

24 May 2018

Ministry of Justice
DX SX10125
Wellington

Attention: Tracey Baguley, Manager, Legal Aid Services

By email: tracey.baguley@justice.govt.nz

Re: Legal aid application, draft combined form – criminal legal aid

The New Zealand Law Society appreciates the opportunity to comment on the proposed draft combined criminal legal aid application form (combined criminal form), which aims to combine the three current criminal forms covering police prosecutions, crown prosecutions and appeals.¹

Three consultation rounds

As noted in the Law Society's first submission in October 2017 on the introduction of the proposed combined family and civil legal aid application form,² and in its April 2018 submission on the proposed combined jurisdiction (family and civil, plus criminal) form,³ the Law Society supports the objective of creating clearer, user-friendly forms that are fit for purpose.

We note however that this is now the third consultation on legal aid application forms (the most recent being only a month ago, in April). One comprehensive consultation covering all possible options, rather than three separate consultation rounds, would have been much more efficient and effective from the perspective of both stakeholders and the Ministry.

General comments

Our April submission noted the Law Society's preference for keeping the criminal legal aid application form separate from the family and civil form, and we therefore support the current proposal to have a stand-alone combined criminal application form. We also acknowledge that the proposed criminal form includes positive changes such as the addition of more space for a duty lawyer to provide additional information, the inclusion of the event type, and the next hearing date/time.

Our other comments on the criminal form are set out below. Many of the comments have also been made in the previous submissions but for completeness are reiterated here.

¹ These forms include: Crown Prosecution (Form 1); Police Prosecution (Form 1a); and Court of Appeal or Supreme Court (Form 12).

² https://www.lawsociety.org.nz/_data/assets/pdf_file/0006/115989/I-MoJ-Legal-Aid-draft-Family-and-Civil-form-12-10-17.pdf

³ https://www.lawsociety.org.nz/_data/assets/pdf_file/0011/121106/I-MoJ-Legal-Aid-draft-combined-application-form-12-4-18.pdf

Information Sheet

The current police and crown prosecution application forms include an information sheet outlining general information about legal aid including an applicant's rights and obligations. This information is particularly important for applicants who apply for legal aid at court. The Ministry has confirmed that a separate information sheet will be developed, to be attached to the proposed combined criminal form. This will provide additional information to applicants, and is supported by the Law Society.

Income, and Assets and Debts

An "interest in a trust" – questions 17, 19, 20, 21

There are a number of questions in the Income (Qs 17, 19, 20) and Assets and Debts (Q21) section relating to whether the applicant has "an interest in a trust".

We have responded to this issue in previous submissions. In its consultation summary the Ministry has stated that "the money owed by the Trust is an asset for financial eligibility purposes", and that it has "taken into account the comments relating to the family and civil aspects of the form, and will modify the family and civil application form in the future".⁴ That feedback is welcomed. However, the same questions have been retained in the draft criminal form and give rise to the same concerns – which are set out below:

- Laypeople will not necessarily know what this phrase means, nor what their "interest" is. Whilst a similar question is included in the current crown prosecution and appeal application forms, there is no reference to any "interest in a trust" in the police prosecution form. These questions emphasise the need for the applicant's lawyer (or a duty lawyer) to be involved at the outset in helping the applicant complete the form.⁵
- Question 21 asks *Do you and/or your partner own or have an interest in a home or land and/or property (yes/no)*, and then asks *Is it in a trust?* Conflating personally-owned and trust-owned assets is likely to confuse applicants; it would be clearer and simpler if the two were separated. In other words, there should be one set of questions directed at whether the applicant/partner own relevant assets, and a separate set of questions directed at whether they have "an interest" in trust-owned assets (as noted above, applicants will need some guidance on what this means).
- Question 21 also asks *What is your share of ownership of it? (eg 50%)* [referring to both personally-owned and trust-owned assets], which is of course not a relevant question for

⁴ *Combined jurisdiction legal aid application form: Submissions and decisions, May 2018*, at pp 2, 5.

⁵ As noted in the Law Society's 12.4.18 submission at p1: "The Law Society considers the proposed form may prove confusing for applicants to navigate, and more information should be provided to help them identify which parts of the form they need to complete. There are also questions in the form that many (if not most) lay people will not be able to answer without legal advice – one example [relates] to interests in trusts ... Some applicants (for example, in relation to mental health matters) may also lack capacity to answer some questions and will need direct assistance. For these reasons, it would be sensible for the introductory section to recommend that applicants get assistance from (or at least consult) their legal aid lawyer before completing the form."

beneficiaries under a trust. This reinforces the need to separate out trust-related questions; if this was done, the question regarding “share of ownership” of personally-owned assets would then be clear.

Income from a trust

Question 17 asks an applicant for information about any income they (or their partner) receive from a trust. It will be relevant to the income assessment only if the applicant is an income beneficiary in the trust; in that case, the trustee decides if any income distributions are made to the discretionary beneficiary (and practitioners have highlighted that generally trustees will not make income distributions to a discretionary beneficiary who has applied for legal aid in family or civil proceedings).

Questions 19 asks *Does the Trust owe money to you and/or your partner – if yes, how much?* The reference to trust money being “owed” to the applicant or partner is difficult to understand in the context of income. Such a question is likely to come about in the context that the applicant has settled assets into a trust and a debt back has arisen, and the debt has not subsequently been forgiven. Any debt back owing is an asset of the applicant – it is not income. Question 19 should then be more properly addressed in the “Assets and debts” section.

Further, in respect of the documents to be attached to the application (question 20): if the applicant is a discretionary beneficiary in a trust, it is unlikely he or she will have a copy of the trust deed and latest financial accounts, and the common law is far from certain about the rights of beneficiaries to information about trust records (although the Trusts Bill proposes to create certain rights to information including access to the trust deed).

Minor drafting recommendations

The Law Society suggests minor drafting changes to the following questions in the form.

Question 12 – Do you have a partner who lives with you?

If the partner is the other party, or alleged victim (the complainant), there should be an instruction not to complete the partner’s income and asset details.

Question 13 – children under 18 years old

In both of its previous submissions, the Law Society suggested that if the fact a financially dependent child is living with the applicant, is considered relevant to the assessment of financial eligibility, the form should make that clear. Question 13 in the current combined form asks *How many children do you have 18 years old or under?* and *How many of those are living with you?* An applicant may have children under 18 years old that they financially support but who are not living with them. It may be more appropriate for the second question to ask *How many of these children do you financially support?* (If the current wording is retained, there should be a further question: *Are you paying child support? If so, how much?*).

Questions 14, 15 and 16 – alleged victim, co-defendants and mental health orders

Questions 14, 15 and 16 are currently located in the ‘Living Arrangements’ section. As they pertain to the applicant and the case itself, rather than the applicant’s living arrangements per se, the questions would fit more logically in the ‘Criminal charges’ section before question 26 or after question 27.

Since the application form is completed when proceedings are commenced, and before guilt has been established, the correct terminology to use in question 14 should be ‘complainant’ rather than ‘alleged victim’.

We understand the purpose of question 15 is to identify if there are any co-defendants, for assignment purposes. For clarity, question 15 could read “Is anyone else *jointly* charged with you?”

Question 17 – Income

The “frequency” column in question 17 does not allow for the applicant and partner to provide information based on different frequencies (weekly/monthly/annual). The form should make this clear (e.g. – “please choose only one of these”).

Question 27 – tick the applicable statements

For clarity, question 27 should end with *tick what applies to you*, rather than *tick the applicable statements*.

Parole and Appeal sections

Not all applicants will need to complete the questions relating to Parole and Appeal proceedings: these sections should clearly identify that they only need to be completed by applicants applying for parole or appeal legal aid. This could be achieved by stating “Parole legal aid only” and “Appeal legal aid only” (as was previously done in the proposed combined jurisdiction form).

Conclusion

If you have any questions regarding these comments, please contact the convenor of the Legal Services Committee, Elizabeth Bulger, through the committee secretary, Amanda Frank (amanda.frank@lawsociety.org.nz / ddi 04 463-2962).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal line extending to the right.

Andrew Logan
Vice President