

Regulatory Impact Statement

Legal Services (Quality Assurance) Amendment Regulations 2012 and Legal Services Amendment Regulations 2012

Agency Disclosure Statement

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

It analyses options to simplify the legal aid approvals process and encourage talented lawyers into the legal aid system. It also assesses options to reduce the administrative compliance burden on lawyers when applying for approval or claiming payment for services.

The choices considered in this RIS are constrained by the requirement in the Legal Services Act 2011 that Regulations set the legal aid approval criteria and time frames for claiming for payments. The options and extent of consultation are further constrained by the expectation that the issues are addressed promptly.

The analysis is based on feedback on the new quality system and invoicing requirements from the New Zealand Law Society (the regulator of the legal profession) and other legal representative bodies, current legal aid lawyers and lawyers considering applying to be approved to be legal aid providers.

There is general support for this reform from the New Zealand Law Society and other legal representative bodies.

The policy options identified will not:

- impair private property rights, market competition, or the incentives on businesses to innovate and invest, or
- override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines).

The preferred option will not have a negative impact on either current and prospective legal aid providers, or recipients of legal aid.

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4 May 2012

Status quo and problem definition

Status quo

The Legal Services Act 2011 provides that regulations may be made that prescribe criteria that must be met by a person applying for approval as a legal aid provider. The Legal Services (Quality Assurance) Regulations 2011 set out the entry criteria that lawyers must meet to be approved as legal aid providers.

The Act states that the time frame for claiming for payment for legal aid services or specified legal services is the time frame set by regulations, unless the Secretary for Justice (in relation to an individual matter) specifies that a different time frame applies. The Legal Services Regulations 2011 provide a time frame of three months from the day the services are provided, or in the case of a fixed fee arrangement, completed.

Problem definition

Legal Services (Quality Assurance) Regulations 2011

The current entry requirements are very prescriptive. If an applicant does not meet any one of the requirements, there is no flexibility to approve an otherwise meritorious application. Specific circumstances include:

- the requirement that applicants provide work samples. We have received feedback from some lawyers that because of the extra administrative burden this requirement has created in terms of time and effort, they have chosen not to reapply;
- the requirement that applicants must provide a minimum of two references from referees having direct experience and knowledge of the applicant's skill in the area of law to which the application relates; and
- the requirement that providers have recent experience (experience within the last five years). This could potentially discriminate against some (e.g. experienced women lawyers re-entering the workforce following parental leave).

The Ministry has received negative feedback from lawyers and legal organisations about the current entry requirements. All lawyers seeking to provide legal aid must go through the approval process; however, it is likely that a very small proportion (perhaps dozens) would fall into the category of not meeting any one of the requirement but being otherwise meritorious.

Legal Services Regulations 2011

The requirement to invoice within three months of the service being provided is forcing lawyers to bill for small amounts and has created an increased volume of invoices. This is putting unnecessary administrative pressure on both legal aid providers and the Ministry of Justice. The three-month period also creates an unnecessary billing situation on files where a trial date may be a year away and there may be little action over the three-month period. Specific circumstances include a lawyer submitting an invoice at the end of a teleconference because of the possibility of no further work on the file for three months, and a delay in billing would have resulted in that work being written off.

The Ministry has received negative feedback from lawyers and lawyer organisations about the three-month invoicing requirement. The requirement applies to all legal aid providers (1972 providers as at 31 March 2012).

Objectives

The objective of the proposed amendments to the Legal Services (Quality Assurance) Regulations is to simplify and streamline the legal aid approvals process and encourage talented, experienced lawyers into the system. The objective of the proposed amendments to the Legal Services Regulations 2011 is to reduce the administrative compliance burden on lawyers, while still enabling the Ministry to manage expenditure.

Regulatory impact analysis

Legal Services (Quality Assurance) Regulations 2011

Option 1: Status Quo

This option leaves the Regulations unchanged and relies on operational measures, such as:

- streamlining the legal aid approvals process through changes in legal aid operational policies; and
- possible alignment of legal aid approval requirements with the New Zealand Law Society's ongoing work on implementing a Continuing Professional Development framework for lawyers.

These options go some way to addressing lawyers' concerns about the overly cumbersome nature of the current framework. For example, the application process for applying for re-approvals or approvals in additional areas is likely to be considerably shorter. However, they do not provide flexibility to approve otherwise meritorious applications.

Option 2: Amend the Regulations to enable the Secretary for Justice to waive the current requirements and be satisfied by other proof of the applicant's experience and competence

This is the Ministry's preferred option.

This option would make the system more flexible to deal with individual situations, while retaining the elements that have been integral to identifying potential problems with new applicants and maintaining the quality of legal aid services. The majority of applicants would still continue to be required to meet the prescribed entry requirements. However, the additional flexibility should attract more talented, experienced lawyers into the legal aid system, who may have been put off by the restrictive requirements.

As with any exercise of discretion, this option carries some risk of variable decision-making and a lack of transparency. However, these risks can be managed through operational guidelines to ensure consistency. The Ministry will also monitor the use of discretion to make sure it is used appropriately.

Option 3: Remove the regulatory requirements for applicants to provide work samples, references and proof of recent experience

This option is not preferred.

This option means that lawyers would need to provide limited evidence to support their applications to be legal aid providers. It would streamline the process but at the risk of compromising quality.

The current entry requirements were a response to the Bazley Report that found the current approval system for legal aid providers is “demonstrably incapable of excluding incompetent lawyers from the system”. The Report recommended that the criteria needed to be strengthened so that approval was based on an assessment of a combination of competence, experience and character. The requirements provide an effective benchmark for assessing a lawyer’s ability to provide competent legal aid services, while imposing as minimal a burden on lawyers as possible to meet those requirements.

Removing the criteria makes it more difficult to assess applicants’ competence and experience. It could also have negative impacts on the quality of legal aid services provided to legal aid clients. For example, if a client were represented by a lawyer with insufficient experience, particularly for a serious criminal matter, an inadequate defence might lead to a more severe sentence.

Legal Services Regulations 2011

The status quo is not regarded as an option because it does not address concerns about the administrative compliance burden on lawyers and the Ministry.

Option 1: Remove the reference to the three-month time frame and replace it with a provision that would enable variable time frames to be set.

This option would move the current enforcement model to a high trust and high accountability/consequence model for legal aid providers. It would enable the Secretary of Justice to set variable requirements for classes of longer, high cost or complex cases while recognising that the majority of providers do comply with reasonable business practices and contractual arrangements without strict regulation.

However, this option is not feasible without legislative change. The concept of a time frame, as envisaged by the Legal Services Act 2011, involves the specification of an end date. Whilst this option could be progressed in the future, the need to address the issue promptly means that regulatory amendment is preferred.

Option 2: Increase the current time frame from three months to six months from the date the services are provided, with the power to decline an invoice if it is not provided within three months of a request

This is the Ministry’s preferred option, given the legislative constraints. It reduces the administrative burden on legal aid providers and the Ministry while still enabling the Secretary for Justice to understand the financial exposure present in the legal aid system and manage budget pressures on an ongoing basis.

This option also has the benefit of providing a statutory lever for declining payment if an invoice is not submitted within three months of a formal request being made by the Secretary.

Consultation

The New Zealand Law Society (NZLS) the New Zealand Bar Association, the Auckland District Law Society Incorporated (ADLSI), and the Criminal Bar Association (CBA) were consulted on the proposals. The NZLS, the ADLSI, and CBA indicated general support for the proposed reforms. There was some desire for more general discretion, however, the use

of discretion is limited by the Legal Services Act which requires applicants to meet criteria prescribed in regulation.

The Department of the Prime Minister and Cabinet was informed.

Conclusions and recommendations

With regard to the Legal Services (Quality Assurance) Regulations 2011, the preferred option best gives effect to the Government's policy intention of simplifying the legal aid approvals process and encouraging talented lawyers into the system. The recommended options for both sets of regulations also reduce the administrative compliance burden on lawyers when applying for approval or claiming payment for services. They do not have a negative impact on either current and prospective legal aid providers, or recipients of legal aid.

Implementation

The recommended options would be given effect to by amendments to the Legal Services (Quality Assurance) Regulations 2011 and Legal Services Regulations 2011. Any amendments would be notified in the *New Zealand Gazette* and would be likely to come into force in June 2012.

Monitoring, evaluation and review

The Ministry will continue to monitor the operation of the Legal Services (Quality Assurance) Regulations 2011 and Legal Services Regulations 2011 as part of its business-as-usual workload.