

27 September 2018

Judith Pryor
Principal Advisor, Access to Justice
Ministry of Justice, Policy Group
Wellington, 6145

By email: judith.pryor@justice.govt.nz

Dear Judith

Re: Triennial Legal Aid Review – Issues Papers

Introduction

The New Zealand Law Society welcomes the Triennial Legal Aid Review (review) and the opportunity to comment on the summary issues papers (papers). The Law Society considers the review is very timely and a necessary step to ensure that New Zealand's legal aid system remains effective and delivers access to justice for New Zealanders.

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, including regularly liaising with the Ministry on operational matters affecting legal aid providers. It is concerned that reforms to legal aid introduced by the Legal Services Act 2011 (the Act) have diminished New Zealanders' access to justice over time. Notably, in 2010 in relation to the proposed reforms, the Law Society said that:¹

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 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.

It is against that backdrop that the Law Society is now seeing an increase in the inequality of arms between legally-aided and privately-funded litigants,² and between legally-aided litigants and the state.³

As noted in the papers, the Law Society and legal aid providers 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, the administrative burdens and the difficulty of running a competent, professional and financially viable legal practice in this context.

¹ NZLS submission on the Legal Services Bill, 8.10.10.

² For example, in the family context: NZLS submission on Fixed Fees Framework for Family Legal Aid Providers, 19.3.12 at [1.5].

³ In the context of Accident Compensation Act claims: NZLS submission on Fixed Fees Framework for ACC Legal Aid Providers, 16.3.12.

The current legal aid climate is also seeing an increase in clients with more complex personal, behavioural and societal issues that inherently require more time and attention.

In addition, concern has been expressed about the long-term viability of the private legal aid bar, 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).⁴ There has been a notable 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, including in the duty lawyer space. There are further significant shortages in the refugee and protection and ACC areas which we believe may be contributing to an increase in self-represented litigants. This is discussed in more detail below.

There are also concerns about family justice reforms in 2013-14 that limited legal representation for parties and the Law Society welcomes the Family Court review to address these concerns.

The Law Society wishes to commend the Ministry for meeting with legal aid providers through a series of forums in Auckland, Hamilton, Wellington and Christchurch in August 2018. The forums provided a valuable opportunity for legal aid providers to raise their concerns directly with the Ministry.

Issues Papers

The Law Society agrees with the overview of issues identified in the papers which accurately reflect the discussions in recent forums with legal aid providers and via other forms of feedback. The Law Society's additional comments are addressed below. The Law Society has been assisted in preparing these comments by its Legal Services Committee and Family Law Section.

Eligibility and Application Process

Eligibility

A common theme throughout the recent legal aid forums is that legal aid providers consider the income thresholds for legal aid eligibility are too low. As noted above, this has resulted in some low-income earners not being eligible for legal aid. The gap between those who don't meet the legal aid financial criteria but cannot afford to pay for a private lawyer is significantly widening. This is resulting in an increase in self-represented litigants (particularly in the civil and family jurisdictions) creating flow on effects to the overall justice system including delays in proceedings and an inequality in access to justice. Of particular concern, is the threshold for a single person with no dependents. Overall, the Law Society agrees that income thresholds should be increased to better reflect the actual cost of living.

Application process

Legal aid providers also universally agreed that the \$50 user charge in the family court jurisdiction was not economically viable for most legally aided clients. In 2014, the Family Law Section noted the "user charge is proving problematic and many lawyers have to waive the user charge for their

⁴ 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/I-Legal-Services-Criminal-Fixed-Fees-Review-12-12-14.pdf.

clients, which is further reducing the remuneration they receive.”⁵ In many instances, providers end up absorbing this cost into their practice, or will allow a client to pay off the charge via weekly instalments, significantly increasing the administrative burden of managing legal aid clients. The Law Society agrees that consideration should be given to removing the user charge.

The Law Society has made several submissions on the recent changes to the civil, family and criminal forms and agree they are clearer and more user-friendly.⁶ However, the Law Society considers further work could be done in regard to the application process to ensure only information that is actually required to assess an application is sought. For example, in the family jurisdiction, when an application is made in Oranga Tamariki proceedings, the applicant is asked about the “merits of the case”. This is inappropriate in a situation where the state is issuing proceedings regarding the removal of a child from its parents. Further, where additional proceedings are filed in the same matter (with leave of a judge), legal aid should be granted without the need to set out the merits of the case.

In this context, simpler, faster and more personal communication with providers would be greatly beneficial. The Law Society looks forward to further improvements in this area.

Other issues

The Law Society notes that providers in the civil jurisdiction have indicated that significant costs are incurred before the legal aid application has been approved, which itself can prove difficult. This may disincentivise people from going through the legal aid application process if there is a risk their application may be declined, and providers run the risk of doing the work for no remuneration. The legal aid application process should encourage eligible applicants to apply, not discourage them. If assistance was provided to ensure legal aid advice could be provided at an early stage, for example in the civil jurisdiction, this may relieve pressure on providers, on the courts and also assist those who may end up self-representing.

The Law Society also notes that refugee legal aid providers have raised particular concern regarding warrants of commitment and we encourage the Ministry to look into this issue.

Providers and Quality Assurance

Remuneration

The Law Society considers that an increase in legal aid remuneration is well overdue. The failure to keep pace with the burgeoning costs of practice has contributed to the decreased pool of legal aid providers (particularly senior and experienced providers) and is making it uneconomic for many firms to undertake this kind of work. Significantly, civil legal aid has not seen an increase in remuneration in over 10 years.

The Law Society believes 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

⁵ Family Law Section submission, Family Legal Aid Fixed Fees, 3.3.14.

⁶ Recent Law Society submissions on legal aid can be accessed here:
<http://www.lawsociety.org.nz/news-and-communications/law-reform-submissions/submissions-on-discussion-papers>

the legal aid fixed fee regime to provide adequate remuneration, in order to attract and retain lawyers in the legal aid system.⁷

The Law Society agrees with the issues paper that some “fixed fees don’t reflect the volume and effort required for certain tasks, the hourly rate paid in fixed fee plus and high-cost cases is too low, and there is an inconsistent approach to rates paid for travel costs associated with providing legal aid.”⁸

Providers have expressed their frustration that they often end up doing a significant amount of work on a legal aid file that is not remunerated. At present many lawyers consider that clients expect them to have a number of attendances and actions on files for which there is not sufficient legal aid funding. Furthermore, counsel’s professional obligations require them to do the work even if they are not remunerated for the additional attendances. Those expectations are further compounded by increasingly complex requirements introduced by legislation, for example sentencing and bail legislation, the courts’ practice requirements, and increasingly difficult and vulnerable clients who require extra attention and care.

If remuneration rates are not increased to a reasonable level, then information should be provided to legal aid applicants (at the time they make an application) by way of brochure, or other appropriate format, of the limits of any grant to the client (within the grant schedule). This will help to ensure that the client has a realistic expectation of what can be expected of their legal aid lawyer.

In the Law Society’s view, increasing legal aid rates is a vital component of helping to ensure delivery of high quality legal aid services. We agree that “underfunding of legal aid providers also creates flow-on effects for others, including duty lawyers and community law centres.”⁹ Duty lawyers have expressed their concern that on many occasions, people are coming to court desperate for legal aid advice (for example in the family jurisdiction) and have not been able to receive any assistance.

Cases which are inherently more difficult and time consuming, should be reflected by a higher remuneration rate. Further, there are important family and civil pre-proceeding steps that are not currently funded, and these can be crucial to having cases resolved early. As the paper notes, these often occur in Oranga Tamariki proceedings, ACC and refugee cases.

A comprehensive review of all legal aid steps in proceedings is appropriate. Legal aid providers often need to apply for an amendment to grant as matters associated with some applications are not adequately covered in the current steps. Legal aid providers are also not remunerated for the time required to apply for an amendment to grant. For example, in the family jurisdiction a section 15 report in Oranga Tamarki proceedings requires the same amount of work as other reports currently listed in the family proceedings steps but requires the legal aid provider to apply for an amendment to grant. The Law Society understands further work on amendments to grant is underway and we look forward to updates in this regard.

⁷ 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>.

⁸ Legal Aid Providers and Quality Assurance issues paper, at p 2.

⁹ Ibid.

A further issue addressed in the paper is the issue of section 27 cultural reports.¹⁰ Legal aid providers have indicated there has been a significant increase in these reports being presented to the court and that there is no specific legal aid disbursement policy to fund them.¹¹ The Law Society is aware of this and understands that courts are utilising these reports at sentencing more frequently. The Law Society also understands these reports are costly for legal aid providers and considers they should be funded by the State (similar to other reports such as a psychologist report). The Law Society encourages the Ministry to investigate the funding of these reports further.

Finally, the Law Society notes that many legal aid providers consider the current disbursement payments to be insufficient and do not include the time spent on administrative tasks for example, printing. We have been advised of numerous cases when large files and multiple documents need to be printed and copied and the disbursement fee has not adequately covered that cost. It is also now common for documents to be sent via email rather than in hard copy so complex proceedings frequently require printing of voluminous documents. This is of particular concern to ACC providers who often have to print large volumes of material contained on email or CD's, and also in the criminal jurisdiction for example on complex fraud cases. A significant amount of the work in ACC cases is completed prior to the dispute at which point legal aid does not cover the costs.

Junior Counsel

The Law Society considers that training and mentoring of junior lawyers is critical to the long-term sustainability of the legal aid workforce. Many criminal legal aid providers have expressed the benefits of having junior lawyers involved in trial preparation and advocacy. Not only do junior lawyers gain invaluable training and mentoring, it also eases the burden on the senior lawyer both in terms of their workload but also on an emotional level. This is particularly apparent in the context of sexual violence cases which have a significant emotional toll on the lawyers involved.

However, outside of the Public Defence Service, the current legal aid system does not assist with providing opportunities to junior lawyers in the private bar. There is also no financial incentive for senior lawyers to train and mentor a junior. Higher courts have recently made a call for further involvement of juniors in appeal work and this is encouraging.¹² Senior lawyers are required to supervise a junior, particularly for those with supervised provider status, and accompany them to court. As such, the Law Society considers there is scope for increasing the financial incentive for senior lawyers to train and mentor juniors, to assist with the increase of retiring senior counsel.

Provider shortages and sustainability of legal aid

Tied to the issue of junior counsel, is the increasing shortage of providers across all jurisdictions. This is more apparent in provincial regions throughout New Zealand where often a legal aid provider cannot act due to a conflict of interest (i.e. they may be acting for the other party) and other legal aid providers are unable to take the matter on due to their own workloads. In such instances, it

¹⁰ Sentencing Act 2002, section 27: an offender may request the court to hear a person on personal, family, whanau, community, and cultural background of the offender.

¹¹ Legal Aid Providers and Quality Assurance issues paper, at p 2.

¹² See: <http://www.lawsociety.org.nz/news-and-communications/latest-news/news/court-of-appeal-committed-to-encouraging-junior-counsel-participation>

would be beneficial for Legal Aid Services to make legal aid providers outside of these areas more accessible, by paying for their travel time and costs.

The shortage of legal aid providers will have a fundamental impact on the long-term sustainability of the legal aid system. As there is an aging pool of legal aid lawyers and currently no incentive for senior counsel to continue undertaking legal aid work, changes are necessary.

For example, the Law Society is aware that there are very few legal aid providers who currently do relationship property work, civil legal aid, ACC and refugee and protection cases. This could be explained in part due to the administrative burdens, low remuneration rates and increase in provider burnout. Even though there may be a larger pool of lawyers approved to undertake legal aid work, there are few active providers in some of these areas. As noted above, this often results in applicants having to seek out of town providers to assist with their case.

Anecdotally, the Law Society understands that some legal aid providers, while still undertaking legal aid assignments, have reduced the amount of legal aid work they provide in terms of their overall practice. For example, those who may have provided legal aid services that make up 20% of their overall practice, have reduced this amount as they do not consider it economically viable to undertake more legal aid work.

An area which has been the subject of a recent study by the Otago Legal Issues Centre,¹³ is civil legal aid. The report notes that “the number of lawyers providing all types of legal aid, including civil legal aid, has declined sharply in recent years.”¹⁴ The decrease in civil legal aid providers (actually undertaking the work as opposed to being approved) may be due to the requirement to establish financial or merits eligibility, the effect of fixed fees in some cases, and the low hourly rates involved. Further, as noted above, in the ACC area there are very few legal aid providers operating which presents a significant barrier to access to justice nationwide.

The Law Society further considers that the legal aid system should encourage those providers who have taken time off from legal aid work, to easily undertake that type of work again. Legal aid providers have noted that it can be particularly difficult to get re-approval for criminal cases following parental leave for example.

The Law Society wishes to acknowledge the work the Ministry is currently doing regarding provider coverage and we look forward to the outcome of that review.

Counsel of choice (Criminal)

The Law Society is aware that there is a divergence of opinion amongst members of the criminal bar as to whether counsel of choice should remain or not. Given the diversity of views, the Law Society does not propose to comment further on this issue from what is currently contained in the paper.

Audits and Approvals

The Law Society recently submitted on the Ministry’s consultation to allow onsite audits, noting that this change improved the efficiency and value of the legal aid audit programme. However, we are aware that providers have expressed considerable frustration over the audit process focusing more

¹³ The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services Auckland and Otago Pilot Report Report by Kayla Stewart and Bridgette Toy-Cronin, 2018.

¹⁴ Ibid at p 12.

on the paperwork contained in a file, rather than on the provider's quality and overall performance. In this regard, the ratings given to a provider are considered unnecessary and not helpful. The overall audit process is very time consuming and a common theme amongst legal aid providers is that the audit process should be more educative.

The Law Society understands the Ministry are currently reviewing the audit process and we look forward to further work in this regard.

Burdensome administration

As noted above, legal aid providers consider the increase in administrative tasks associated with the legal aid process, is contributing to the decrease in legal aid providers undertaking this type of work, in part due to the greater bureaucracy in the process. The Law Society has been told on numerous occasions that the administrative processes providers must adhere to have affected the working relationship with Legal Aid Services and adds time and money to an otherwise underfunded area of work.

While the Law Society understands the need for state funds to be used appropriately, working towards a high-trust relationship with legal aid providers, in terms of the information they provide to Legal Aid Services, is desirable. For example, insisting that proof is provided by way of judge's minutes and directions, where a judge has already made a determination, increases delay in the process. The professional obligations of lawyers and the audit process of legal aid providers should reduce the necessity for Legal Aid Services to ask for specific directions in these cases.

The Law Society acknowledges the extensive work that Legal Aid Services is doing to ease the administrative burden on providers (for example changes to the application forms and upcoming changes to invoices) and encourages further progress in this area.

Other issues

The Law Society does not propose to comment further on the issue of duty lawyers and the Police Detention Legal Assistance Scheme other than to acknowledge the work the Ministry are undertaking to review these practice areas. We look forward to further updates and the opportunity to comment in due course.

Legal aid grants, repayment and debt

The Law Society agrees with the outline of issues in regard to legal aid grants, repayment and debt and does not propose to provide further detailed comment. As noted above, the increase in administrative tasks and changes to the grants process through the recent centralisation have negatively affected the provider relationship with Legal Aid Services. Of particular concern to legal aid providers is the judgment and lack of trust that develops when a matter is referred to a National Specialist Adviser. Legal aid providers have also expressed concern over the initial client letter advising the client of the maximum amount they may be required to repay on their debt. These letters are confusing and distressing to the client. It would be helpful if more information was provided to explain what the maximum repayment means. We understand the Ministry are currently reviewing these letters and we look forward to further updates in this area.

Broader Access to Justice Issues

The 'Broader Access to justice issues' paper outlines key themes relating to barriers to access to justice faced by specific population groups. The Law Society agrees with the overview of these

themes addressed in the paper. As noted above, the Law Society encourages and supports a legal aid system that creates access to justice for New Zealanders, particularly some of the most vulnerable members of society.

The Otago Legal Issues Centre study noted three key reasons for the barriers to accessing civil legal aid. These were:¹⁵

1. Being deterred from taking up legal aid assistance because it is granted as a loan with the imposition of a user charge, interim repayments, interest, and sometimes a security taken over assets.
2. Finding a lawyer who will take their case. The number of registered civil legal aid lawyers is known to have decreased by 54 per cent between 2011 and 2016 and there are currently 150 registered providers in Auckland and 20 in Otago. The audit suggests that approximately one third of these registered lawyers are not currently providing services to civil legal aid clients. The number of available legal aid lawyers is therefore very limited.
3. Finding a local and/or specialist legal aid lawyer. Legal aid lawyers are not evenly distributed geographically, so people out of central city locations may find it difficult to access a lawyer. There is a very small pool of legal aid lawyers who can provide assistance in specialised civil areas, for example intellectual property, the example used in the report.

Aligned with our earlier comments on eligibility and provider shortage, although the observations from the Otago Legal Issues Centre were made in the context of civil legal aid, the Law Society considers these barriers exist across the entire legal aid system, resulting in the overall decrease in access to justice.

Conclusion

We hope these comments have been helpful to the Ministry. If further discussion would assist, you can contact the convenor of the Legal Services Committee, Elizabeth Bulger, via the committee secretary, Amanda Frank (amanda.frank@lawsociety.org.nz / 04 463 2962).

Yours sincerely



Tiana Epati

Vice President

¹⁵ The New Zealand Legal Services Mapping Project.