

Regulatory Impact Statement

Executive summary

The review of the legal aid system chaired by Dame Margaret Bazley found that the legal aid system is facing serious challenges which threaten its viability into the future. Demand for legal aid is expected to increase markedly, with implications for expenditure. The review's 86 recommendations amount to an overhaul of the legal aid system.

The issues raised in the report are serious. There has also been a resulting loss of public confidence in the legal aid system, and the uncertainty created by the report will give rise to risk of reduced service levels by those working and providing services in the legal aid system. Immediate and comprehensive action is therefore required to reduce the risk of widespread service failure and improve public confidence in the legal aid system.

Responses are proposed to review recommendations relating to assessing eligibility, the procurement and provision of legal aid services, accreditation of legal aid providers and machinery of government. Legislation will be introduced in 2010 to amend the Act to provide for:

- disestablishing the Legal Services Agency (LSA) and moving its functions to the Ministry of Justice
- disestablishing the Legal Aid Review Panel (LARP) and establishing a new tribunal within the Ministry of Justice to carry out reviews of granting decisions
- a streamlined eligibility assessment process for low cost criminal cases
- the flexibility to use multiple models of service delivery contracting for and providing legal aid services
- an improved accreditation process which ensures the professional and administrative competence of providers of legal aid services.

Once legislation is in place the procurement reforms will be implemented progressively, starting with those that involve the lowest risk. Remaining recommendations require further analysis and will be addressed in a paper to Cabinet in March 2010.

Adequacy statement

The Ministry of Justice prepared this Regulatory Impact Statement and considers it to be adequate.

Status quo and Problem

Demand for legal aid is forecast to increase markedly, with implications for expenditure. The increases are primarily in the criminal and Waitangi jurisdictions.

Against this backdrop, the review of the legal aid system chaired by Dame Margaret Bazley found that the legal aid system is facing serious challenges which threaten its viability into the future. It is failing on a system-wide level. The review's 86 recommendations amount to a system overhaul. The review also found that the legal aid system is perceived by many as being a second-rate service, and its clients deserving of a lesser standard of service. The review found that this is unacceptable, given that many of the clients of the legal aid system

are already disadvantaged and at risk of social exclusion. Specific problems relating to the quality and provision of legal aid services include:

- legislative impediments which contribute to market inefficiencies
- variable quality legal aid services, including a number of lawyers who are poor performers, and some who are alleged to be acting in a corrupt way
- a lack of mechanisms to ensure quality services are provided, including problems with role clarity by the LSA and the New Zealand Law Society (NZLS).

The Legal Aid Review Panel (LARP) is situated within the LSA and is funded by the LSA. This arrangement has led to tension between the two functions and the Bazley review found that the review function should be moved to the tribunals division of the Ministry of Justice.

Public confidence in the legal aid system has been severely compromised as a result of the review and due to the longstanding issues identified in the review report. As well, those providing legal aid services, including LSA staff and legal aid lawyers, are likely to be at risk of providing reduced levels of service because of the uncertainty created by the review. This will have a negative impact on the users of legal aid services, and will likely impact significantly on the efficient operation of the courts. Immediate and comprehensive action is therefore required to reduce the risk of widespread service failure and improve public confidence in the legal aid system.

Objectives

The primary objectives applicable to the administrative arrangements for the legal aid system are the ability to set the direction for the legal aid system while also preserving the independence of granting functions, ability to work with other justice sector agencies towards joint outcomes, operational effectiveness, critical mass and capability to perform the high-risk functions associated with the legal aid scheme.

The primary policy objective applicable to the placement of LARP is the avoidance of actual and perceived conflicts of interest. The objectives applicable to improving LARP's operational functions are efficiency, effectiveness and protecting clients' rights.

The objectives in introducing the eligibility assessment process are administrative simplicity and cost effectiveness. The objectives in introducing flexibility into the way legal aid services are contracted and provided are access to justice, service quality, cost containment, support for the court system, and a sustainable and resilient legal aid system. Underlying all proposals is the objective of achieving enhanced access to justice.

Alternative options

The primary alternative option to the placement of the LSA was to continue the status quo, but improve its capability and sustainability. While this option allowed for the independence of granting functions, it was weaker in fostering sector leadership in the LSA in the form of direction-setting and being able to work with other justice sector agencies. A major shortcoming of this option is that the organisation is likely to suffer from a lack of the capability needed to implement the major changes recommended by the Bazley report.

Further options considered but rejected were to create a new stand-alone agency, vest the functions in another government agency such as in an operational division of the Ministry of Social Development, or contract the functions to the private sector.

Options for the placement and governance of LARP are tied to options for the placement and form of the LSA. However, the Bazley review found that whether or not the functions of the LSA are moved to the Ministry of Justice, the review function should be shifted to the Ministry's tribunals division.

To improve contracting and service provision, other options were considered including the status quo. However, the Bazley report raised quality and administrative issues and called for change and a new and flexible procurement model. Options are discussed below.

A universal system of public provision of legal aid services, as implemented in some Auckland courts, could generate significant economies of scale and be a low cost option. Public provision has, however, only been tested in large communities and in criminal cases. As well, universal public provision creates a risk of an inefficient bureaucracy over time, due to the absence of any competition.

A capitation model, whereby the provider agrees to provide the required services to a pre-defined population, was rejected as capitation contracts are typically associated with significant service quality and quality control issues. Further, the data and actuarial models necessary to calculate an appropriate capitation rate are not available at this time.

Tendering for services was considered but assumes there is excess capacity in the market and an associated willingness to reduce hourly rates for service, neither of which is likely to hold in practice. Limiting provider numbers was considered as it allows for more rigorous scrutiny of service delivery via audit or other measures. While efficiencies may result, reduced costs and improved service quality are not necessarily achieved.

Preferred option

The preferred option for administrative arrangements is that the LSA is disestablished and the Chief Executive of the Ministry of Justice assumes responsibility for the administration of the legal aid system. This is likely to include responsibility for functions such as setting the direction for the legal aid system, developing strategic and operational policy, monitoring unmet legal need, providing services such as legal education and information, planning for and trialling new methods of service delivery, and providing support services such as administering the legal aid debt repayment scheme.

A statutory officer, the Legal Services Commissioner, will be appointed by the Chief Executive to be responsible for three functions that require independent decision-making: granting legal aid to individuals, determining repayment requirements and issues related to the management of cases in the Public Defence Service (PDS).

Sections 91 to 115 of the Legal Services Act 2000 address the Legal Services Agency, and its Public Advisory Committee. These sections will be repealed and the Act amended to enable the move to the Ministry of Justice.

The preferred option in relation to LARP is to disestablish LARP and transfer its functions to the tribunals division of the Ministry of Justice in the form of a new tribunal, the Legal Aid Tribunal. The placement in the tribunals division will ensure that the administration of LARP is independent of the granting functions of the statutory officer within the Ministry. Sections 54 to 64 of the Legal Services Act 2000 relate to LARP and will be repealed. The Act will be amended to enable the proposed changes. The proposed changes will not impact noticeably on claimants, and if anything, will enhance access to justice.

The preferred option for application assessment is to endorse the Bazley review's recommendation to introduce a streamlined eligibility scheme in the criminal jurisdiction

only. Specifically, applications for legal aid grants where the cost is below a certain threshold would receive a basic assessment (such as providing evidence of being on a benefit or having a current Community Services Card) for eligibility.

This scheme is preferred as it has the potential to significantly reduce administration costs. Grants for the lowest tier of criminal legal aid comprise 63 percent of all grants and 89 percent of criminal grants. The scheme will align with changes proposed in the Criminal Procedure (Simplification) project, as greater use can be made of fixed fees to encourage an efficient progression of cases. Streamlining eligibility will reduce compliance costs as claimants using the scheme will provide a greatly reduced level of application information.

It is proposed that the procurement agency have the flexibility to purchase or provide services according to the market conditions, including being able to implement at a particular location any of the following models. These are:

1. continuing the current system of contracting to individual providers for individual cases only for more serious and complex cases that require more experienced lawyers and that are subject to a greater level of contract management and oversight
2. funding groupings of lawyers to contract for multiple low to middle level cases (and higher level cases if the lawyers are suitably accredited). Groupings would be headed by a senior experienced lawyer who is subject to a higher level of accreditation, and who would be responsible for ensuring that those providing services within their contract are appropriately qualified and accredited and able to access suitable 'infrastructure', such as offices and office support
3. expanding the current PDS provision to encompass the courts in the main metropolitan areas (Auckland, Hamilton, Wellington and Christchurch) and to cover family and civil law in addition to the criminal cases that are currently delivered through the PDS. Such services could also be available in locations where the market is not able to provide services to the required quality or at an acceptable cost.

The current procurement model involves high compliance costs for those providing legal aid services, and can result in some of those receiving services to wait for significant periods of time before a case can be progressed. The models outlined can be achieved with a lower compliance cost for those, and can reduce the time some legal aid users wait for their case to be progressed.

Work is underway to review the methodology for the forecast demand for legal aid (which determines the baseline, because legal aid is a demand-driven fund) and if necessary revise the forecast. A review is underway of the baseline forecast for legal aid demand, and the results will be addressed as part of Budget 2010.

Costs and savings arising from distinct policy changes have been estimated over six years, and hence are considered to apply regardless of the level of forecast spend. Estimates are preliminary only. There has been no opportunity to explore the proposals with the Legal Services Agency. Net operational costs over six years of all proposals are expected to be \$11.53 million. Within this, the streamlined eligibility scheme is expected to generate significant savings of \$7.51 million, but this saving will be more than offset by the costs of transferring administrative functions to the Ministry of Justice, estimated to be \$17.47 million.

Capital costs are estimated to be \$8.01 million, incurred in the first two years and are spread amongst the transfer of administrative functions, establishing the Legal Aid Tribunal, the streamlined eligibility scheme and expansion of the PDS.

While it is intended that efficiencies be achieved as part of the transfer of responsibility for legal aid, the Legal Services Agency is currently forecasting a deficit of \$1.75 million for 2008/09 (about nine percent of its operating budget of \$20.4 million). This means that substantial efficiencies will need to be achieved in order to reach break-even point, and making further savings less achievable.

Benefits of the proposals include:

- over the long term, savings in legal aid expenditure and administrative costs
- improved public confidence in the legal aid system by addressing the issues raised in the Bazley report
- improved access to justice for legal aid users through:
 - improved quality of legal services
 - improved timeliness of case progression
 - a less confusing and streamlined approach to eligibility assessment for low cost criminal cases, which make up a significant proportion of the total legal aid system
- greater links between the legal aid system and the wider justice system.

Risks

Several risks have been identified in relation to disestablishing the LSA and moving its functions to the Ministry of Justice. The independence of granting decisions under this model may be questioned by the legal profession and some members of the public. This risk will be mitigated by the establishment of a statutory officer (the Legal Services Commissioner), accurate communications as to the independence of the functions of the statutory officer, and the continued existence of an independent appeal body to review decisions of the statutory officer.

It is common in public sector restructurings that a proportion of affected staff, often key employees, leave to pursue new career opportunities. A change management team situated within the Ministry of Justice will assist the LSA in providing leadership for LSA staff in order to mitigate this risk.

The Bazley report recommends a vastly different approach to Crown procurement of legal services, which will require a major culture change amongst service providers. The transfer of administrative arrangements creates potential risks to managing this transition. Significant management will be necessary to make this change effectively and to maintain access to justice.

Streamlining eligibility assessment for the bulk of low cost criminal cases will achieve significant administrative savings. However, it will increase the risk that applicants who have the means to pay for legal services are funded through legal aid (albeit only for small amounts). This risk can be minimised by operational design and by enhancing the auditing and monitoring function, however the risk cannot be removed entirely.

Because many of the models proposed in the Bazley report have not been tested, an incremental approach to implementing the recommendations is proposed. This will allow

lower risk and less costly proposals to be implemented first, reducing the forecast short term expenditure increases.

Implementation and review

These proposals will allow work to begin on drafting legislative amendments to implement many of the key recommendations outlined in the Bazley report. Prior to the legislation being passed it is possible to undertake some change to improve the legal aid system, such as continuing expansion of the PDS, improving accreditation processes, and improving information for legal aid clients. Priorities for this period will be the minimisation of disruption to the delivery of legal aid services and the continued coordination of the various aspects of the legal aid system ready for the formal transition to the Ministry of Justice and the establishment of a statutory officer.

Consultation

Consultation was undertaken as part of the review conducted by Dame Margaret Bazley. Submissions were received from the Law Society, members of the legal profession, community law centres and others. These submissions related to the areas covered by the proposals, but did not address the specific proposals.

Because of the need for immediate action following the release of the Bazley report, it has not been possible to consult on the specific proposals.