

13 September 2017

International Bar Association
London
United Kingdom

By email: divisions@int-bar.org

Re: Consultation on proposed guidance in creating/reforming Legal Aid Systems (Civil, Family, Administrative)

1. The New Zealand Law Society welcomes the opportunity to comment on the International Bar Association's Consultation Paper on Proposed Guidance in Creating/Reforming Legal Aid Systems (Civil, Family, Administrative) (consultation paper). The Law Society agrees that it would be helpful to have clear international guidance on matters that governments can consider when developing or reforming their legal aid systems.

Overview

2. The Law Society was established in 1869 and is the statutory regulator of New Zealand's approximately 13,000 lawyers. The Law Society's regulatory functions are set out in statute and include assisting and promoting law reform (for the purpose of upholding the rule of law and the administration of justice). The Law Society agrees that legal aid is an essential element in a fair, humane and efficient justice system based on the rule of law. In New Zealand, legal aid is provided in criminal, family and civil matters,¹ and is administered through the Ministry of Justice (a government department) in accordance with the Legal Services Act 2011.
3. The Law Society's Legal Services Committee monitors the operation of New Zealand's legal aid system and proposed reforms affecting legal aid, and advocates on behalf of lawyers and their clients for an effective legal aid system and to ensure access to justice for New Zealanders.
4. The Law Society has made many submissions in recent years on the operation and scope of the legal aid system in the criminal, family and civil areas. It is concerned that reforms to legal aid introduced by the Legal Services Act 2011 (the Act) have diminished New Zealanders' access to justice. The Law Society said in 2010 in relation to the proposed reforms that:²

Legal aid is central to a just and democratic society founded on the rule of law. It enables vulnerable members of society to have access to justice through legal advice and representation. The [Legal Services] Bill introduces fundamental change to New Zealand's

¹ The Legal Services Act 2011 (sections 6-13) specifies the types of proceedings for which legal aid may be granted in criminal, family and civil matters. (Available online: www.legislation.govt.nz).

² New Zealand Law Society submission dated 8.10.2010 on the Legal Services Bill.

established system of legal aid, and will impact first and foremost on legal aid applicants, as well as on practitioners through the legal aid scheme.

5. The reforms in some cases are also likely to have contributed to an inequality of arms between legally-aided and privately-funded litigants,³ and between legally-aided litigants and the state.⁴
6. The Law Society and lawyers have expressed concern about the economic viability of legal aid work, based on the current level of legal aid fees. Lawyers have expressed considerable frustration over the low level of fees, and the difficulty of running a competent, professional and financially viable legal practice on the current fees
7. In addition, concern has been expressed about the long-term viability of the private legal aid bar,⁵ with many providers unable to afford to continue taking on juniors, leading to likely shortages of legal aid lawyers in the long-term (signs of which are already apparent in the criminal, family and civil areas).⁶ There has been a drop in the number of lawyers, and particularly senior lawyers, willing to continue doing legal aid work, with resulting shortages of criminal, family and civil legal aid lawyers in many parts of the country.
8. There are also concerns about family justice reforms in 2013-14 that have limited legal representation for parties and limited legal aid. In the Law Society's view, the removal of legal aid for the purposes of obtaining legal advice (and of the right of parents to have legal representation), in the context of both Family Dispute Resolution and the Family Court process that can result in final orders being made for the day-to-day care and contact of a child, breaches the United Nations Convention on the Rights of the Child.⁷
9. For these reasons, the Law Society considers the International Bar Association's consultation paper is timely and supports the move to develop guidance on what works in creating and running good legal aid systems. The Law Society provides comments below on specific propositions in the consultation paper, from a New Zealand perspective.

Propositions 1, 2(a) and 2(b):

1 – Legal aid service delivery generates significant social and economic benefits. In the budget formulation process governments should estimate the social and economic costs and benefits of legal aid service delivery, including by taking into account the social and economic costs of failure to deliver services.

³ For example, in the family context: NZLS submission on Fixed Fees Framework for Family Legal Aid Providers, 19.3.12 at [1.5].

⁴ In the context of Accident Compensation Act claims: NZLS submission on Fixed Fees Framework for ACC Legal Aid Providers, 16.3.12.

⁵ There is also a publicly funded Public Defence Service (a unit that operates independently within the Ministry of Justice), providing criminal legal aid services: <https://www.pds.govt.nz/about/>.

⁶ See, for instance, the Law Society's submission dated 12.12.14, available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0011/85529/l-Legal-Services-Criminal-Fixed-Fees-Review-12-12-14.pdf.

⁷ NZLS submission dated 13.3.15 at [37] – [38], available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0010/88048/l-MSD-UNCROC-draft-report-13-3-15.pdf.

2(a) – Setting the legal aid budget is a political decision. However it needs to be adequate to support the services the executive and legislature have agreed should be funded and needs to provide fair remuneration for those who do the work.

2(b) – It also needs to be informed by evidence from the academic, professional and policy communities. The body administering legal aid should be responsible for gathering this information.

10. In relation to Proposition 2(a), the Law Society agrees that legal aid should provide fair remuneration for those who do the work. As noted above, the Law Society has made numerous submissions in recent years on the need for the legal aid fixed fee regime to provide adequate remuneration, in order to attract and retain lawyers in the legal aid system.⁸

Proposition 3:

Professional bodies of lawyers should seek to maximise the ways in which their members can provide pro bono legal services in accordance with their culture and traditions, but governments cannot rely on this to cover services which should properly be funded by legal aid.

11. The Law Society agrees with Proposition 3, that governments cannot rely on pro bono work to cover services which should properly be funded by legal aid. In New Zealand, there is no compulsory pro bono requirement for lawyers, but there is a high rate of voluntary pro bono work done by lawyers. In addition, many lawyers undertake “low bono” work for little or no profit, including many legal aid providers who have told the Law Society they do not invoice for some (or even all) of their legal aid work. There is a risk that introducing a mandatory requirement for pro bono work would impact on the voluntary work already currently being done and also on those lawyers who continue to do legal aid work for low remuneration.

Proposition 4:

There should be clear, transparent and published criteria on scope and eligibility for legal aid in civil, administrative and family law matters. These criteria should be drawn up by government in consultation with other stakeholders.

12. The Law Society agrees there should be clear, transparent and published criteria on the scope and eligibility for legal aid in civil, administrative and family law matters. This currently occurs in New Zealand and much of this information can be accessed through the Ministry of Justice website.⁹ The Ministry of Justice undertakes public consultation, including with the Law Society and legal profession, on matters affecting the scope of and eligibility for legal aid assistance.

⁸ Relevant submissions are available online (under the heading ‘Access to Justice (including legal aid)’): <http://www.lawsociety.org.nz/news-and-communications/law-reform-submissions/submissions-on-discussion-papers>.

⁹ See <https://justice.govt.nz/courts/going-to-court/legal-aid/get-legal-aid/>.

Proposition 5:

Court fee waivers should be seen as a form of legal aid. Where legal aid is granted, all court fees should be automatically waived without the need to complete an additional application process. Where a case is not within the scope of legal aid, but the client would have been financially eligible for legal aid had the case been within scope, court fees waivers should be available.

13. The Law Society agrees that court fee waivers should be available, but does not consider it necessary that this be included within the legal aid system. In New Zealand, an applicant can apply for a court fee waiver in the civil and family courts on grounds of financial hardship or public interest, even if not eligible for legal aid. There are separate simpler forms for those who are receiving legal aid or benefits, which make it easier for them to apply for a waiver.¹⁰

Proposition 6:

Where legal representation is mandatory to access legal services, courts and tribunals, the state has a duty to ensure that individuals without the financial means to pay for a lawyer themselves are represented by competent lawyers.

14. Whilst generally agreeing with Proposition 6, the Law Society notes that individuals have the right to be self-represented in New Zealand courts. Under the Criminal Procedure Act 2011, a defendant's case may be conducted by a lawyer, or by "the defendant personally".¹¹
15. There are no proceedings in New Zealand relating to an adult where legal representation is mandatory; instead, an individual can choose to access the services of a lawyer (privately or through legal aid). If legal representation is deemed necessary (for instance, to ensure an individual's right to a fair trial, or principles such as defendants not being able to cross-examine victims of sexual violence), then the court may appoint legal representatives to assist the defendant and/or to assist the court.¹² In matters involving young people, a lawyer must be present (however the young person still has a right to be heard in person) and free Youth Advocates are generally automatically appointed.

Proposition 7:

Principle 6 of the UN Principles and Guidelines on Criminal Legal Aid should apply, adapted to take account of relevant scope and eligibility criteria.

16. The Law Society agrees that Principle 6 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems – that legal aid should be available "to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship, or domicile, birth, education or social status or other status" – should apply also in relation to civil, family and administrative legal aid.

¹⁰ See <https://www.justice.govt.nz/courts/going-to-court/court-fees/apply-for-help-to-pay-court-fees/>

¹¹ Criminal Procedure Act 2011, section 11(b). (Available online: www.legislation.govt.nz).

¹² For example, amicus curiae can be appointed to assist the Court in certain circumstances such as where the defendant is unable to provide an effective defence due to mental health issues.

Proposition 8:

Financial means is a relevant criterion when assessing eligibility for legal aid. Vulnerability, including lack of knowledge or ability to enforce legal rights without expert help, is also a relevant factor.

17. The Law Society agrees financial means should not be the only criterion relevant to determining eligibility for legal aid, and that vulnerability (including age) is also an important factor. In the New Zealand Youth Court, Youth Advocates are appointed without an assessment of the young person's financial circumstances.
18. It is also noted, however, that some individuals do not meet the financial threshold for legal aid eligibility but are still unable to afford to pay for legal advice and representation – and this has led to an increase in the numbers of self-represented litigants in civil and family proceedings in New Zealand courts.

Propositions 9 and 10:

9 - The following criteria are relevant to eligibility for legal aid: (a) The interests of justice (which, in turn will be affected by the importance of the matter to the individual – considered objectively – and the importance of the matter to others in society, particularly disadvantaged groups, as well as the complexity of the matter and the availability of satisfactory alternative methods of achieving justice, including alternative funding); and (b) The likelihood of success.

10 - The 'interests of justice' is a more important eligibility criterion than the 'likelihood of success' in civil, administrative and family legal aid. In family law matters, the prospects of success will often not be relevant.

19. In New Zealand, the “interests of justice” and the “prospects [likelihood] of success” are both relevant criteria in the Act for legal aid eligibility in relation to different types of proceedings. The wording of section 8 (when legal aid may be granted: criminal matters) and section 10 (when legal aid may be granted: civil matters) of the Act are set out in **Appendix 1**. A significant body of case law exists on the correct interpretation of these eligibility provisions.
20. In the civil jurisdiction, section 10(3) of the Act provides that the Commissioner “*must* refuse to grant legal aid if the applicant has not shown that [he/she] has *reasonable grounds* for taking or defending the proceedings or being a party to the proceedings”. In practice, this causes difficulties for civil legal aid applicants when it comes to providing information relevant to the case's prospects of success.
21. Under section 10(4)(d)(i), the Commissioner *may* refuse to grant legal aid for original proceedings if “the applicant's *prospects of success* are not sufficient to justify the grant of legal aid”. However, the test does not apply to certain original proceedings filed under a number of family law statutes.¹³
22. While the “prospects of success” test does not apply to certain proceedings filed under some family law statutes, the test is a key consideration for the Commissioner when deciding whether to approve grants in a number of applications made to the Family Court (mainly in

¹³ Legal Services Act 2011, section 11(a) and Schedule 2.

applications made under the Care of Children Act 2004, the Domestic Violence Act 1995 and the Children, Young Persons and Their Families Act 1989).

Proposition 11:

General eligibility for initial advice should be available when there are no other satisfactory sources for this advice.

23. The Law Society agrees in principle with Proposition 11. In New Zealand, Community Law Centres operate nationally to provide free initial legal advice to individuals (generally those with unmet legal needs). The Citizen Advice Bureau also operates as an independent advice service, available to everyone on any subject matter.
24. In the criminal context, an individual arrested and held at a police station is able to access the Police Detention Legal Assistance scheme which provides access to a list of lawyers for initial advice. Similarly, an individual charged with an offence is able to access the duty lawyer on first appearance at court. The duty lawyer is a free lawyer (remunerated through the Ministry of Justice) who is able to provide initial advice and assist with a range of low-level offences through to sentence or assist with the completion of a legal aid application.
25. In 2014 there was significant reform in respect of people applying for parenting and guardianship orders from the Family Court: as noted above, legal aid was removed (except in situations of urgency or risk where the legal threshold was met for a without-notice application to the court). The Law Society (as noted in paragraph 8 above) and other stakeholders expressed concerns about this.
26. In response to those concerns, the Ministry of Justice established the Family Legal Advice Service¹⁴ (FLAS) to replace legal aid in respect of proceedings for parenting and guardianship matters.
27. FLAS provides a two-stage process to those who meet the income eligibility criteria. It provides initial legal advice in the first stage including an explanation of the new family justice system. This includes mandatory participation in the Family Dispute Resolution process (mediation) and *Parenting Through Separation* programme before parties can apply to the Family Court. If the matter proceeds to court, the second stage of the process is assisting the party to complete the application form/affidavit. FLAS does not cover the costs of a lawyer preparing these documents or representing a party in court. Parties are required to represent themselves in court unless a judge directs otherwise.

Propositions 12 and 13:

12 - The body administering legal aid must be operationally independent of government, subject to its accountability obligations.

13 - The body administering legal aid should consult with professional bodies of lawyers, to benefit from their relevant expertise. The risk of conflicts of interest will generally preclude professional bodies of lawyers controlling legal aid.

¹⁴ See <https://www.justice.govt.nz/family/care-of-children/when-you-dont-agree/disagreements/lawyers-for-disputes-about-children/>.

28. The Law Society agrees with Proposition 12. It expressed concerns in 2010 that the Legal Services Bill (subsequently enacted in 2011) did not provide the Legal Services Commissioner with the necessary degree of operational independence from the government. Section 71(2) of the Act provides that the Commissioner “must act independently” when performing specified functions, but the Commissioner is subject to direction by both the Minister of Justice and the Secretary for Justice (the Chief Executive of the Ministry of Justice) pursuant to section 70(3). The Commissioner is an employee of the Ministry, and has the role of Deputy Secretary, Legal and Operational Services, in the Ministry (section 70(2)).
29. The Law Society agrees with Proposition 13. The Law Society does not play a role in the administration or granting of legal aid, but does participate in Ministry consultations regarding practical operation of the legal aid scheme and proposed reforms of the scheme. (The Law Society does have a role in nominating lawyers to sit on the Selection Committees that approve legal aid providers (see section 78 of the Act).)

Proposition 14:

The body administering legal aid must be legally answerable for the quality of the service it administers. It must answer to the sponsoring ministry which provides its funding, but also to parliament, as the representatives of the people who pay for, and benefit from, legal aid.

30. The Law Society agrees that the body administering legal aid should be legally answerable for the quality of the legal aid administration it delivers. As legal aid is publicly funded, the Secretary for Justice (Ministry of Justice) is accountable for the allocation and expenditure of public funding, including public reporting on payments to legal aid providers.

Proposition 15:

The body administering legal aid – as with other groups and bodies involved in the justice system – has an important role to play in providing information to government, parliament and the public that will assist in ensuring the efficiency of the justice system as a whole. This includes information on where the system is failing to provide access to justice.

31. The Law Society agrees with Proposition 15. Monitoring and evaluation frameworks provide a useful tool to ensure the efficiency of justice services, including ensuring the quality of services provided by legal aid providers. This is also discussed below in relation to Proposition 26: there is a quality assurance framework for the approval of legal aid providers, a Ministry-run complaints process covering legal aid providers (in addition to the Law Society’s complaints service concerning all complaints about lawyers), and legal aid providers are subject to audit.¹⁵

Proposition 16:

Principles 9 and 12 of the UN Principles and Guidelines on Criminal Legal Aid should apply to all legal aid areas, including civil, administrative and family legal aid.

¹⁵ See <https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/quality-assurance-framework/>

32. The Law Society agrees that principles 9 and 12 of the UN Principles and Guidelines on Criminal Legal Aid should apply to all legal aid areas, including civil, administrative and family legal aid. These principles aim to ensure effective remedies and safeguards are in place if access to legal aid is undermined, delayed or denied,¹⁶ and that legal aid providers are able to carry out their work effectively, freely and independently.¹⁷

Propositions 17, 18 and 19:

17 - The criteria and procedure for the grant of legal aid should be clear, transparent and published. Opponents in a case where someone has applied for legal aid have the right to make representations to the body administering legal aid. However, decisions must be made independently and in accordance with the published criteria and procedure.

18 - The criteria and procedure for the allocation of cases to legal aid providers must be clear, transparent, and published. The allocation of cases must be done independently of the courts and the opposing participants (for example, defending public bodies or individuals in civil cases) and in accordance with the published criteria and procedure. There must be published anonymised information on how cases have been allocated, a right of challenge, and regular audit.

19 - The body administering legal aid must be independent and must be protected from interference (or attempted interference) in its decisions on the grant of legal aid and the allocation of work by government, the media, the profession and others.

33. The Law Society agrees in part with Proposition 17: the criteria and procedures for the grant of legal aid should be clear, transparent and published, and decisions should be made based on an assessment of the application against consistent criteria and procedures. However, in the Law Society's view it is not appropriate to allow opponents to make representations to the legal aid administrator about the other party's application for legal aid.
34. In relation to Proposition 18, the Law Society agrees that the criteria and procedure for the allocation of cases must be clear, transparent and published. The Ministry of Justice regularly reports on the amount earned by legal aid providers and a summary of the annual audit process.¹⁸
35. In New Zealand, criminal legal aid is administered by Legal Aid Services (a unit within the Ministry of Justice) and criminal cases are allocated between the Public Defence Service (salaried lawyers employed by the Ministry of Justice) and the private bar. For lower level offending an individual is not able to have counsel of choice, but for serious criminal offending the applicant is able to list their lawyer of choice.
36. In the family and civil context, legal aid applicants are only able to apply for legal aid once they have chosen a lawyer. Legal Aid Services will assist them to find a legal aid provider if they cannot find one themselves. The legal aid provider will then apply for legal aid on the applicant's behalf. For applications about care of children, some earlier stages of the

¹⁶ United Nations Principles and Guidelines on Criminal Legal Aid, Principle 9.

¹⁷ Ibid, Principle 12.

¹⁸ For example <https://justice.govt.nz/assets/Documents/Publications/Legal-Aid-Payments-to-Firms-1-July-2015-to-30-June-2016.pdf>.

proceedings must be undertaken by the applicant in their personal capacity (as noted earlier, in these cases legal aid is only available in limited circumstances, and parties are unable to be legally represented in court).

37. The Law Society agrees with Proposition 19. Concerns about the Legal Services Commissioner's lack of operational independence from government have been expressed earlier (in relation to Proposition 12).

Proposition 20:

To ensure that the pursuit of a reasonable working relationship with the sponsoring ministry does not threaten institutional, operational or financial autonomy, Board, Chair and CEO of any body administering legal aid should have robust security of tenure.

38. The Law Society refers to its earlier comments in relation to Propositions 12 and 19.

Propositions 21 and 22:

21 - A provider who wishes to undertake legal aid work should be qualified to deal with the relevant area of law, either by experience or training, and should understand and be familiar with the legal aid scheme and how it operates.

22 - The body administering legal aid should consult with professional bodies of lawyers, as well as the sponsoring ministry, to establish the correct level of qualification mentioned in Proposition 21, but must have the duty to set the standard independently and in accordance with the published criteria and procedure.

39. The Law Society agrees with Propositions 21 and 22, which seek to ensure competent legal aid services are provided. In New Zealand, a lawyer must complete an approval application form and demonstrate skills and qualifications in specific areas (based on whether they want to be a supervised or a lead provider), in order to provide legal aid services.¹⁹ The provider approval scheme is a tiered system for criminal providers based on the category of criminal offending and the applicant's experience. Once a lawyer has been approved as a legal aid provider, they must sign a provider contract, which includes practice standards, and abide by the rules that apply to all lawyers (the Lawyers and Conveyancers Act – Lawyers: Conduct and Client Care Rules 2008).²⁰

Proposition 23:

Lawyers undertaking legal aid work are bound to carry out the work in accordance with their professional code of conduct.

40. The Law Society agrees with Proposition 23. In New Zealand, legal aid providers are bound to carry out legal aid work in accordance with their professional code of conduct (the Lawyers and Conveyancers Act – Lawyers: Conduct and Client Care Rules 2008) and the minimum practice standards set out in the provider contract.

¹⁹ See the approvals criteria on the Ministry of Justice website: <https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/forms/application-forms-for-approval-to-provide-legal-aid-services/>

²⁰ See <http://www.legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437811.html>

Proposition 24:

Model Practice Standards for legal aid cases in the areas of civil, administrative and family law should be developed by relevant IBA committees, following the example of the UN Principles and Guidelines on Criminal Legal Aid in regard to those undertaking criminal defence work.

41. Proposition 24 may be difficult to apply in practice. Most jurisdictions will have their own practice standards and it may be more useful for countries to look at jurisdictions closely aligned to their own rather than attempt to draft generic practice standards. In New Zealand, practice standards were designed in conjunction with the Law Society, and are well established and apply to all legal aid providers.²¹

Proposition 25:

Legal aid services can be provided in a number of ways, for example by lawyers in private practice or lawyers employed directly by the body administering legal aid. Non-membership of a professional body of lawyers, for example based on the nature of employment, should not be used to prevent non-members from carrying out legal aid work that they are otherwise qualified to undertake. However, all legal aid providers must be held to identified quality and ethical standards, whether or not they are members of a professional body of lawyers.

42. The Law Society agrees with Proposition 25 and supports the aim of ensuring all legal aid providers are held to identified quality and ethical standards.

Proposition 26:

The body administering legal aid should put in place an effective system to measure the quality of work. This should consider the merits of outputs (assessed, for example, by audit or peer review) rather than inputs (for example, years of qualification or specific training) as the best way of assuring quality.

43. The Law Society agrees with Proposition 26, that the body administering legal aid should put in place an effective system to measure the quality of legal aid work. In New Zealand, the Ministry of Justice operates a quality assurance framework which includes an annual audit of selected legal aid providers. The audit policy sets out a process for assessing a range of files selected for audit. The quality and value of legal aid services are audited against both general and case specific responsibilities. These can include the quality of advice and representation, record keeping, communication with the client, instructions and preparation, conduct and advice and obligations under the Conduct and Client Care Rules. The Law Society has recently made a submission to the Ministry of Justice in support of proposed amendments to the audit policy to allow greater use of on-site audits of legal aid providers, in addition to the usual audit process (an audit conducted on the papers).²²

²¹ See <https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/quality-assurance-framework/legal-aid-practice-standards/>

²² See the Law Society's submission at http://www.lawsociety.org.nz/_data/assets/pdf_file/0011/114104/l-MoJ-Legal-Aid-onsite-audits-3-8-17.pdf

44. Client confidentiality is a relevant matter to be considered when designing and running a legal aid quality assurance system. In New Zealand, the Legal Services Act 2011 provides that legal professional privilege does not apply to communications between a legal aid provider and a legal aid client for the purposes of audit (section 109). However, information that is subject to legal professional privilege and produced for the purposes of an audit must not be used in any proceedings against the client, or in any way that is detrimental to the client.
45. Client feedback is also relevant to assessing the quality of legal aid services. In New Zealand, legal aid clients are able to raise concerns about legal aid providers to the Ministry of Justice and/or to the Law Society through their respective complaints services (as discussed in relation to Proposition 15). The Ministry also recently surveyed legally aided clients on the services provided.

Proposition 27:

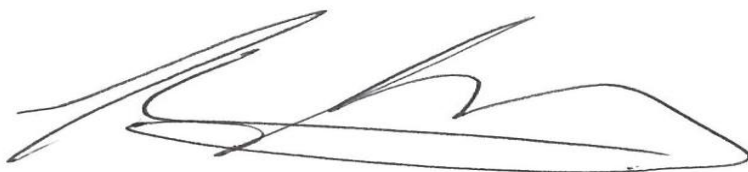
Those providing exclusively or mainly legal aid services should be paid according to industry norms so as to attract high quality providers and to allow for the development of expertise in the sector and therefore create value for money, whether in a salaried service or through private practice.

46. The Law Society agrees in principle that legal aid providers should be paid according to industry norms so as to attract high quality providers. As stated above in relation to Proposition 2(a), the Law Society considers it important that the legal aid system provides fair remuneration for those who do the work. Currently there is real concern about the economic viability of legal aid work in New Zealand based on the current level of fees, and the resulting loss of lawyers (particularly senior lawyers) from the legal aid system. However, it is acknowledged that governments will often face competing funding priorities in other areas (health, education etc) which will impact on the funding available for legal aid.

Conclusion

47. We hope these comments are helpful to the IBA and would be happy to discuss them further. If you have any questions please feel free to contact the convenor of the Legal Services Committee, Elizabeth Bulger, through the Committee Secretary, Amanda Frank (amanda.frank@lawsociety.org.nz / ddi + 64 4 463 2962).

Yours faithfully



Kathryn Beck
President

Appendix: Legal Services Act 2011, sections 8 and 10

8 When legal aid may be granted: criminal matters

- 1) The Commissioner may grant legal aid to an applicant in respect of proceedings to which section 6 applies (criminal matters) if—
 - a) the applicant is a natural person charged with or convicted of an offence; and
 - b) it appears to the Commissioner that the applicant does not have sufficient means to enable him or her to obtain legal assistance; **and**
 - c) **either**—
 - i) the offence to which the application relates is punishable by a maximum term of imprisonment of 6 months or more; **or**
 - ii) it appears to the Commissioner that **the interests of justice** require that the applicant be granted legal aid.
- 2) When considering whether the interests of justice require that the applicant be granted legal aid, the Commissioner—
 - a) must have regard to—
 - i) whether the applicant has any previous conviction; and
 - ii) whether the applicant is charged with or convicted of an offence punishable by imprisonment; and
 - iii) whether there is a real likelihood that the applicant, if convicted, will be sentenced to imprisonment; and
 - iv) whether the proceedings involve a substantial question of law; and
 - v) whether there are complex factual, legal, or evidential matters that require the determination of a court; and
 - vi) whether the applicant is able to understand the proceedings or present his or her own case, whether orally or in writing; and
 - vii) in any proceeding to which section 6(c) applies, the consequences for the applicant if legal aid is not granted; and
 - viii) in respect of an appeal, the grounds of the appeal; and
 - b) may have regard to any other circumstances that, in the opinion of the Commissioner, are relevant.
- 3) When determining whether an applicant has sufficient means to enable him or her to obtain legal assistance, the Commissioner must, except as provided under section 9(1), have regard to the applicant's income and disposable capital as set out in Schedule 1.
- 4) Subsection (1)(c)(i) does not apply in respect of—
 - a) an appeal; or
 - b) a proceeding to which section 6(c) applies.

- 5) Despite subsection (1)(a), the Commissioner may not grant legal aid to a child or a young person (as those terms are defined in section 2(1) of the Oranga Tamariki Act 1989) in respect of any proceedings against that child or young person for an offence, if those proceedings are heard in the Youth Court.

Legal Services Act 2011 (as at 14 July 2017)

10 When legal aid may be granted: civil matters

- 1) The Commissioner must, subject to this section and sections 11 to 13, grant legal aid to an applicant in respect of proceedings to which section 7 applies (civil matters) if the applicant is—
- a) a natural person, whether resident in New Zealand or not; or
 - b) a trustee corporation (as defined in section 2(1) of the Administration Act 1969) that applies for legal aid in connection with proceedings in which it is concerned in a representative, fiduciary, or official capacity.
- 2) The Commissioner must refuse to grant legal aid to an applicant whose income or disposable capital exceeds the relevant maximum level prescribed in regulations, unless the Commissioner is satisfied that there are special circumstances, having regard to—
- a) the likely cost of the proceedings to the applicant; and
 - b) the applicant's ability to fund the proceedings if legal aid is not granted.
- 2a) However, in the case of an application that comes within any of paragraphs (b) to (d) and (f) to (h) of the definition of specified application in section 4(1), it is sufficient, for the purposes of subsection (2), if the Commissioner has regard to either paragraph (a) or (b) of that subsection.
- 3) **The Commissioner must refuse to grant legal aid if the applicant has not shown that the applicant has reasonable grounds for taking or defending the proceedings or being a party to the proceedings.**
- 3a) The Commissioner may, unless the interests of justice require otherwise, refuse to grant legal aid to an applicant if—
- a) any amount payable by the applicant in respect of a repayment of a previous grant of legal aid is in arrears; and
 - b) the application made by the applicant does not come within any of paragraphs (b) to (d) and (f) to (h) of the definition of specified application in section 4(1).
- 4) The Commissioner may refuse to grant legal aid to an applicant in any of the following circumstances:
- a) the Commissioner is unable to obtain full information concerning the applicant's financial affairs because of the default or failure of the applicant;
 - b) in the opinion of the Commissioner, the prescribed repayment amount will exceed the likely cost of the proceedings for which legal aid is sought;
 - c) the applicant is not resident in New Zealand and the Commissioner considers that the proceedings might reasonably be brought in a jurisdiction other than New Zealand:

- d) **in the case of original proceedings,—**
- i) the applicant's **prospects of success are not sufficient to justify the grant of legal aid**; or
 - ii) the grant of legal aid is not justified, having regard to the nature of the proceedings and the applicant's interest in them (financial or otherwise), in relation to the likely cost of the proceedings; or
 - iii) for any other cause where it appears unreasonable or undesirable that the applicant should receive legal aid in the particular circumstances of the case:
- e) in the case of an appeal (whether or not in respect of proceedings in which the applicant has received legal aid), the Commissioner considers that for any reason the grant of legal aid or further legal aid is not justified.
- 5) The Commissioner may refuse to grant legal aid to an applicant in respect of any original proceeding under an enactment specified in Schedule 2 if the Commissioner considers that the grant of legal aid is not justified.
- 6) In determining under subsection (5) whether a grant of legal aid is not justified, the Commissioner must have regard to—
- a) any previous proceedings in the matter to which the application relates; and
 - b) any personal protection issues such as (without limitation) any orders relating to domestic violence, protection of personal property rights, compulsory treatment, or compulsory care; and
 - c) [Repealed]
 - d) whether there are any complex factual, legal, or evidential matters that require the determination of a court; and
 - e) **whether it is in the public interest** that legal aid be granted.

[emphasis added]