

Policy on Authorised Payments

Section 66 of the Legal Services Act 2000

Purpose

1. This policy provides guidelines to ensure agency staff, listed providers and legally aided persons understand the Agency's approach to authorising payments to a listed provider from or in respect of a person to whom services are provided.

Background

1. Section 66 of the Legal Services Act 2000 (the Act) provides that no listed provider "may take payments from or in respect of a person to whom services are provided under any scheme unless they are authorised" by the Agency.

Types of Payment

1. proposed payment could be from the aided person, their partner, family member or other third party. Listed providers could potentially seek authorisation for payments in order to:
 - Top up their hourly fee/total remuneration over and above the total legal aid grant; and/or
 - Cover or top up disbursements [1] (i.e. travel, accommodation etc.) that are not directly provided for in the legal aid grant; and/or
 - Provide for additional legal work (either at legal aid guideline hourly rates or at private rates), not covered in the legal aid grant; and/or
 - Receive additional payment through so-called "contingency fees". This involves arrangements whereby a practitioner's services (paid at legal aid rates) are topped up from any proceeds of proceedings remaining after the Agency's costs of services have been met.
2. In this policy no distinction is made between different types of additional payment (i.e. disbursements vs. hourly fees). Any form of proposed payment will be considered on its own particular facts.
3. A payment could either be made directly to a provider or indirectly. An example of an indirect payment is one made by a client (their partner etc.) directly to a hotel (rather than to the provider) in order to pay for a provider's accommodation costs that were not covered by legal aid. The Agency would consider such an arrangement to constitute a payment to a provider in respect of the legally aided person that would require its authorisation.
4. The wording and context of section 66 suggest that any proposed payment to a listed provider is in addition to a legal aid grant (i.e. a private "top up") rather than a mechanism by which the Agency's contribution to the total grant of legal aid can be reduced (i.e. less the amount of "top up"). [2]

Rationale

1. The Agency is required to administer the legal aid scheme in a "consistent, accountable, inexpensive and efficient manner" consistent with the purpose of the Act. To achieve this, the Agency has designed policies to ensure that every aided person has the opportunity to:
 - Be considered for eligibility under the same means, merits and interests of justice tests; and
 - Have equitable access to adequate legal representation.
2. The Agency expects that listed providers accept assignments on the basis that the majority of cases will be funded exclusively through a grant of legal aid. No provider is compelled by the Agency to accept a legal aid assignment. The Agency also has procedures for amendment to the grant or reconsideration. Where a case falls outside the standard a lawyer can provide reasons and the Agency will consider an additional payment. Providers and clients are also able to seek review of an Agency decision by the Legal Aid Review Panel.

Policy Guidelines

1. In this context, the Agency expects that it will only authorise additional payments under section 66 in exceptional circumstances. In assessing whether exceptional circumstances exist each case will be considered on its own special facts and approached with an open mind.
2. Generally speaking, exceptional circumstances are most likely to involve situations where a legally aided person will not receive adequate legal representation unless a top up is authorised. In determining whether exceptional circumstances exist the Agency will evaluate a number of considerations (depending on the particular facts) including whether:
 - The specified lawyer has a unique set of skills or experience relevant to the particular case; and/or
 - Another lawyer of an appropriate level of seniority and experience (when compared with the seniority and composition of opposing lawyers and the nature of the case) is available to accept assignment without an additional payment; and/or
 - Another lawyer could not reasonably be expected to provide representation due to the short time remaining before trial; and/or
 - A refusal to authorise a top up impacts on the client's right to legal representation under section 24(c) and (d) of the New Zealand Bill of Rights Act 1990; and/or
 - The payment is fortuitous (e.g. from an unrelated third party); and/or
 - The additional payment is not the result of additional pressure being put on the client, their partner, family members or other third parties; and/or
 - Any other relevant consideration given the particular circumstances.
3. The Agency is unlikely to authorise a proposed additional private payment that is high in comparison with the Agency's guideline hourly rate.

4. In addition to the considerations outlined above, the Agency is unlikely to grant authorisation for a top up where the source of the proposed payment is the aided person, their partner or arranged on a "contingency" basis (relying on a payment from the proceeds of proceedings). Such payments will be assessed with reference (where relevant) to:
 - The aided person's continued eligibility to receive legal aid; and/or
 - The Agency's contribution and costs policies; and/or
 - Whether the listed provider has sought an increase or amendment of the legal aid grant in accordance with the Agency's policies and procedures before applying for authorisation under section 66.

5. In respect of legally aided services for Waitangi Tribunal Proceedings, the Agency would normally only authorise additional payments for work outside that paid for by legal aid. However, any additional payments (i.e. a "top up") in such matters will be assessed in accordance with this policy.

Endnotes:

1 Refer to the Agency's Disbursements Policy

2 In *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111 (one of two High Court cases to consider top ups under the Legal Services Act 1991) the Court accepted the assumption that the proposed payment was "additional".