

12 April 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, family and civil legal aid

The New Zealand Law Society welcomes the opportunity to comment on the draft combined jurisdiction legal aid application form (combined form), which will combine the current family and civil form plus relevant criminal forms.¹

As noted in its submission regarding introduction of the combined family and civil legal aid application form in late 2017,² the Law Society supports the objective of creating a clearer, user-friendly form.

The aim of the current consultation is to ensure the new form, which incorporates criminal legal aid applications into the current family and civil form, is fit for purpose and meets the needs of applicants, providers and Legal Aid Services. The Law Society sought input from its Legal Services Committee and Family Law Section, as well as the profession, and comments below on the proposed combined form. In some areas, we have reiterated comments made in our October 2017 submission.

Application for a particular jurisdiction

All applicants are required to provide standard information (living arrangements, financial circumstances etc) and then identify the relevant remaining parts of the form that apply to them (“criminal legal aid only”, “parole legal aid only”, “appeal legal aid only”), with other sections to be completed by their lawyer. The only information provided is that “if you have any questions, call [the 0800 number or go to the website]”.

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, relating to interests in trusts, is discussed below. 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

¹ These forms include: Family and civil legal aid application form; Crown Prosecution (Form 1); Police Prosecution (Form 1a); Court of Appeal or Supreme Court (Form 12).

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

section to recommend that applicants get assistance from (or at least consult) their legal aid lawyer before completing the form.

In addition, the Ministry may wish to consider whether a ‘form generator’ could be used to make the combined form more user-friendly. In the family jurisdiction, the Ministry has a form generator for relevant Care of Children Act forms, so that depending on the type of application (for example a without notice parenting order) only the details relating to that application are included in the form. If a form generator was available for legal aid applications, an application for family legal aid would only include questions relating to that type of proceeding, rather than including questions relating to other proceedings (e.g. criminal).

It is also assumed that the combined form when finalised will be made available in Word format. Legal Aid Services has indicated previously at meetings with the Law Society that the intention is to provide the form in Word format, in order to make it more user-friendly for legal aid providers.

Income

The information requested in the Income section has been significantly reduced from the current criminal forms, and this is a positive change.

Question 14 (income received, “eg weekly/monthly/annual”) appears to require only information about current income. There is no reference to whether the applicant anticipates a change of income in the forthcoming year – but there may be circumstances where an applicant for family legal aid will need prospective income to be used in the assessment. The Ministry could consider including this as a subsidiary question (“if relevant, provide information about your anticipated income over the next 12 months”).

The “frequency” column in question 14 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”).

Income, and Assets and Debts

An “interest in a trust” – questions 16, 17, 18, 42

There are a number of questions in the Income (Qs 16, 17, 42) and Assets and Debts (Q18) sections relating to whether the applicant has “an interest in a trust”. Laypeople will not necessarily know what this phrase means, nor what their “interest” is. As discussed above, this emphasises the need for the applicant’s lawyer (particularly in family, civil and mental health cases) to be involved at the outset in helping the applicant to complete the form.

Question 18 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 18 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 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.

It is also not clear what is meant by the final question *Is it in dispute?* Is this referring to a dispute about ownership of the property, a dispute about whether it is in a trust, or a dispute about division of the property (or all three)? This should be clarified.

Question 18 could also be made clearer, by providing space for separate answers for the applicant and partner.

Income from a trust

Question 14 asks an applicant for information about any income they (or their partner) receive from a trust, and question 16 asks *Does the trust owe money to you and/or your partner – if yes, how much?* It will be relevant to the income assessment if the applicant is only a discretionary beneficiary in the trust; in that case, the trustee decides if any payments are made to the discretionary beneficiary (and 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). The reference to trust money being “owed” to the applicant or partner is therefore difficult to understand.

Further, in respect of the documents to be attached to the application (question 42): 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 it is uncertain whether the trustees could be compelled to provide copies).

Appeal Legal Aid only (Qs 29, 30)

Practitioners note that on appeals to the Court of Appeal, Legal Aid Services will only accept appeal applications after the notice of appeal has been filed. The current criminal appeal application form 12 asks for a copy of the notice of appeal to be included in the application.³ The new draft form does not require that document. If Legal Aid Services will still accept an appeal application only after the notice has been filed, it would be sensible to retain the current requirement to provide a copy of the notice of appeal.

Who do you want as your lawyer? (Q31)

As currently drafted, question 31 appears to be a part of the sub-heading “*appeal legal aid only*”, when it applies to all criminal legal aid applications. This question should be moved and incorporated into question 26 (“*criminal legal aid only*”). As a minor point, the instruction to question 31 (“complete ... if you ... were advised by a PDLA lawyer in custody”) might be read as suggesting the PDLA lawyer is in custody, and should be reworded (“... were advised in custody by a PDLA lawyer”).

³ Form 12 – Court of Appeal or Supreme Court, p 3.

Family and Civil Legal Aid only (Qs 32-37)

Justification for legal aid (question 37)

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 37 asks the applicant's lawyer to *Tell us why legal aid should be granted*. The Ministry noted in its 2017 feedback on the family and civil form that the question allows a short description or key bullet points about the case to assist grants officers in assessing eligibility. It would be clearer, and more consistent with the statutory provisions, for the form to set out what details the Ministry is looking for, including reasonable grounds for taking or defending the application, or prospects of success.

Minor drafting recommendations

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

Questions 5 and 6 – Your current address and postal address

Question 6 alludes to the possibility that an applicant might be in custody: *Your postal address (if different from current address or in custody)*. It would be clearer, however, to have a separate question *Are you being held in custody?*

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

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

Question 13 – children under 18 years old

In its October 2017 feedback, 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?*).

⁴ Above n 3, s 10(3).

⁵ *Ibid*, s 10(4)(d)(i).

Question 22 – Other reasons

In addition to information about income and assets/debts, the form asks for “other financial information”, including *Are there any other reasons why you can't pay for your own lawyer?* (Q22). This is presumably intended to assist Legal Aid Services in determining whether there are special financial circumstances (section 10(2) of the Act: an application must be refused where financial eligibility thresholds are exceeded unless there are special financial circumstances). Currently criminal legal aid forms (and previously the family/civil form) ask a similar question *is there any other financial information legal aid should know*, and wording along these lines (perhaps including a reference to ‘special financial circumstances’) might be clearer.

Question 27 – tick the applicable statements

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

Question 40 – other people with an interest

The second part to this question reads *If yes, would any person beneficially interested suffer hardship?* It would be clearer if this was reworded: *If yes, would any person with an interest in this matter suffer hardship?*

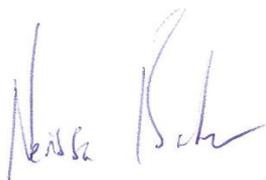
Questions 41-42 – documents to be attached

Questions 41 and 42 require the applicant to provide documentary evidence of income and trust interests. They are currently at the end of the form, following the various sections to be completed by the applicant’s lawyer. They would however fit more logically after question 31, immediately before the *Applicant confirmation* section (which, amongst other things, notes that it is an offence to produce false documents, provide false/misleading information, etc).

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 faithfully



Nerissa Barber
Vice President