

Legal aid eligibility extended

The Minister of Justice, Hon Phil Goff, proposed new legislation to Parliament on 10 May, which would result in more New Zealanders being eligible for legal aid. This Bill, to amend the Legal Services Act 2000, should be passed in 2006 and come into force late in that year.

The new legislation is expected to result in an increase in the number of legal aid grants by 25,000 to 85,000, and an increase in the number of legally aided people required to make repayments from 8000 to 22,000. The legislation will also introduce changes to the way eligibility is assessed.

"This legislation will restore to a wider range of lower income New Zealanders the ability to afford legal representation for civil, family and criminal matters," Justice Minister Phil Goff said.

"With the major public investment in legal aid to ensure access to justice, it is equally important that proper safeguards are built into the system to ensure that spending is justified.

"Overall, the new system will be fairer, both in ensuring access to justice does not depend on an ability to pay, as well as ensuring that people seeking public assistance genuinely need it and will contribute to the cost," Mr Goff said.

The proposed amendments contained in the Bill are summarised below. However, these may alter as the Bill moves through the select committee and parliamentary process.

Financial eligibility and means assessment

- A new income threshold based on the Community Services Card.
- The financial means of both criminal and civil/family applicants to be assessed in terms of gross income and disposable capital. It is proposed that this would include a maximum gross income threshold for each household size, and a maximum disposable capital and house equity allowance. For example, a family of 2 adults and 1 child would meet the criteria on earnings up to \$36,371. The current equivalent is \$19,060.
- Benefits are to be considered as income.

Repayment of aid

- The amount of aid to be repaid is to be called a repayment. Repayments are to apply to civil/family and criminal on the same basis.
- The repayment level is to be calculated in the Regulations to determine the maximum amount payable based on income and capital. Repayments from income and capital are to be added together to result in a total repayment. Weekly repayments based on the total repayment amount are to be established.

- The Agency will be able to amend repayment plans if the aided person's finances change, and the Agency will continue to be able to write off a repayment.

Interests of Justice test

- The gravity of the offence test is to be changed. For offences with a statutory sentence of six months imprisonment the interests of justice test is met. For offences with a statutory sentence of less than six months imprisonment, the Agency will be required to consider a number of specific issues and assess whether the weight of these factors requires aid to be granted.

Family merits test

- The prospects of success test is to be removed for most family matters. Instead, the Agency will be required to have regard to a range of specific criteria, such as:
 - the position of vulnerable people, such as victims of domestic violence and children, and
 - previous litigation undertaken by the applicant for aid.

Proceedings completed

- In certain circumstances, the Agency is to have the discretion to consider a grant of aid (or an amendment) even though the proceedings are completed.

Other changes proposed will affect:

- the Agency's ability to withdraw and amend aid
- the manner in which the Agency can seek verification of financial information
- amendments to the costs provisions
- the provider's obligations to protect proceeds of proceedings
- the Agency's ability to charge interest on a debt in some situations
- the criteria that must be met before aid is granted for mediation
- the Agency's ability to temporarily suspend or permanently remove providers from the list
- other more minor administrative matters

The Agency will keep listed providers as fully informed as possible and will consult on proposed policy and procedure changes. A project team has been established in the Agency to manage the implementation of the changes, and part of the project will be a communications plan with providers as key stakeholders.

Two new community law services

The Agency has approved funding for two new community law services – Waitakere Community Law Service and Baywide Community Law Service (Bay of Plenty).

For over a year, interested community members and groups have been identifying unmet legal needs in their respective communities and determining the nature of the services that will best meet those needs.

The working groups for each of these new community law services (CLS) are currently securing premises, setting up organisational processes, and recruiting staff.

The Waitakere CLS will be setting up a “shop-front” in a main street in Henderson, and aims to open its doors 9-5 weekdays around June, initially with a co-ordinator, one staff solicitor and a part-time administrator. The centre intends to offer the full range of services with most effort concentrated on law related education and legal assistance.

Waitakere CLS will also offer regular outreach clinics, in collaboration with social service providers using a team of volunteers.

Starting with an administrator and two solicitors, the Baywide CLS will be setting up two premises. One is adjacent to the Citizens Advice Bureau in Tauranga and will be staffed for 40 hours a week, and the other in Whakatane will initially offer services for 20 hours a week with plans for increased hours in early 2006.

It is hoped both premises will be open in June 2005 and there are plans for an extra community worker in the New Year to extend the support in the eastern Bay of Plenty. On offer are a full range of services with focus on law-related education, legal representation and legal assistance.

Both new community law centres are “pilots” and the Agency is supporting the committees of both centres through their establishment phase. We look forward to these centres opening their doors and thank the organisers for their work and wish them every success.

New Listed Provider Application Form

In early June 2005, the Agency will implement a new Listed Provider Application Form.

While the criteria to become a listed provider have not changed, the format of the application form and the information required to be supplied by an applicant has been amended to make the processing of applications more efficient.

Another significant change is the way in which the form may be accessed. It is now only available from the Agency website (www.lsa.govt.nz) in a PDF version, to print off, complete and send in, replacing the previous printed and web versions.

The Agency will continue to accept applications on the old form until 30 August 2005, after which any application not providing sufficient information in line with the new form may be returned to the applicant.

Key changes are:

- All areas of law (or courts) have been incorporated into a single package, which applies to all types of listed providers including lead providers, secondary providers and non-lawyers.
- The application form is longer, but this includes guidance for an applicant in the information required by the Agency. This should reduce the need for the Agency to request additional information.

- All applicants are now required to send in copies of **two recent written references** that specifically address the application, whereas previously only names and contact phone numbers were required.
- Where applicants are asked to demonstrate their involvement in particular proceedings, space is provided in the form. This standardises the format of the information required and indicates the level of detail and the number of examples expected by the Agency.
- The Listing Criteria for lawyers is attached to the form for ease of reference.
- The introduction section guides an applicant to the parts of the form they need to complete.
- The Change of Employment and Litigation Experience Level forms have been included to replace the previously separate forms.
- Also included in the application package is a Glossary of Terms that explains commonly used terms throughout the application form.

If you have any questions regarding the application process or the new application form, please contact the Service Contracts Team at the Agency Head Office on 04 495 5910 or provider@lsa.govt.nz.

Streamlining initiatives

The Agency would like to confirm two initiatives arising from its streamlining project. Streamlining work is ongoing and the Agency is still keen to hear of further suggestions from lawyers.

Conditions on a grant/authorising a charge on property

The Agency will no longer require a legal aid applicant to sign a letter of Acceptance of Conditions on the Grant, and re-sign another one after each amendment, but will require a signed letter to secure the debt. This will be effective from 26 May 2005.

The initial grant, and any letter approving an amendment to the grant, will continue to inform the legally aided person of the conditions on his or her grant.

The Agency will still require a signed letter to be returned with written authorisation to a charge on property or other valuable assets to secure a debt to the Agency.

This authorisation letter, enclosed with the initial grant letter, will be sent to the provider to ensure the applicant signs the authorisation and returns it to the Agency. In requesting providers to assist in this process, the Agency is relying on s68(2) of the Legal Services Act 2000.

If authorisation for a charge to secure a contribution payment is not given, aid may be withdrawn if it is a civil or family case. In a criminal case, where a charge was originally agreed to but no authorisation given, the Agency will need to discuss further with the aided person how he or she intends to pay the contribution.

Revised form 5 – Civil/Family legal aid summary

The Agency can make a speedy and informed decision on new family/civil applications if all the information about a case is provided up front.

To assist the provider with this, and reduce the need for incomplete applications to be returned or delayed, the Agency

has reworded and reformatted the Form 5. The new version (with downloading instructions) is now available on the Agency's website (www.lsa.govt.nz). All civil and family law providers are encouraged to use this new version.

Prospects of success

The first change is to the section where the provider explains to the Agency why aid is sought. This is now a single section allowing the provider to address why taking or defending the case is reasonable, what the proceedings (or legal dispute) will be, followed by a reasoned statement of the client's prospects of success. Providers are reminded that this should be their objective opinion on prospects of success, rather than advocacy for legal aid.

Financial situation

The second change is to allow space for comment on the applicant's financial situation, in relation to eligibility for legal aid and/or the applicant's ability to pay a contribution. For example, comments may be made about special circumstances regarding disposable income, or the 12-month period to be used to assess annual income if there has been a recent change in an applicant's financial circumstances, or special financial commitments.

Seeking funding outside the standard rate/disbursement

The third change is a new section, which allows a provider to explain why additional funding is being sought, if the amount of aid exceeds our standard rates. This section was added following the suggestion of the New Zealand Law Society and will benefit providers who do not write a covering letter.

Confirmation of other providers' experience level

This final change requires the lead provider to identify other providers who may work on the legal aid file and allows their level of experience to be indicated – including secondary providers.

If you have any difficulties in understanding the revised form, please seek assistance from your local Legal Services Agency office.

When the Agency will pay for waiting time

Hearing delayed – all matters

Providers should be aware that it is Agency practice nationally to remunerate waiting time, when the provider is required to attend at a specific time and has to remain in court when the start of the hearing is delayed through no fault of the provider.

Required to be in Court – criminal matters

In addition, some courts have specific practices relating to the provider's attendance for pre-trial matters and stand-by jury trials. In such situations, it is the usual practice of the Agency to remunerate providers for reasonable waiting time when they are required by the Court to be present in court, until their matter is heard.

Callovers in criminal matters are included in preparation time, except for courts in the Auckland area, where a specific payment of 1.5 hours @GHR for each callover is paid.

Because of the specific practices at the Auckland Court, the Agency pays providers at this court for up to an hour at the appropriate GHR for waiting time for pre-trial matters where they are required to be present from the start of the session until their matter is heard, and will also pay at the appropriate GHR for actual stand-by jury trial waiting time when the provider is required to be present.

Providers are reminded that duplication of billing time is not allowed.

Assignment practices and duty solicitor protocols

A review of assignment practices in the Auckland courts was undertaken by the Agency in 2004. This highlighted that assignment operates differently in Auckland courts, with lawyers either phoning in or attending court to pick up assignments.

In all other courts, assignments are made to the solicitors on duty that day. These two options are detailed in the Agency's Assignment Policy.

The Agency considered whether to bring Auckland assignment practices in line with the rest of the country because of its concerns that the current system in Auckland is less transparent and is more difficult to ensure equity of assignment. However, the Agency has decided not to proceed after consultation with the Auckland District Law Society and their expressed view that it and its members have a distinct preference for the status quo.

The review also identified apparent differences in the way the Duty Solicitor Scheme operates in Auckland as opposed to the rest of the country. These differences relate to duty solicitors not performing the full range of duties inherent in their role, that is:

- not attending cells
- instead of attending to non-opposed bail arrests (which

are generally remanded) as duty solicitor, expecting immediate assignment

- not standing up in court for people they have interviewed and taken instruction from

- not attending status and defended bail hearings.

As a result of this, the Agency has decided to expand the current protocols to provide more explicit expectations, and so ensure consistency and a minimum standard of service to clients and the courts.

The Agency is currently consulting with the New Zealand Law Society, the Auckland District Law Society and the Criminal Bar Association on these expanded protocols and will undertake wider consultation after that.

The impact of the expanded protocols on the operation of the Duty Solicitor Scheme in places other than Auckland is not thought to be significant.

If you have any queries regarding this please write, email or telephone Graham Metcalfe, Manager Northern Region (09) 488 5440, Andrew Harbidge, Operations Adviser (04) 495 5910 or Robyn Nicholas, Manager Grants (04) 495 5910.

E-lodgement feasibility

As part of the Legal Aid Improvement Programme the Agency has undertaken a feasibility study on the introduction of electronic lodgement (e-lodgement) of legal aid applications, amendments and claims.

This has been completed and the Agency's Board has agreed in principle to trialling this initiative. It is expected to result in acceleration of the granting and payment process and also a reduction in overall effort associated with applying for and deciding on legal aid.

However, with the work the Agency has to undertake over the next 18 months to implement changes arising from the Government's review of eligibility for legal aid, it has been decided to put further development and trialling on hold until the Agency has sufficient capacity to manage the project.

When this initiative is picked up again as part of the Agency's work programme a more extensive consultation exercise will be undertaken with providers before proceeding to a trial.

PDS assignment

Since the opening of the Public Defence Service Pilot (PDS) on 3 May 2004, the PDS has undertaken cases in all four criminal proceedings categories, with the vast majority of cases being criminal proceedings categories one and two.

The PDS has undertaken a total of 1168 assignments in the Auckland Court and 1047 in the Manukau Court for the period 3 May 2004 to 29 April 2005. This represents 25% of all available assignments at the Auckland Court and 27% of all available assignments at the Manukau Court, the balance being taken up by private providers.

A staged approach to caseload growth for the PDS was implemented, starting at 25% of all assignments for the period from

1 May 2004 to 31 July 2004. This increased to 28% from 1 August 2004 and to 32% from 1 November 2004. From 1 May 2005, the percentage of cases able to be assigned to the PDS increased to 33%.

Cases assigned to the PDS are comprised of preferred lawyer assignments and up to 50% of assignments available "on rotation", based on the accumulated total number of assignments over time. When "on rotation" assignments to the PDS have been at less than 50%, additional assignments have been made at the Auckland Court at a rate of two to the PDS and one to private providers in order to restore the cumulative "on rotation" assignment percentage. The additional assignments are in accordance with the PDS Assignment Guidelines.

Details regarding the assignment numbers and percentages can be found on the Agency website www.lsa.govt.nz.

Reconsideration and/or review - reminder

Legally aided persons, applicants for legal aid and providers can apply to the Agency for a reconsideration, or to the Legal Aid Review Panel for a review, if they are dissatisfied with a decision made by the Agency. Either or both options may be used.

Reconsideration by the Agency

Section 29 of the Legal Services Act allows for an aided person or an applicant for legal aid to request a reconsideration of a decision that has been made by the Agency. In addition, it is Agency policy to allow providers to request a reconsideration.

A grants officer, other than the one who made the original decision, or a debt recoveries officer, will reconsider the decision. The staff member responsible for the reconsideration may take into account any new or additional information supplied by the person applying for the reconsideration.

The reconsideration process usually takes around 15 working days to complete.

Review by the Legal Aid Review Panel

Section 54 of the Act provides that an aided person or an applicant for legal aid may apply to the Legal Aid Review Panel

(LARP) for a review of an Agency decision on the grounds that the Agency's decision is "manifestly unreasonable" or "wrong in law". A listed provider may seek a review on a remuneration decision on the same grounds.

Applicants for legal aid, legally aided persons and providers can apply to LARP for a review, either before or after seeking a reconsideration by the Agency.

However, if new or additional information is available, which the Agency has not seen, it may be preferable to pursue a reconsideration by the Agency, as LARP will refer the matter back to the Agency to reconsider, if information is supplied to the Panel that the Agency did not have when making the original decision.

The Panel is an independent body set up to review decisions of the Agency with its secretariat based in Auckland. Applications to LARP must be made within 20 working days. However, the Convenor of LARP may on application allow an extension.

A review is usually completed in 8 weeks.

Reappointment of members to Legal Aid Review Panel

The Legal Aid Review Panel (LARP) is established under section 62 of the Legal Services Act 2000 (Act). Members are appointed by the Attorney-General for a specified term of not more than 3 years.

Pursuant to section 62(2) of the Act, the Attorney-General has appointed the following people to be members of LARP for a period of three years on and from 19 June 2005:

Ruth Mary Buddicom, Barrister of Christchurch

Lee Lee Heah, Barrister of Christchurch

Leigh Catherine Langridge, Barrister of Auckland

Margaret Edith Joan Marshall, Disputes Tribunal Referee of Wellington

David James More, Barrister of Dunedin

Andrew Grant Ogilvie, Legal Agent of Wellington

Debra Kay Smallholme, Disputes Tribunal Referee of Auckland

Tania Georgina Tetitaha, Solicitor of Kerikeri

Gregory Ralph Woodcock, Psychologist of Auckland

Court of Appeal and Supreme Court - waiver and refund of fees

The Ministry of Justice requires that applications by legally aided persons to have their court fees waived or refunded must include evidence of the grant and continuing entitlement. In general, the letter from the Agency to the legally aided person advising that aid has been granted is sufficient for this purpose.

For appeals to the Court of Appeal and the Supreme Court, it is recognised that this letter contains more information than is necessary to assess a fees waiver application.

From 9 May 2005, the Agency will automatically issue a Grant

Confirmation letter to the provider with each grant of legal aid for appeals to the Court of Appeal and the Supreme Court.

The Grants Confirmation letter is addressed to the Registrar of the Court and confirms the legally aided person's name, the proceedings for which aid was granted and the name of the provider.

Please note that the Grants Confirmation letter will not be issued in respect of civil proceedings in other courts, tribunals or authorities.

LARP update

Applications for review by the Legal Aid Review Panel (LARP) comprised 0.1% of all legal aid applications, amendments and claims received by the Agency during April 2005.

Of the 28 decisions made by the Panel in that period, 11 (39%) upheld the Agency decision, 6 (21%) reversed the Agency decision, 1 (4%) modified the Agency decision, 9 (32%) directed the Agency to reconsider the decision and 1 (4%) was for other reasons (the Panel had no jurisdiction to review).

Of the decisions finalised in April, 26 (93%) were on application from the legally aided person and the remainder were applications from providers. 14 (50%) of the reviews related to an Agency decision to decline aid, 11 (39%) related to an Agency decision on the level of the grant of aid, 1 (4%) was related to an Agency decision about a contribution or charge, and 2 (7%) were related to an Agency decision to withdraw aid.

Appeals

The Finn & Kelly appeal, in which the Agency was the respondent, was heard in December (Kelly v Legal Services Agency (12 December 2004) HC New Plymouth, CIV 2004-442-537, Williams J). The appeal was unsuccessful.

The appeal involved two decisions on the same issue in which the Agency declined to approve aid for disbursements for a second opinion on a psychologist report provided by the Department of Corrections for a Parole Board hearing. LARP upheld this decision.

The Court found in the LARP decision that on the material presented to LARP the Agency's decision was not shown to be manifestly unreasonable, and therefore no error of law could

be demonstrated to justify the Court's intervention in the LARP decision.

Also, it could not be shown that either the Agency or LARP routinely rejected such applications, and there was no question on equality of arms under the NZ Bill of Rights Act 1990 demonstrated. In addition the judgment found several procedural errors related to filing the appeal.

In the Chatha appeal the Agency was the respondent (Chatha v Legal Services Agency (14 April 2005) HC Palmerston North, CIV 2004-454-888, Ronald Young J). In this case, Mr Chatha was declined aid and LARP upheld the decision.

The points of appeal were that (i) the Panel erred in applying prospects of success and overlooked/did not take into account the supporting evidence; and (ii) the Panel erred in applying the objective test of 'manifestly unreasonable' regarding the Agency's decision. The appeal was allowed in favour of Mr Chatha because it was found that the Agency failed to take account of a relevant matter.

The Brown appeal, in which the Agency was appellant was filed in December 2003, heard in August 2004 and judgment received in April 2005 (Legal Services Agency v Brown (7 April 2005) HC Wellington, CIV 2003-404-7065, Miller J). The points of the appeal were whether, when deciding on what weight is appropriately given to a factor, LARP can substitute its view for that of the Agency and whether brief reasons are required to be given by the LARP for its decisions. The appeal to have the LARP decision reversed was unsuccessful. The judgment is complex and should read in full.

Care of Children Act 2004

The Agency is preparing for the implementation of the Care of Children Act 2004 on 1 July 2005. The New Zealand Law Society has been consulted on proposed changes to the Steps to reflect the provisions of the Act. The changes to the Steps will be finalised this month.

All Provider Manual holders will receive a Manual update incorporating relevant changes to the Steps during the week of Monday 20 June 2005. This information will also be available on the Agency's website from 1 July 2005.

Further information and a summary of changes to the Steps will be provided in the July edition of LSA News.

