

12 October 2017

Ministry of Justice
DX SX10125
Wellington

Attention: Eleanor Aitken, Principal Advisor, Operational Support Services

By email: eleanor.aitken@justice.govt.nz

Dear Eleanor,

RE: Consultation on family and civil legal aid application form

The New Zealand Law Society welcomes the opportunity to comment on the draft family and civil legal aid application form (form), which will combine five current application forms into one.¹ The Law Society sought input from its Legal Services Committee and Family Law Section, as well as the profession, and makes the following general and specific comments on the draft form.

General comments

The Law Society supports the aim of the proposed changes to create a simpler, easy to use form for legal aid applicants in the family, civil and mental health areas. The Law Society received positive feedback from practitioners and there appears to be a consensus that the form is much clearer and more user-friendly. Practitioner comments included:

"In general, the new form seems great, simplified and much better to have the partner and client income in the same place";

"Condensing two forms which were very similar, into one, makes sense. It is simpler, as in easier to complete and therefore user-friendly";

"I agree with the concept that the family and civil legal aid application forms should be combined on the one form"; and

"I agree the forms are a big improvement on size and simplicity".

The introduction of a clearer, user-friendly form is supported, but as discussed below some amendments are recommended to ensure that necessary information for assessing legal aid applications is included in the form, consistent with the legal tests prescribed by the Legal Services Act 2011 (Act) and the Legal Services Regulations 2011 (Regulations).

¹ These forms include: civil general application (form 5); family general application (form 6); mental health proceedings application (form 7); statement of financial position (form 17); and trust form.

Specific comments

Assistance in completing the form

The preface to the form suggests calling the 0800 number “or contact your lawyer” if applicants need help filling in the form. Practitioners advise that litigants needing family or civil legal aid will almost always see a lawyer before completing their application for legal aid, and the application will be submitted to Legal Aid Services by the lawyer. This is recognised in the form (section 6, “Lawyer’s section”, has to be completed by the legal aid lawyer), in the family fixed fees schedules (which include time for preparing the application), and by the information provided on the Ministry of Justice website. 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, relating to interests in trusts, is discussed below. 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.

Income (section 3)

The information requested in the Income section has been significantly reduced and this is a positive change from the current forms. However, some necessary information has been omitted. The Regulations prescribe the maximum levels of income for the purposes of determining an applicant’s eligibility for civil legal aid.² Information about the applicant’s income from the previous 12 months (or such other period as the Commissioner considers appropriate in the circumstances)³ is necessary in determining eligibility. However, as currently drafted question 15 does not address an applicant’s *annual* income, only the current (“e.g. weekly/fortnightly”) income at the date of application. Similarly, there is no longer a reference to change of income over the next 12 months – but there may be circumstances where an applicant for family legal aid will need prospective income to be used in the assessment. The Law Society recommends that question 15 is clarified to include the period for assessing income to align with the Regulations.

Space could also be provided for information about the applicant’s partner’s source of income (employer’s name, phone and address).

Income from a trust

Question 15 asks an applicant to indicate any income they (or their partner) receive from a trust. It will be relevant to the income assessment if the applicant is only a discretionary beneficiary in the trust. In these cases, the trustee decides if any payments are made to the discretionary beneficiary. Practitioners have highlighted that generally trustees will not make payments to a discretionary beneficiary who has applied for legal aid in family or civil proceedings. If the applicant is only a discretionary beneficiary then the remaining questions (questions 16 – 18) are no longer relevant. Further, in respect of the documents to be attached to the application (question 26), 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 it is uncertain whether the trustees could be compelled to provide a copy).

² Legal Services Regulations 2011, regulation 5.

³ Legal Services Act 2011, s 4(1).

The “income from a trust” part of question 15 should therefore ask whether the applicant is only a discretionary beneficiary, and if so, the form should indicate that questions 16 – 18 do not apply, and documents relating to the trust are not required (question 26).

It would also be useful for question 15 to require the applicant to provide the name of the trust.

An “interest in a trust”

Section 3 concludes with the heading “Only complete this section if you have an interest in a trust” (questions 16 – 18). Laypeople will not necessarily know what an ‘interest in a trust’ means, or what their interest is. As discussed above, this emphasises the need for the applicant’s lawyer to be involved at the outset in helping the applicant to complete the form.

Assets and liabilities (section 4)

The current family general application (form 6) refers to the “estimated market value” of a property, but the draft form refers only to “estimated value”. If market value is still the relevant assessment, this should be made clear in the form.

The reference in question 19 to “50%” as an example of an applicant’s share of ownership of a property may be misleading. The example of 50% suggests a tenancy in common. However, where an applicant has a partner who shares ownership, it is likely to be a joint ownership (rather than tenants in common). The practical implication is that if a joint owner of a property has a charge registered against it for the repayment of a legal aid debt, that charge may sever the joint ownership and turn it into a tenancy in common. This can have significant legal ramifications.

Question 19 should therefore ask the applicant to state the nature of the shared ownership. This is another instance where applicants will need advice and assistance from their lawyer.

Lawyer’s section (section 6)

Justification for legal aid (question 40)

The Act prescribes the circumstances when aid may be granted in civil and criminal matters. An applicant applying for civil (including family) legal aid needs to show reasonable grounds for taking or defending the application or being a party to the proceedings,⁴ and in the case of original proceedings, the applicant must indicate the prospects of success.⁵

Question 40 asks “What is this application of legal aid for? Do you think it will succeed?” The second question “Do you think it will succeed?” might be misread as relating to whether the application for legal aid itself (rather than the proceedings) will succeed. It would be clearer, and more consistent with the statutory provisions, for the second sentence to be reworded to read: “Why should legal aid be granted (reasonable grounds for taking/defending the application; prospects of success)?”

Minor drafting recommendations

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

⁴ Above n 3, s 10(3).

⁵ Ibid, s 10(4)(d)(i).

Question 12 – contact details

It might be helpful for the form to indicate who the “other contact phone” number belongs to.

Question 14 – any “financially dependent children”

The Regulations prescribe different eligibility levels for applicants with or without dependent children. The current family general application (form 6: question 12) asks the applicant whether financially dependent children are living with them. This has been omitted from the draft form, which asks only if the applicant has *any financially dependent children*. The Act and Regulations do not define “dependent child” and applicants may assume that financially dependent children are only those living with them. If this information (whether a financially dependent child is or is not living with the applicant) is considered relevant to the assessment of financial eligibility, the form should make that clear. If it is not considered relevant, it may be appropriate to ask “Are you paying child support? If so, how much?”.

Question 20 – money or investments

The Law Society recommends there should be a comma in between “cash” and “savings” to avoid confusion that only “cash savings” are required. It would also be helpful for the “other” category to include shares, and to provide more space to fill in that category.

Lead provider confirmation (section 7)

Section 7 requires the lead provider to confirm that he/she “will advise the Commissioner if circumstances arise that would affect the prospects of success of the proceedings”. Lead providers will only be able to provide notification where he/she is aware, or becomes aware of, a change in circumstances affecting the prospects of success. Bullet point two should therefore be reworded to read “I will advise the Commissioner if *I become aware of* circumstances that would affect the prospects of success of the proceedings.”

Conclusion

We hope these comments are helpful to the Ministry and would be happy to discuss them further. If you have any questions 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 sincerely,

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