyer under the service will be information available to a Family Dispute Resolution (FDR) provider and presumably to the Court which can access the system to confirm a person's attendance at FDR. For example, information about one party that is confidential (such as an address or contact information) might already be on the system and may be accessed by the other party's representative. Clients will need to be informed of this and consent to the release of this information to those users. Clear guidelines will also need to be established that define the responsibilities of those who use and have access to the system so that clients' private information is protected.

The Law Society assumes there will be a help desk able to be accessed by users of the system if there are technology issues or other problems accessing the system.

4. Do you agree with the proposed split of the legal support service into two separate activities?

The paper proposes that the fee for the service should be accounted for in two separate steps. The Law Society does not oppose this provided that a reasonable fee is available for each activity, regardless of what stage in the process that activity is accessed and which party accesses the service first. The Law Society recommends amendments to the proposed schedule, as set out in the [Appendix](#).

5. What do you think about the proposed ratio of 75% on the first activity and 25% on the second, that is, assistance with completing the court forms?

The Law Society considers that splitting the fee in this way is not justified and will not provide sufficient funding or time to cover the costs of post-FDR attendances. If there is no agreement reached at FDR and proceedings are to be filed, lawyers will be required to:

- (a) Obtain an update from the client as to what progress has been made since the initial meeting. The initial meeting may have been some months earlier if there has been a delay in having FDR completed or, for example, where preparatory counselling has been arranged or there have been difficulties engaging with the other party because of financial or other reasons.
- (b) Review the advice given at the initial meeting in light of any change in circumstances of the client or children and take into account any matters agreed at FDR.
- (c) Identify any outstanding issues and options for resolution. Clients will need to be reminded of the need for the child's welfare and best interests to be the paramount consideration and to consider other ways of resolving the dispute than filing proceedings.
- (d) Advise the client of the steps for commencing and pursuing proceedings and the types of directions and orders the Court may make. This will include requesting information from the Ministry of Social Development via the new section 131A report option and costs orders if a lawyer for the child is appointed or a specialist report is requested.
- (e) Prepare one (or more) application(s), affidavit(s), information sheet, filing letter and an application to dispense with filing fee (if required) and to ensure that Parenting Through Separation and FDR certificates are attached. These will need to be copied at least three times and given to the client to file. Completing these forms and affidavits will take significant time and will require care to ensure that all relevant information is included and that unnecessary or inflammatory information is not.

The preparation of documents is vital to the progression of the case, both in terms of the response from the other party and also ensuring the provision of good information to assist the Court to triage and identify the issues for the children and the likelihood of settlement.

6. Should there be provision for a higher fee for the second activity when the lawyer has not previously been involved in the case? If so, is the proposed rate reasonable?

The Law Society sees no justification for providing less than the full fee even if the lawyer first becomes involved after a party has attended FDR and wants to make an application to the Family Court. The entire fee should be available at any point in the process provided the client has not already had the benefit of any part of the proposed service.

Lawyers' duties when advising clients are prescribed in section 7B of the Care of Children Amendment Act (No 2) 2013, as follow:

7B Duties of lawyer when giving advice

A lawyer providing legal advice to a person about arrangements for the guardianship or care of a child, or both, must ensure that the person is aware of—

- (a) the need for the child's welfare and best interests to be the first and paramount consideration when settling arrangements; and
- (b) the mechanisms for assisting resolution of family disputes; and
- (c) the steps for commencing a proceeding under this Act and subsequently pursuing the proceeding through the court process to obtain a resolution; and
- (d) the types of directions and orders that the court may make if a proceeding is commenced.

The requirement to ensure the client is aware of the matters contained in section 7B(a) to (d) exists in whatever part of the pre-Court process the legal advice is being given. The lawyer's duties cannot be severed.

In addition, lawyers would be unable to assist a party to complete the application and affidavit without first having full information about the dispute, assessing what information is relevant and discussing with the client the matters contained in section 7B(a) to (d).

The benefit to a party (and to the Court) is the same regardless of whether the legal advice is given in two parts (pre and post FDR) or whether it is given following FDR.

7. *What are your views on the activities and tasks set out in the fee schedule? Are there any other tasks which should be included, keeping in mind the out of court legal support package is funded for no more than four hours of work?*

The Law Society recommends amendments to the proposed schedule, as set out in the [Appendix](#).

The Law Society does not support the inclusion of “promoting resolution and reviewing any agreement reached”. Lawyers providing advice under the proposed service should not be required to be involved in any negotiations or be available at FDR to provide advice and assistance.

Lawyers will need to limit their role under the proposed service, and particularly around when the role comes to an end. The Law Society supports the first part of the lawyer's role ending when the client is referred to FDR. At this stage the process should belong to the FDR provider. Lawyers should not be required to be involved in drafting consent agreements or orders arising out of FDR under the proposed service. This responsibility must rest with the FDR provider.

The first part of the fee should be rendered after the initial advice and referral to FDR or within a certain timeframe of the initial appointment if the client does not return or provide the lawyer with the information required. The Law Society suggests that a six week timeframe would be appropriate.

Pre-Court entry legal advice where no previous lawyer involvement

Please refer to the comments above under Question 6. A lawyer's obligations and duties remain the same and the full fee should be available.

Filing a notice of defence

The full fee should be available to provide advice and to file documents responding to any application filed. The provision of advice and the management of client expectations are usefully provided to the client even at the notice of defence stage. Lawyers' statutory duties do not differ depending on whether the lawyer is representing the applicant or the respondent. In fact, it is likely to take longer to file a defence because it is necessary to respond to the application and also to file additional information.

It will also assist the Court get the best information possible as it is unlikely that the applicant will have put the respondent's position fully to the Court nor been able to give evidence of the respondent's perspective of the best outcome for the child. This is an important safeguard for the Court when considering which track the matter should be on and whether agreement might be reached or the issues for hearing narrowed.

The same rationale applies to a nominal respondent – the client who is responding to the other parent where no proceedings have been filed but who may have received a letter from the other parent, the other parent's lawyer or an FDR provider inviting them to engage.

Neither a respondent nor a nominal respondent should be penalised through the receipt of a lesser service because they have not been the first to seek advice or file proceedings. The respondent may well be the client seeking to resolve the dispute without resort to the Family Court.

Respondents will require, and are entitled to, advice on all activities listed in the proposed schedule. The only exception will be advice about the FDR process for a respondent who first seeks Out of Court Legal Advice after completion of the FDR process.

Disbursements

The Law Society strongly opposes general office disbursements being absorbed in the fixed fee component. There needs to be a separate provision for disbursements for office expenses. The photocopying costs alone will be significant. Currently under the fixed fee framework for family legal aid up to \$100 is approved for ordinary office disbursements even for pre-proceedings or where matters resolve shortly after the issuing of proceedings. The same disbursement should be available for this service. This disbursement has been split in the amended schedule (see [Appendix](#)) so that disbursements are available to a lawyer providing legal advice prior to FDR and to a lawyer providing legal advice following FDR, in the case of a client changing lawyers partway through the process.

Uplift when difficult factors are present

The Law Society recommends that the new system has an uplift for difficult factors as provided for under the current legal aid system. These factors include literacy difficulties, mental health issues, multiple parties to the dispute and other barriers to communication. The presence of these factors significantly adds to the time required to be spent with a client and potentially the form of and number of documents to be prepared and copied.

8. *Are the total fixed fees proposed reasonable for the activities outlined?*

The Law Society believes that the total fixed fees and the four hours of time proposed are inadequate for the activities outlined. They are inconsistent with the current fixed fee rates and time provided for family legal aid, notwithstanding that many of the same tasks will need to be carried out under this new service.

The Law Society is aware of the application form and affidavit that were tested with the assistance of Colmar Brunton. We understand that very few of the people tested were able to complete the application and accompanying affidavit within the one hour timeframe, even with the assistance of a lawyer. Of those who did manage to complete both on their own, the information provided was seriously deficient. The Law Society is aware that the original forms have been abandoned and new forms will be developed for each application under COCA. Multiple applications will each require an affidavit in support and cover multiple issues that will require decisions by the Court. The maximum of one hour is woefully inadequate to complete this task.

The Law Society considers that a minimum time of six hours will be required in order to complete the activities as outlined: a minimum of three hours pre-FDR and a minimum of three hours to provide legal advice (as set out in section 7B(a) to (d)) and assistance with the preparation of applications and supporting documentation. Based on the current fixed fees for legal aid, the fee for six hours of Out of Court Legal Advice would be a fee of \$720.00 (plus disbursements).

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized 'A' followed by a long horizontal line that ends in a small dot.

Allister Davis
Vice President

Appendix: amendments to proposed schedule

Appendix: amendments to proposed schedule**Proposed Family Legal Advice Fee Schedule****PARTIES SEEKING ADVICE PRIOR TO COMMENCING FDR**

Activity	Tasks	Fee (excl GST)
Pre-FDR legal advice	<ul style="list-style-type: none"> • Taking instructions, attending the client • Administering funding eligibility test • Entering funded clients into reporting system • Identifying legal and factual issues • Explaining the FJS process so that the client understands their responsibilities and options and the legal implications of each • Informing the client about Family Dispute Resolution • Advising the client about possible outcomes of FDR and/or Court proceedings (refer to section 7B obligations) • Managing client expectations 	\$360
Pre-Court entry legal advice	<ul style="list-style-type: none"> • Taking updated instructions, attending the client • Identify outstanding issues • Advise client of steps for commencing (or responding to) and pursuing proceedings and the types of directions and Orders the Court may make • Assisting the client to complete application and affidavit (or notice of defence and affidavit) 	\$360
Disbursements	<ul style="list-style-type: none"> • Office • Travel • Interpreter • Other 	\$50 (available at each step) \$Actual/reasonable \$Actual/reasonable \$Actual/reasonable
Additional factors	<ul style="list-style-type: none"> • The party suffers from mental illness/intellectual disability • The party requires an interpreter or translator or has barriers to communication (which do not require an interpreter or translator) 	\$120 (available at each step)

APPLICANT OR RESPONDENT FIRST SEEKING ADVICE AFTER COMPLETION OF FDR

Pre-Court entry legal advice where no previous subsidised lawyer	<ul style="list-style-type: none"> • Taking instructions, attending the client • Administering funding eligibility test • Entering funded clients into reporting system • Identifying legal and factual issues • Explaining the Family Justice System process so that the client understands their responsibilities and options and the legal implications of each • Advising client of legal rights and responsibilities • Advising client of steps for commencing (or responding to) and pursuing proceedings and the types of directions and Orders the Court may make • Assisting the client to complete application and affidavit or notice of defence and affidavit • Managing client expectations 	\$720
Disbursements	<ul style="list-style-type: none"> • Office • Travel • Interpreter • Other 	\$100 \$Actual/reasonable \$Actual/reasonable \$Actual/reasonable
Additional factors	<ul style="list-style-type: none"> • The legally aided person suffers from mental illness/intellectual disability • The legally aided person requires an interpreter/translator or has barriers to communication (which don't require an interpreter/translator) 	\$120 (available once only)

Note:

These activity fees are not repeatable and may be claimed only once per case. Clients who wish to file:

- cross-applications,
- applications for leave to apply because of changed circumstances, or
- applications to file consent memoranda

will not be able to access further funded legal assistance if they have already used it for the first application.