

Regulatory Impact Statement

Amending the Legal Services (Quality Assurance) Regulations

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice.

It provides an analysis of options to improve the operation of the Legal Services (Quality Assurance) Regulations 2011. The Regulations specify entry criteria that applicants (lawyers) must meet to be approved as legal aid providers and provide for procedures for making decisions on approval applications. The Regulations are made under the Legal Services Act 2011.

Discussions with lawyers have identified that the current threshold for experience required to be a duty lawyer are too high, making it uneconomical to use the duty lawyer service as an effective way for junior lawyers to gain practical criminal law experience.

The options considered are constrained by provisions in the Act, which require the Secretary for Justice to prescribe the criteria that must be met by a person applying for approval to provide specified legal services, and bar those who are not approved by the Secretary from providing specified legal services.

The options considered are based on advice and comments received from key stakeholders of the legal aid system, such as legal representative bodies and individual lawyers. There is overall support for this reform from the New Zealand Law Society and other legal representative bodies.

The options considered will not impose substantial additional costs on businesses; impair private property rights, market competition, or incentives on businesses to innovate or invest; or override fundamental common law principles.

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13 May 2013

Background

1. The Legal Services (Quality Assurance) Regulations 2011 (the Regulations), made under the Legal Services Act 2011 (the Act), specify the entry criteria that lawyers must meet to be approved as legal aid providers. The Regulations came into force on 1 July 2011. Since this legislation was enacted, the Ministry of Justice (the Ministry) has monitored the procedures established for any required improvements to better implement the Government's commitment to an effective and efficient legal aid scheme.
2. The Ministry has identified certain aspects of the approval criteria and process which we believe can be improved. The majority of the proposed changes to the criteria and process are minor and administrative changes to streamline existing processes so are not discussed here. The change likely to have a wider impact is a reassessment of the experience threshold required to perform duty lawyer services.
3. A duty lawyer (also called a duty solicitor) is a lawyer on duty at the courts. They provide free legal assistance and preliminary advice to people who have been charged with an offence, and who do not have their own lawyer.
4. Duty lawyers are paid from funds appropriated for the purpose by the Ministry. They are required to complete a daily invoice when they provide duty lawyer services. Duty lawyers are paid at a standard rate of \$88 per hour (GST excl.) regardless of level of experience.

Legislative framework

5. Under the Act, the Secretary for Justice is given a broad power to specify certain legal services to which quality assurance systems apply. Specific details of the requirements for potential service providers are set out in the Regulations. These include the experience requirements for approval as a duty lawyer. The regulated requirements are that the applicant must have at least 12 months' recent experience in criminal law practice, and must have appeared as counsel with substantive and active involvement in at least 3 defended hearings.

Market for duty lawyers

6. Duty lawyers operate in District Courts across New Zealand. The duty lawyer service is intended to ensure that sufficient duty lawyers are available at each District Court for the purpose of assisting, advising and representing unrepresented defendants charged with an offence. The duty lawyer service is administered by the Public Defence Service (the PDS), for courts where the PDS is in place, or by the local legal aid office, for courts where there is no PDS presence.
7. The level of assistance which duty lawyers provide is determined by operational guidelines, published by the Ministry. Duty lawyers serve a substantially different role in the criminal justice system compared to lawyers who represent their clients, focusing on providing initial advice to those defendants who arrive at court without representation and assisting them in completing applications for legal aid. The degree of legal expertise and experience required to perform duty lawyer services is, in most circumstances, less than that required to undertake more complex criminal work.
8. The level of demand for duty lawyer services is variable, and partially dependent on the degree to which these needs are not met by legal aid lawyers or the private bar.

Status quo

- There are currently 705 duty lawyers approved under the Regulations – approximately 6% of the 11,871 lawyers certified to practice in New Zealand, and 21% of the 3,394 lawyers approved as lead providers of legal aid.
- These duty lawyers are grouped into three levels of experience, based on their number of years of litigation experience. There are also 5 providers who are approved as supervised, rather than lead, providers (ie, they work under a lead provider, rather than on their own account).

Experience level	1 (<4 yrs)	2 (4-9 yrs)	3 (>9 yrs)	Supervised
Providers approved	62 (9%)	165 (23%)	473 (65%)	5 (1%)

- This indicates that, despite the relative simplicity of duty lawyer work in comparison to wider criminal practice, only 9% of current duty lawyers have less than 4 years criminal practice.
- The vast majority of duty lawyers (97%) are also approved to undertake criminal legal aid work. The highest complexity of criminal cases each duty lawyer is approved to undertake provides a useful proxy for their overall criminal experience.

Criminal approval	PC 1	PC 2	PC 3	PC 4	Supervised
Providers approved	297 (43%)	142 (20%)	79 (11%)	171 (25%)	4 (1%)

Note: "PC" stands for Proceedings Category – the highest level of case for which a lawyer is approved. In general the higher the PC number, the more legally complex a case is.

Problem definition

- Discussions with the PDS and other lawyers have identified that the current threshold for experience required to be a duty lawyer is too high. These lawyers have indicated that the current requirements make it uneconomical for them to use the duty lawyer service as an effective way for junior lawyers to gain practical criminal law experience.
- Given the relative simplicity of duty lawyer work noted above, it makes sense to adjust the make-up of the duty lawyer market towards having a higher proportion of junior lawyers. Experienced lawyers' time could be better spent on more complex legal work.
- Our discussions with lawyers indicate that there is interest from the legal profession in moving towards this more cost-effective allocation of resources, but that the need for senior lawyers to supervise junior lawyers until they meet the threshold for experience makes it difficult to justify under the current structure.
- In the absence of regulatory intervention, it is expected that the structure of the duty lawyer market will remain roughly the same. Any change would be reliant on practice by individual providers and law firms, and therefore localised in implementation.

Objectives

- The objective of the Act is to promote access to justice by establishing a system that provides legal services to people of insufficient means, and delivers those services in the most effective and efficient manner.

18. The objective of the legal aid quality assurance framework is to ensure legal aid clients receive quality and competent legal aid services and can have confidence in the legal aid system.
19. The objective of the duty lawyer service is to ensure that a sufficient number of lawyers are available at each District Court for the purpose of assisting, advising and representing unrepresented defendants charged with an offence.
20. The options have been assessed against these objectives.

Regulatory impact analysis

21. All three of the options discussed below:
 - meet the Act's overarching objective of providing legal services to people of insufficient means
 - meet the duty lawyer service's objective of ensuring that sufficient lawyers are available at each District Court, and
 - represent a more efficient allocation of New Zealand's limited legal expertise than does the status quo.
22. Where the options differ is the degree to which they ensure:
 - the efficiency of legal services, and
 - the effectiveness of legal services (including ensuring the quality and competence of services, and allowing clients to have confidence in the system).

Option A: Encourage shift amongst providers

23. The Ministry could minimise adjustments to the regulatory framework for duty lawyer services by letting legal aid lawyers and legal representative bodies know that we consider acting as a duty lawyer a good way for junior lawyers to get some experience in court. Over time this will likely lead towards more junior lawyers picking up this work.
24. This option could be further supported by providing incentives for young lawyers to take up this work. For example the New Zealand Law Society (the Society) could be encouraged to advertise their course of training for duty lawyers as a good way for junior lawyers to get practical training in criminal law.
25. This is not a particularly efficient mechanism to effect this change, as it relies on individual uptake by lawyers. Larger firms may move in this direction, although as noted above the PDS have noted that the current requirements make such a strategy uneconomical.
26. This option is not preferred.

Option B: Adjust experience threshold

27. The Ministry could adjust the regulatory threshold for duty lawyer experience, requiring six months recent criminal law experience, and substantial and active involvement in the four types of legal work most often required of duty lawyers:
 - trials
 - pre-trial hearings

- hearings for opposed bail applications, and
 - sentencing hearings where pleas in mitigation are made
28. This would be a lower threshold than the current requirement of 12 months recent criminal law experience, and substantial and active involvement in at least 3 defended hearings. This change would place the level of experience required to become a duty lawyer below that required to undertake PC 1 criminal proceedings as a legal aid lawyer. This would make working as a duty lawyer a natural precursor to such work.
 29. Amending the relevant regulations is the most efficient lever to effect this change, as it ensures national consistency and provides certainty of practice to lawyers, the Ministry and legal aid clients. Reducing the threshold for duty lawyer experience will allow junior lawyers to undertake duty lawyer work. This will impact on lawyers, individuals represented by duty lawyers, the judiciary and Ministry staff.
 30. This option ensures the efficiency of legal aid services, by allowing more junior lawyers to pick up work which is comparatively simple, and prepares them well for criminal practice. This will free up the time of more senior lawyers to work on complex cases, and will build the overall competency of the legal profession.
 31. This option will likely reduce the quality and depth of legal advice provided by duty lawyers. However, as discussed above, duty lawyer work does not always require the level of legal expertise and experience currently assigned to it. A reduction in the overall legal expertise of duty lawyers should not cause an equivalent reduction in the effectiveness of duty lawyer services.
 32. Any reduction in effectiveness which does eventuate will primarily impact on individuals represented by duty lawyers, who may receive a lesser service than they would under the current system. There is a risk that less experienced lawyers will be more likely to make mistakes, which could impact on court time and have flow-on costs for the justice system. Regardless of the overall impact on duty lawyer service's effectiveness, the judiciary and court staff will need to adjust to working with a higher proportion of less experienced duty lawyers.
 33. Adjusting the experience threshold to enable junior lawyers to undertake duty lawyer work is expected to be fiscally neutral. As noted above duty lawyers are paid at a standard rate regardless of level of experience.

Option C: Adjust experience threshold and temper change with clarified requirements

34. The Ministry could lower the regulatory threshold for duty lawyer experience as noted in Option B. The lowering of this threshold could, however, be tempered by placing in regulation a mandatory requirement that prospective duty lawyers complete the Society's duty lawyer training course. This will ensure that the legal skills and training most relevant to working as a duty lawyer are maintained.
35. Making completion of the duty lawyer course compulsory will have a fiscal cost for prospective duty lawyers (the course currently costs \$450). However, the marginal effect of making the course mandatory will be relatively low, as most duty lawyers currently complete this course.
36. Completion of the duty lawyer training course could be made an incentive as well as a requirement, by encouraging the Society to consider the duty lawyer training course as

counting towards the requirements of their proposed mandatory Continuing Legal Education scheme.

37. As noted above, regulatory amendment is the most efficient lever to effect a shift in the duty lawyer market. This option has the additional benefit of providing firmer guidance and a clearer path for junior lawyers to follow in getting the requisite approval to act as a duty lawyer.
38. This is the Ministry's preferred option.

Consultation

39. The Ministry consulted with the New Zealand Law Society; the Auckland District Law Society; the New Zealand Bar Association; and the Criminal Bar Association of New Zealand on:
 - the policy proposal to move towards more junior lawyers being involved in the provision of duty lawyer services, and
 - the specific regulatory changes involved in implementing the preferred option.
40. Key feedback received was that if completion of the Society's duty lawyer training course was made compulsory, there needed to be the ability to exempt experienced lawyers from this requirement.
41. To address this concern, the regulations will be amended to allow the Secretary for Justice to exempt experienced lawyers from this requirement by written notice. This will ensure that the course requirement applies to most lawyers, but allow exemptions for those for whom it serves no practical purpose.

Conclusions and recommendations

42. The Ministry's preferred option is to lower the regulatory threshold for duty lawyer experience, requiring six months recent criminal law experience, and substantial and active involvement in the four types of legal work most often required of duty lawyers.
43. This will ensure the efficiency of legal aid services, by allowing more junior lawyers to pick up work which is comparatively simple, and prepares them well for criminal practice. This will free up the time of more senior lawyers to work on complex cases, and will build the overall competency of the legal profession.
44. The lowered threshold will be tempered by placing in regulation an additional requirement that prospective duty lawyers complete the New Zealand Law Society's duty lawyer training course, unless exempted from this requirement by the Secretary for Justice. This will ensure that the legal skills and training most relevant to working as a duty lawyer are maintained.
45. This option is preferred over the others examined, as it provides the best balance of ensuring:
 - the efficiency of legal services (through a more efficient distribution of New Zealand's limited legal expertise), and
 - the effectiveness of legal services (through maintaining the quality and competence of duty lawyers).

Implementation

46. The preferred option will be implemented through amendments to the Legal Services (Quality Assurance) Regulations 2011. The making of the Legal Services (Quality Assurance) Amendment Regulations 2013 will be notified in the *New Zealand Gazette*. The Regulations are intended to come into force on 1 July 2013.

Monitoring, evaluation and review

47. The Ministry will continue to monitor the operation of the amended Regulations as part of its standard practice.