Transforming the Legal Aid System

Final Report and Recommendations

Legal Aid Review
November 2009

Title: *Transforming the Legal Aid System: Final Report and Recommendations*
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Publisher: Ministry of Justice
Place of publication: Wellington
Date of publication: November 2009
ISBN: 978-0-478-29080-2

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PREFACE FROM THE CHAIRPERSON

In the course of this review I have visited all of the major courts in New Zealand, all but one of the provincial courts, and many smaller courts. I have sat through proceedings and listened and watched how people are dealt with by the court and legal aid system. I have met with numerous judges, legal aid lawyers and many other lawyers, police and Crown prosecutors, and court registrars and their staff. I have also visited many community law centres and Citizens Advice Bureaux and met with others with an interest in the legal aid system. This has given me a unique opportunity to see first-hand how the legal aid system and the justice system operate.

The legal aid system is essential to ensuring that the justice system is accessible to all, not just to the wealthy. It is also essential to the operation of the justice system: its effect extends far beyond the individual who is represented by a legal aid lawyer. By enabling people to access lawyers, the legal aid system keeps the wheels of justice turning and helps to maintain trust and confidence in the justice system.

The legal aid system is facing some serious challenges, which I consider threaten its viability into the future. The major issue for the legal aid system is the increasing expenditure on legal aid services, which is primarily driven by the volumes and complexity of cases. Against that backdrop, are system-wide failings caused by problems such as

- an overly operational focus from the Legal Services Agency
- poor relationships between the New Zealand Law Society and the Legal Services Agency
- reluctance by the Legal Services Agency to exercise its statutory discretions, particularly in relation to lawyers
- an Act which seems to be, at times, overly protective of the market share of the lawyers who provide legal aid services
- inflexible procurement provisions in the Act, which prevent the Legal Services Agency from procuring services in the most efficient way possible
- variable quality legal aid services
- over-reliance on complaints as an indicator of lawyers who are failing to perform.

These combine in a way that means the Legal Services Agency is administering a system that is open to abuse by lawyers and defendants. There is a small but significant group of lawyers (and some defendants) who are abusing the system to the detriment of clients, the legal aid system, the courts, and the taxpayer. While there are very good lawyers in the legal aid system, there is also a small but significant proportion of very bad lawyers who are bringing themselves and their profession into disrepute. The behaviour I have been told about in the course of this review is simply appalling and I am surprised that the legal profession has allowed the situation to go on as long as it has. This situation cannot be allowed to continue. The damage that incompetent and unscrupulous lawyers can inflict on their unsuspecting clients – and the potential to destabilise the court system, with resulting wasted expenditure of public money – is simply too great.

A strong and united stance needs to be taken by the New Zealand Law Society as the regulator of lawyers and the Legal Services Agency as purchaser of legal aid services. I believe they should be given three years – no more – to fix the quality issues I have identified. Before the end of three years, I would like to see a further review of the quality of legal services (and legal aid services) that involves visits to the same courts that I visited. If the issues I have raised in this report have not been resolved by then, I would urge the government to institute an independent regulator of the legal profession and a regulatory regime that incorporates quality standards.

A sea change is needed in the legal aid system. It needs: a stronger direction; a customer focus; new machinery; a quality system for lawyers; and a more flexible approach to the procurement of services. It will be a challenge to bring about the changes needed whilst keeping the legal aid system running smoothly through the transition, but the results will be worthwhile. The changes should transform the legal aid system into a system of which the people of New Zealand can be proud. It will deliver access to justice for those who are most in need in a way that is appropriate to both their needs and those of the justice system. Taxpayers will be able to have confidence that legal aid expenditure goes on high quality legal services provided by competent lawyers who act with integrity, with minimal wastage in the system.

"A sea change is needed in the legal aid system"

The legal aid system and the court system need to link better with social services. People entering the court system can be from the most deprived sections of society. Many struggle with language and literacy barriers, which render the court system utterly incomprehensible. The current approach to the basic tenets of customer service in the courts is far too hit and miss. The system fails to capitalise on one of the most teachable moments in terms of improving the social deprivation of families and crime prevention with children and young persons. I strongly urge the government to assess its spending on social services and reprioritise it to extend existing social services into courts.

I am grateful to those people who generously made themselves available during the course of this review. Their comments and opinions have been enormously helpful. I am also grateful to those who made submissions in response to the discussion paper. The quality of submissions was very high and they were a valuable aid in the formation of my final conclusions. I also acknowledge the important contribution made by members of the Reference Group appointed to provide stakeholder perspectives. Finally, I would like to acknowledge the support I have received from the Ministry of Justice in the course of this review. That support has ranged from arranging and accompanying me to the many meetings I have attended, through to policy advice and assistance with the production of this report.

Dame Margaret Bazley, DNZM, Hon DLit
Chairperson, Legal Aid Review

27 November 2009

EXECUTIVE SUMMARY

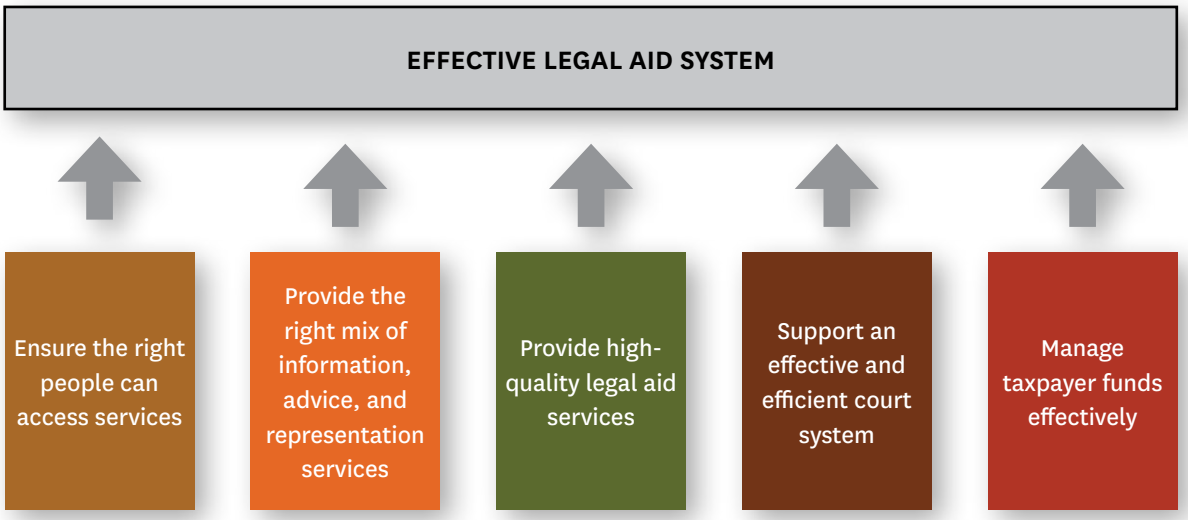
TRANSFORMING THE LEGAL AID SYSTEM

The legal aid system is essential to the operation of the justice system: its effect extends beyond the individual who is represented by a legal aid lawyer. The legal aid system's operation can help the courts run smoothly, or it can bring the court system to a halt. The range and mix of services, and delivery method, can help people to resolve their problems, or can perpetuate social exclusion.

The legal aid system can no longer focus solely on legal representation one case at a time. It needs to focus on helping people to resolve their problems before they progress further into the justice system, and to leave the justice system by resolving the problems that took them there in the first place. The legal aid system must anticipate and meet legal needs through a variety of means, not just through legal representation. It must be integrated with community-based information and advice services. It needs to have a national overview and be strongly linked into government agencies and non-governmental organisations throughout the justice and social sectors.

The legal aid system needs to be transformed for it to become more effective. While the legal aid system cannot control externally driven demand, it can control its own efficiency and effectiveness. That requires it to meet the criteria set out in figure 1.

Figure 1: Components of an effective legal aid system



The legal aid system currently faces a number of issues, which are acting together to cause system-wide failings. They include

- the strong operational focus of the Legal Services Agency
- poor relationships between the New Zealand Law Society and the Legal Services Agency, and other key stakeholders
- reluctance by the Legal Services Agency to exercise its statutory discretions, particularly in relation to lawyers
- cumbersome administrative procedures originating from the Legal Services Act, which seems to be, at times, overly protective of the market share of the lawyers who provide legal aid services
- inflexible procurement provisions in the Act, which prevent the Legal Services Agency from procuring services in the most efficient way possible
- variable quality legal aid services, resulting from ineffective barriers to entering the legal aid system
- over-reliance on complaints as an indicator of lawyers who are failing to perform. The incentives are stacked against complaining, which means that while everyone knows who the bad lawyers are, nobody will act on that knowledge.

These factors work together to create a legal aid system that is open to abuse by lawyers and defendants. There is a small but significant group of lawyers (and some defendants) who are taking advantage of this.

MORE EFFICIENT MACHINERY FOR THE LEGAL AID SYSTEM

There are significant problems with the governance of the legal aid system and poor dynamics between the Legal Services Agency and the legal profession. The Legal Services Agency has to administer a system in which the participants will not take responsibility for the quality of the legal services provided. It appears to have been paralysed by difficult relationships and the assertion of control over the legal aid system by the legal profession.

The different perspectives are now so entrenched on both sides that nothing short of structural change will improve matters. A clean slate is needed to allow new relationships to form and a rebalancing of control in the legal aid system to occur.

The Legal Services Agency's attempts to hold lawyers to account for their performance in the legal aid system have not been successful. Consequently, some poorly performing lawyers (and what appears to be a small but significant number of corrupt lawyers) have been able to stay in the legal aid system, to the detriment of their clients, the courts, and the legal aid system as a whole.

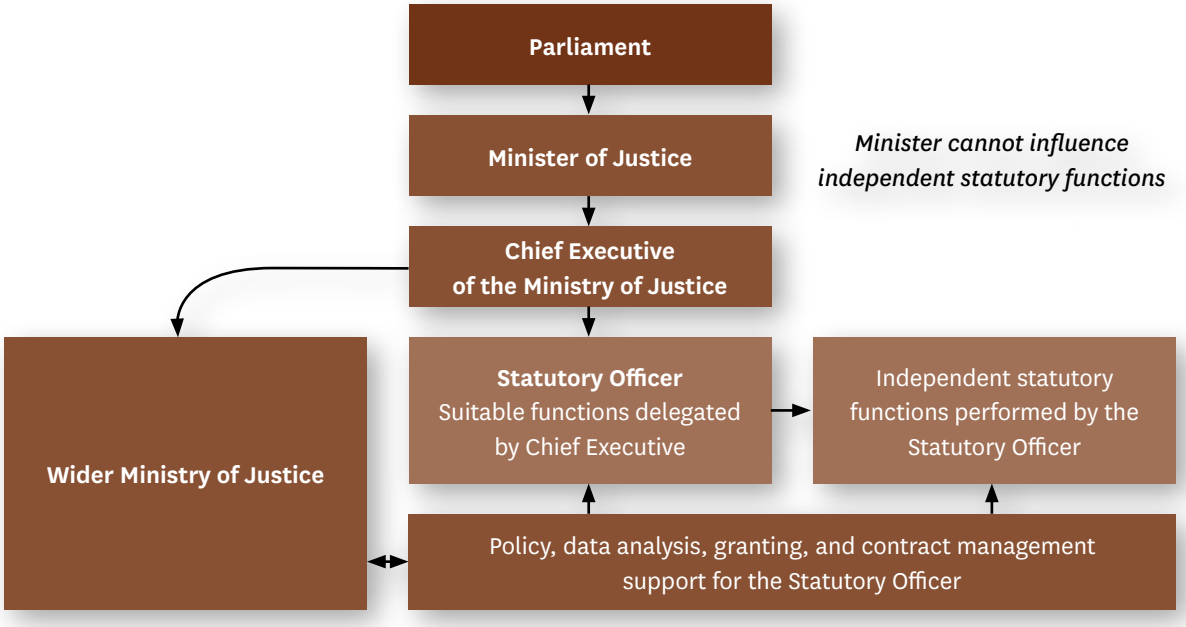
Administration costs in the legal aid system are becoming unsustainable. This is not a result of poor management: substantial drivers of administrative expenditure include the Legal Services Act itself, and increasing volumes of applications for legal aid. However, administrative costs have now reached $20.4 million and have become a driver of legal aid expenditure in their own right. The Legal Services Agency struggles as a small bureaucracy outside the mainstream of government bureaucracies and is not able to keep abreast with trends and developments.

These issues require reconsideration of the Crown entity model as the machinery for running the legal aid system. Although a level of independence is necessary in relation to individual grants of legal aid, that independence can be achieved without the expense of creating a standalone agency.

It is time the administering body was brought closer to the government. It now has a key role to play in justice sector policy development and needs to be resourced accordingly. It must have the capability to be responsive to implementing the fundamental changes recommended by this review.

The functions of the Legal Services Agency should be moved into the Ministry of Justice, and the decisions which need to be made independently of the government vested in a statutory officer (see figure 6 below). The Ministry of Justice has the appropriate strategic fit and compatibility, and would be able to maintain the special characteristics associated with the legal aid system and link it into the wider justice system.

Figure 6: Administration of legal aid procurement



The transition of functions from the Legal Services Agency to the Ministry of Justice will need careful management to ensure that the legal aid system continues to function effectively.

Administration of the Legal Aid Review Panel should be moved into the tribunals division of the Ministry of Justice and procedures established to ensure its decisions are made independently of both the Ministry and the statutory officer.

CHANGING THE FOCUS OF THE LEGAL AID SYSTEM

Focus on direction-setting

A focus on direction-setting for the system is needed. While the roles and responsibilities for direction-setting are clear, they do not appear to be functioning well. Consequently, opportunities are not being taken to be proactive in shaping legal services to make them more effective, or to address legal needs in a way that will make the system more sustainable in the long term. Effective and strong leadership is critical to embedding strategic planning and using it to drive change.

Focus on customer service

The court system and social services for court users tend to focus on the perpetrators of crime, and ignore their families and the potential that consideration of their needs has for enabling family members to live better lives and to avoid patterns of offending into the future. People entering the court system can be from the most deprived sections of society, and many will be high users of social spending. Many struggle with literacy and language barriers, which render the court system utterly incomprehensible. The approach to basic tenets of customer service in the courts is far too hit and miss in terms of directing people to courtrooms, informing them of the date and time of their next appearance, and providing facilities for the care of children who are brought into the courthouse so they can be kept away from the courtroom.

One of the most important teachable moments in terms of improving the social deprivation of families, and crime prevention with children and young people, is being lost. The government needs to assess spending on social services and consider reprioritising it to extend existing social services into courts in four ways:

- extend the Work and Income case management system into courts
- wrap-around support for families going through court proceedings
- early education services in busy courts
- wrap-around services for young first-time offenders, including assistance into employment.

Barriers to accessing legal aid

People who are entitled to receive legal aid appear to face some barriers in accessing it. These include the level of awareness about legal aid, language and literacy barriers, the availability of legal aid lawyers, and fear of having to make repayments. The legal aid system needs to focus on monitoring the extent to which people face these and other barriers, with a view to lowering them over time.

Māori and Pacific peoples feature strongly amongst those most likely to experience groups of problems that require legal assistance. Arguably, if the legal aid system fails Māori, it fails altogether. Māori and Pacific peoples appear to face barriers in accessing legal aid, in addition to the barriers faced by other eligible people. The legal aid system needs to focus on the legal needs of Māori and Pacific peoples, and the barriers they face in accessing legal aid, with a view to enhancing their access over time.

Initial advice and assistance

There is an extensive network of community-based agencies that provide initial advice and assistance, including Citizens Advice Bureaux and community law centres. The legal aid system needs a stronger focus on initial advice and assistance, which can help to prevent cases from escalating and requiring expensive legal solutions. The Ministry of Justice is currently reviewing community law centres, and this review of legal aid cannot pre-empt that. However, the report makes the following observations

- Community law centres are too important to be allowed to fail or to have their services restricted significantly.
- There needs to be stronger coordination between community law centres and central government.
- The focus of services should be on initial advice and assistance where services are able to help the greatest number of people for the funding available. The core of services within this area should be available across New Zealand and should meet national standards.
- There needs to be more focus on the quality of publicly funded services provided by community law centres, because this is currently variable.

PEOPLE, QUALITY, AND ACCOUNTABILITY

Problem clients and repeat clients

Some of the legal aid system's clients can only be described as difficult. Some enter the legal aid system with the aim of manipulating it to their own ends, or for their lawyer's financial benefit. They can, for example, engineer the dismissal of their lawyers in an attempt to prolong proceedings or engineer grounds for an appeal against conviction.

The legal aid system also has a high number of repeat clients, who account for around 63 per cent of expenditure.

A case management system should be introduced for repeat clients who reach a certain threshold and for clients who repeatedly dismiss their lawyers. The case management system should involve giving more stringent consideration of the interests of justice and merits tests. Clients within the case management system should not be entitled to their choice of lawyer. It may also be possible to case manage these clients into other social services, where that would help to resolve underlying problems that are contributing to the repeat grants of legal aid.

The system's lawyers

The ties that once held lawyers together as a profession seem to be breaking down, and some lawyers appear to be operating as a business without the professional standards and support that used to exist. The legal aid system appears to have had a role in this, through the pay rates and administrative burdens that have led to many law firms exiting the system, and being replaced by barristers sole, "car boot lawyers" in particular.

There are many conscientious and experienced barristers and solicitors working in the legal aid system, who are a credit to their profession. There is also a small but significant proportion of lawyers providing very poor services. Behaviour I have heard about includes callous and arrogant indifference to clients' needs, and an absolute disregard and disrespect for the court system, its processes, and its participants. Some lawyers appear to be acting corruptly, and should be disbarred.

The poor practices identified in the review include

- lawyers making sentencing submissions without having read the pre-sentence report
- practising lawyers being unaware of legal principles and being unaware of their ignorance
- lawyers repeatedly failing to turn up to court
- "car boot lawyers" using a District Court law library phone number as their office number, and appropriating interview rooms in the court as their offices
- lawyers gaming the system by delaying a plea or changing pleas part-way through the process in order to maximise legal aid payments (I have been told by people who work in the court that up to 80 per cent of lawyers practising in the Manukau District Court could be gaming the system)
- lawyers who demand or accept "top up" payments from clients who do not understand that the Legal Services Agency pays all of the bill
- widespread abuse of the preferred lawyer policy by duty solicitors, including by taking backhanders for recommending particular lawyers to legal aid applicants.

These problems are more serious and more entrenched in the criminal bar than in other law types.

More needs to be done to encourage quality in legal aid lawyers. This cannot be driven by the Legal Services Agency without help from the legal profession itself. Seven changes are needed to enhance quality:

- raise the barriers to entry: only lawyers with competence and integrity should be able to enter the legal aid system
- create incentives for lawyers to maintain their competence, quality and integrity
- create a mechanism for the swift ejection of incompetent and/or dishonest lawyers from the legal aid system
- build ties between legal aid lawyers to limit their isolation and minimise the risk of cases falling over because of the lawyer's absence
- require legal aid lawyers to train, supervise, and mentor junior lawyers to ensure long term sustainability of the legal aid workforce
- pay legal aid lawyers in a way that recognises the services they provide
- clarify the roles and responsibilities of the two regulators with an interest in the area: the Legal Services Agency and the Law Society.

The responsibility for quality is a shared one. While the Legal Services Agency has the primary responsibility for the quality of legal aid services, it should be able to assume that someone issued with a practising certificate is both competent and honest. The Law Society's role as regulator of lawyers does not always sit comfortably with its role as the representative of its members. The Law Society's regulatory role is quite new, and significant improvements may yet be to come.

The quality issues with legal aid lawyers are so serious that the situation cannot be allowed to continue for more than three years. There needs to be a review of the quality of legal services, including legal aid services, before three years has expired. If that review concludes that the issues identified in this report have not been rectified, the government should institute an independent regulator for the legal profession.

PROCUREMENT OF LEGAL AID SERVICES

Publicly provided services should be used where case volumes are sufficient to make them an efficient option. The Public Defence Service should be used in courts in Auckland, Wellington, and Christchurch. It should also be used where there are particular problems with quality, and one should be established in Palmerston North as soon as possible.

A new procurement model

A new model for procurement would: help to address the quality issues identified above; reduce the administrative burden associated with legal aid; and take advantage of efficiencies. It would involve bulk funding groups of lawyers (whether in firms, chambers, or looser groupings based around a court) led by a senior lawyer who would be responsible for quality. Senior lawyers would need to demonstrate that they had appropriate infrastructure in place to ensure a quality service would be provided, including

- an office and office support systems
- ongoing training and development of lawyers in the grouping
- peer support and the ability to collaborate with others in providing the services
- mentoring and supervision of junior lawyers by more senior lawyers.

This procurement system should be very flexible and should not exclude any quality lawyers who want to participate.

Senior specialist lawyers should be contracted on an individual basis to provide specialist services at a rate that suitably reflects their experience and expertise.

Streamlined eligibility assessment

High-volume, low-cost criminal cases should be subject to a streamlined eligibility assessment process. Long term, this could be extended to low-cost cases in other law types and could reduce the cost per application by $123 across 90 per cent of legal aid grants.

Eligible cases would go through a streamlined assessment process with a simplified means test. They would be excluded from the repayment regime, and the Legal Services Agency would allocate a lawyer on strict rotation.

Generally, the preferred lawyer policy should be limited because of its abuse and the distortions and inefficiencies it introduces into the legal aid system.

Management of high-cost cases

The current approach does not focus sufficiently on responsible expenditure of taxpayer funds. High-cost case management panels should be chaired by a senior public servant and include experts who bring legal, economic, and public policy perspectives. This blend should give better decisions focused on value for money, without undermining access to justice for people on legal aid.

Administrative arrangements for Waitangi Tribunal claims

As a matter of urgency, the government should clarify funding streams for Treaty of Waitangi claims and modify them to ensure there is no possibility of double-dipping or triple-dipping by claimants or lawyers.

SUMMARY OF RECOMMENDATIONS

TRANSFORMING THE LEGAL AID SYSTEM

Evolution of the legal aid system: from private to public management

1. Because the legal aid system is essential to the operation of the justice system, administration of the legal aid system and procurement of legal aid services, I recommend that it be centralised and close to the Crown.

Components of an effective legal aid system

2. The key elements of the legal aid system should be that it
   - ensures the right people can access services
   - provides the right mix of information, advice, and representation services
   - provides high-quality legal aid services
   - supports an effective and efficient court system
   - manages taxpayer funds effectively.

Administrative costs are unsustainable

3. The government should give urgent consideration to alternative ways of resolving the claims of historic abuse of people who were in the care of government agencies.

MORE EFFICIENT MACHINERY FOR THE LEGAL AID SYSTEM

The Crown entity model: the best machinery?

4. The Legal Services Agency should be disestablished as a Crown entity and its functions moved into the Ministry of Justice.

5. Decisions relating to the granting of legal aid to applicants and in the running of cases by the Public Defence Service (and any other publicly provided legal services) need to be made independently of both the Ministry and the Minister of Justice. There should be a person within the Ministry of Justice designated as a statutory officer to make these decisions.

6. The chief executive of the Ministry of Justice should have overarching responsibility for administering the legal aid system, including
   - continuing to administer the legislation and policy settings for the legal aid system
   - setting the direction for the system, supported by data capture and analysis
   - monitoring unmet legal need
   - overseeing the accreditation system for legal aid lawyers
   - setting standards of service delivery, monitoring for quality of legal aid services, and establishing processes for removal of poorly performing lawyers from the legal aid system
   - providing certain services such as legal education and information
   - planning for and trialling new methods of service delivery
   - ensuring the legal aid system is linked into the wider social services network of government agencies
   - providing support services such as administering the legal aid debt repayment scheme.

7. The person appointed as statutory officer should be able to undertake other functions related to the procurement of legal aid services, as delegated by the chief executive.

8. The chief executive should consider appointing a senior public servant to manage the transition of the LSA's functions into the Ministry of Justice. That person needs to have experience in managing reform and restructuring government agencies, particularly where that reform has successfully shifted staff culture towards a customer service focus.

9. The Legal Aid Review Panel should be constituted as a tribunal and its administration moved to the tribunals division of the Ministry of Justice.

10. The new tribunal should have an explicit requirement to have regard to both access to justice considerations and responsible expenditure of public monies. To this end, the Chair of the new tribunal should not be a lawyer.

CHANGING THE FOCUS OF THE LEGAL AID SYSTEM

A focus on direction-setting

11. The focus of planning and reporting needs to be on transformation of the legal aid system, which needs to reflect the elements outlined in recommendation 2.

12. Strong leadership will be needed to drive change in the legal aid system, to overcome the risk that push-back by some people in the system will jeopardise its transformation.

13. The legal aid system needs to map legal needs across New Zealand, taking into account the geographical, social, cultural, and economic factors that can contribute to or exacerbate legal need.

14. The legal aid system needs to map service providers (lawyers, and community-based legal and social services) across regions, to highlight gaps and overlaps, identify and remedy impending service gaps, and inform future service delivery.

A focus on customer service

15. The Legal Services Agency and the New Zealand Law Society should work together to develop simple and clear information for legal aid recipients that amalgamates
    - the requirements imposed on legal aid lawyers by the Legal Services Agency and, in particular, that people on legal aid do not have to pay their lawyers any money
    - the New Zealand Law Society's rules of client care.

16. The information set out in recommendation 15 should be made available in the languages most commonly spoken by New Zealand's immigrant communities, so it is accessible to those who do not have a strong command of English.

17. Distribution of this information needs to be enhanced so that it reaches more legal aid clients than currently appears to be the case. It should be posted on the walls of courts, and in police and court cells.

18. The Ministry of Justice should explore the feasibility of having skilled and professional people at the court to welcome court users and provide directions and assistance to them. These people should have the knowledge and resources to refer people to social services.

19. The Ministry of Justice and the Legal Services Agency should consider options for ensuring that defendants leave the court with clearly understood information about what happened in the court, the date and time of their next appearance, and any conditions they have to comply with in the meantime.

20. The government should reprioritise expenditure on social services to allow services to be extended into the courts to reduce the social deprivation of court users and their families and whānau.

21. The case management system used by Work and Income in community link centres should be extended into courts.

22. More needs to be done to enable community law centres to link their clients into social services.

23. Community law centres' funding agreements with the Legal Services Agency should include an explicit requirement to build and strengthen links with social services.

24. The contracts with existing social services should be extended to provide wrap-around support to families of offenders from the time of arrest through to support following resolution of the court process, including assisting children back to school.

25. The Ministry of Justice and Ministry of Education should work together to investigate the possibility of arranging for temporary childcare available for the children of court users. This care should have an educational focus.

26. The case management system of Work and Income should be extended to provide wrap-around services to young, first time offenders, to reduce the risk of their offending in the future, and to support them into employment.

27. The legal aid system needs to include a focus on the barriers to accessing legal aid in its information gathering and analysis on legal need. Information about barriers needs to be benchmarked, so progress can be measured over time.

28. The legal aid system needs to include a focus on the legal needs of Māori and Pacific peoples, and on the barriers they face in accessing legal aid. Information about legal needs and barriers needs to be included in the system's information gathering and analysis, and it needs to be benchmarked so progress can be measured over time.

A focus on initial advice and assistance

29. I recommend that better use be made of initial advice and assistance services in the legal aid system.

30. A more active purchasing and monitoring approach should be adopted to give both the government and community law centres greater certainty over the community legal services being purchased and the standards to be met.

31. The review of funding for community law centres should focus on
    - developing stronger national oversight of community law centres, to maximise their contribution to the early resolution of legal problems
    - standardising the kinds of services that should be provided by community law centres across New Zealand
    - developing quality standards that can be implemented through community law centres' funding agreements.

32. The duty solicitor scheme should be changed to allow people to meet the duty solicitor in the days before their first court appearance, to enable meaningful engagement with the duty solicitor and time for proper consideration of the defendant's options.

33. The legal aid application form should be simplified so that it does not require a lawyer to complete it.

34. The legal aid system should not use duty solicitors to complete lengthy and complex legal aid application forms. This function should be performed by clerical staff, to free up duty solicitors to provide substantive legal advice.

PEOPLE, QUALITY, AND ACCOUNTABILITY

Problem clients and repeat clients

35. A case management system should be instituted for clients who
    - reach a certain threshold of repeat applications
    - demonstrate a pattern of dismissing their lawyers or consistently behave in such a way that their lawyers withdraw from representing them.

36. The case management should start with stringent application of the interests of justice tests (for criminal cases) and the merits test (for family and civil cases).

37. Clients in the case management system should not have their choice of lawyer. Their lawyer should be assigned by the agency responsible for the procurement of legal aid services.

Improving quality in the legal aid system

38. There should be a new accreditation system to ensure incompetent and/or corrupt lawyers are excluded from the legal aid system. The development of this new system should proceed with urgency, given the pressing nature of the problem.

39. Lawyers should have to be accredited before they can provide legal aid services.

40. Accreditation decisions should be made by a panel of suitably experienced people, including representatives from the New Zealand Law Society, the judiciary, court officials, and community law centres. The accreditation system should be controlled by the agency responsible for legal aid procurement.

41. There should be an appeal mechanism, although the panel should have statutory immunity from other civil proceedings for decisions that are made in good faith.

42. Criteria for accreditation should be developed in consultation with the New Zealand Law Society in its capacity as regulator of the legal profession.

43. Accreditation should be subject to such conditions as are necessary to enable effective accountability for the provision of legal aid services.

44. The legal aid system needs to encourage lawyers to affiliate themselves with other lawyers, to ensure they get training, supervision, mentoring, support, and feedback on their performance in providing legal aid services.

45. All lawyers should have premises from which they operate.

46. Affiliation with a group of lawyers should be a condition of accreditation for all lawyers, except the designated group of senior aid lawyers.

47. Lawyers' accreditation to provide legal aid services should be time-limited for a period of three years.

48. Renewal of accreditation decisions should be made by the accreditation panel described in recommendation 40.

49. The criteria and process for re-accreditation should be developed in consultation with the New Zealand Law Society in its capacity as regulator of the legal profession.

50. The processes for verification and monitoring of service provision in the legal aid system need to be strengthened in accordance with public sector best practice.

51. The purpose of verification and monitoring should be two-fold: to detect fraud and over-claiming by verifying that the services claimed for have been provided; and to provide incentives for lawyers to supply services that meet quality standards and value for money objectives.

52. The feedback mechanism suggested by the Criminal Procedure (Simplification) project (using the court registry to compile reports on systemic non-compliance with procedural requirements) is a useful option and should be made operational quickly.

53. The legal aid system needs to strengthen other, less formal feedback loops as part of a quality framework for the provision of legal aid services.

54. The New Zealand Law Society, the Legal Services Agency, and the Ministry of Justice need to work together to ensure the competence and integrity of the legal profession working in the legal aid system.

55. The quality system for the legal aid system should contain a complaints mechanism, but should not rely on complaints as a trigger for action against lawyers.

56. The law needs to be strong enough to ensure that
    - judges, prosecutors, the Police, court staff, lawyers, clients, and others can complain
    - formal avenues for complaints exist, with appropriate guarantees of confidentiality.

57. The legal aid system needs to accommodate some of the costs involved for lead providers who supervise the training of junior lawyers.

58. The Legal Services Agency, the New Zealand Law Society, and the Ministry of Justice should work together to enhance access to training courses by lawyers in small firms and rural areas.

59. A specialist panel under the control of the agency responsible for legal services procurement should be used to review lawyers' conduct where there is cause to suspect problems.

60. The specialist panel should comprise suitably experienced people, including representatives from the Law Society, the judiciary, court officials, and the community.

61. There should be an appeal mechanism, although the specialist panel should have statutory immunity from other civil proceedings for actions done and decisions made in good faith.

62. The legal aid system should have the following sanctions available to respond appropriately to problematic conduct
    - temporary ineligibility for new legal aid assignments
    - a reduction in payment for a case
    - changes to the types of cases for which the lawyer is accredited
    - supervision requirements
    - training requirements
    - suspension of accreditation
    - removal of accreditation
    - a bar on re-applying for accreditation for a specified period of time.

63. Legal aid remuneration rates should be reviewed, and the factors used to determine the rates should be made transparent.

64. There should be no expectation of parity with Crown Solicitors until issues of quality in the legal aid system have been resolved.

65. Long term, it would be advisable to move the remuneration of senior legal aid lawyers closer to Crown Solicitor rates, once the quality issues have been resolved.

66. A further review of the quality of legal services, including legal aid services, should be undertaken in three years' time to see if the issues identified in this review have been rectified.

67. If the issues have not been rectified within three years, the government should institute a strong regulatory body for lawyers that is focused on the quality of legal services and is completely independent from the legal profession.

PROCUREMENT OF LEGAL AID SERVICES

Publicly provided services

68. The legal aid system should use a mixture of publicly and privately provided services.

69. The Public Defence Service should be used in courts in the major centres – Auckland, Wellington, and Christchurch – where the case volumes are sufficient to make it an efficient option.

70. The Public Defence Service should be used in smaller centres where there are particular problems with the quality of legal aid services.

71. To address the quality problems I have identified in Palmerston North, a Public Defence Service should be established there as soon as possible.

72. The government should consider expanding publicly provided legal services to civil law and family cases, where necessary to achieve efficiency and/or quality gains.

Flexibility in procurement

73. The Legal Services Act 2000 should specifically enable flexibility in the procurement of legal services. Services should be procured using the most appropriate funding model in the proportions that will enable the best value for taxpayers' money. Sections 80-84 of the Legal Services Act 2001 should be removed.

74. The government should introduce bulk funding of groupings of lawyers to provide legal aid services.

75. Bulk funded groups of lawyers should be headed by senior lawyers who would be responsible for the quality of legal aid services delivered under the contract.

76. Bulk funded groups of lawyers would need to have appropriate infrastructure in place to ensure a quality service would be provided, including
    - an office and office support systems
    - ongoing training and development of lawyers in the grouping
    - peer support and the ability to collaborate with others in providing the services
    - mentoring and supervision of junior lawyers by more senior lawyers.

77. The legal aid system should retain suitable senior lawyers for use in appropriate cases, at a higher rate than is currently paid in the legal aid system.

78. Senior lawyers could also be contracted for services to bulk funded groupings of lawyers or to publicly provided services. These contracted services might include work where
    - the matter has a level of complexity that cannot be dealt with by other legal aid service providers
    - there are conflict of interest issues
    - overflow work is required because a grouping of lawyers is already fully committed
    - it would provide senior-level support to junior lawyers
    - specialist expertise is required that is not available within the service or grouping.

Streamlined eligibility assessment for high-volume, low-cost cases

79. The government should investigate introducing a streamlined eligibility assessment process for criminal, civil, and family cases that fall below a cost threshold.

80. Cases that proceed through streamlined eligibility assessment should not be subject to repayment requirements, and should have lawyers allocated by the legal aid system.

81. Cases above the threshold should follow the standard granting process and remain subject to assessment for repayments.

82. People whose cases fall below the threshold who wish to choose their own lawyer should not be able to enter the streamlined eligibility assessment process. Instead, they should be shifted into the case management system for high-cost cases, and actively case managed. Their choice of lawyer (and any subsequent reassessment of that choice) should be scrutinised carefully. These people should be made subject to assessment for the purposes of repaying their legal aid.

Preferred lawyer policy

83. Where people choose their own lawyer, the Legal Services Agency needs to be vigilant that, even in complex cases, strong preference is given to using suitably experienced local lawyers, to minimise travel costs.

Management of high-cost cases

84. The high-cost case management panels should be led by a senior public servant, and include experts who bring legal, economic, and public policy perspectives.

85. The focus of high-cost case management should be on balancing access to justice concerns with responsible expenditure of public funds.

Administrative arrangements for Waitangi Tribunal claims

86. As a matter of urgency, the government should clarify funding streams for Treaty of Waitangi Claims and modify them to ensure there is no possibility of double-dipping or triple-dipping by claimants or lawyers.

CONTENTS

ABOUT THE REVIEW

TERMS OF REFERENCE FOR THE LEGAL AID REVIEW

1. The terms of reference for the legal aid review were announced on 1 April 2009. They are as follows:

> The purpose of this review is to take a first principles approach to reviewing New Zealand's legal aid system to ensure it:
> - delivers legal services to those who need them most
> - manages costs effectively and is sustainable
> - complements efforts to maintain and improve the effective operation of the justice system, especially the court system
> - is consistent with principles of natural justice and New Zealand's international obligations
> - is based on objectives of fairness, efficiency, effectiveness, and quality
> - provides value for money
> - is simple and low-cost to administer.
>
> The review must align with Government priorities and take into account the projected fiscal environment of future years. In this respect, a key focus is on developing alternative approaches to manage or reduce costs. Existing models of public and private service provision (including other forms of social assistance) should be considered.
>
> The review will be led by a Chair appointed by the Minister of Justice and supported by a panel of experts, who will develop a report in agreement with the Minister of Justice.
>
> The review is intended to be broad and include in scope:
> - all aspects of initial criminal legal services, legal information, education, advice and representation, and in particular:
>   - the areas of criminal, family, civil, and Waitangi Tribunal legal aid
>   - all eligibility criteria, and eligible proceedings
>   - contracting and payment of providers
>   - operational issues, such as the assignment of cases including the "preferred lawyer" system
> - spending in areas related to legal aid (for example, lawyers for the child and youth advocates etc)
> - the administration and operation of the system.
>
> The review will not focus on issues relating to the wider justice system (for example, a shift to a more inquisitorial system of justice or the use of mediation for all civil disputes). The review will consider the impact of any legal aid reform proposals on the wider justice system and may consider linkages between the wider justice system and legal aid. Proposals will also be assessed in light of their impact on particular groups, such as Māori.

STRUCTURE

2. The Minister of Justice appointed Dame Margaret Bazley to chair the review. The Chairperson was supported by a reference group comprising members from the New Zealand Law Society, the Legal Services Agency, the New Zealand Association of Citizens Advice Bureaux, and a community law centre.

3. The Chairperson was also supported by officials from the Ministry of Justice.

PROCESS

4. A consultation paper was released in September 2009, which was developed after the Chairperson's extensive meetings with stakeholders. The Chairperson visited and interviewed many people, including
   - the Ministers of Justice, Courts, Māori Affairs, and the Attorney-General
   - the Chief Justice, the heads of bench, and many judges
   - the acting Chairperson and a past Chairperson of the Waitangi Tribunal
   - the Solicitor-General, his staff, and Crown prosecutors around the country
   - the Commissioner of Police and members of the Police
   - the Chief Executives of the Ministry of Social Development and the Legal Services Agency
   - the Commissioner for Children
   - the convenor of the Legal Aid Review Panel
   - the Chair of the Legal Services Board, and a member of the Risk Management Committee
   - staff of Te Puni Kōkiri and the Ministry for the Environment
   - senior management and staff of the Legal Services Agency
   - staff of the Public Defence Service
   - staff of the Ministry of Pacific Island Affairs
   - court staff, social service providers, and many members of the legal profession at many courts around New Zealand
   - community law centres
   - Citizens Advice Bureaux
   - the New South Wales courts and Office of the Legal Services Commissioner
   - the New Zealand Law Society and its various committees
   - the New Zealand Bar Association and local bar associations
   - Māori wardens, Māori lawyers, Police Iwi liaison officers, and Māori people working in the agencies visited
   - members of the legal profession.

5. Emerging themes were canvassed with the reference group as the consultation paper was being developed.

6. The consultation paper covered a wide range of issues grouped around the following themes
   - Can the right people access services?
   - Are we providing the right mix of services?
   - The quality of legal aid services is variable.
   - Legal aid's effect on the court system.
   - Does the system manage taxpayer funds effectively?

7. It asked submitters to consider 73 questions. The review received 88 submissions, including many from community, Māori, and women's groups and the legal profession. A full list of the people who have contributed to this review through their comments and submissions can be found at the Appendix.

8. This final report has been informed by the comments made to the Chairperson in her meetings around New Zealand and by the submissions. It has also been informed by statistical information obtained from the Legal Services Agency and the Ministry of Justice, and by economic modelling commissioned by the Ministry of Justice. A lack of data about certain legal aid matters has meant that the final report has had to rely on anecdotal information in places, but only where that information appears to indicate a genuine concern.

TERMINOLOGY

9. In this paper, **legal aid system** and the **system** refer to the whole of the system of legal education and information, advice, and representation that receives State funding. "Legal aid" is often a shorthand reference to legally aided representation. This paper uses **legal aid** in this way, and will refer specifically to information and education, and advice where the context requires.

10. The following abbreviations are used throughout this paper:
    - **Act** – Legal Services Act 2000
    - **CFRT** – Crown Forestry Rental Trust
    - **CLC** – community law centre
    - **LARP** – Legal Aid Review Panel
    - **LSA** – Legal Services Agency
    - **NZLS** – New Zealand Law Society
    - **OTS** – Office of Treaty Settlements
    - **PDS** – Public Defence Service.

TRANSFORMING THE LEGAL AID SYSTEM

EVOLUTION OF THE LEGAL AID SYSTEM

11. Legal aid as a means of ensuring access to justice has a long tradition in the common law system. Various forms of free legal representation have existed in England since the ninth century. The first statutory provision for legal aid – known as *in forma pauperis* – was enacted in 1495. It entitled a poor person to court-appointed counsel, attorneys, and others to pursue civil litigation free of charge.

12. New Zealand's history of legal aid comes from this long tradition, and its system has evolved gradually, characterised by incremental extensions to the system's boundaries to cover more law types and more people. Criminal legal aid has been legislated for since 1912, and civil legal aid since 1969.

13. Administration of the system has also evolved. A significant waypoint in that evolution was the Legal Services Act 1991. This Act merged the civil and criminal schemes and established a Crown entity, the Legal Services Board, to administer the system. The management of the legal aid system was close to the Crown, but still at arm's length, to ensure granting decisions were (and were seen to be) free from political influence. As I discuss below, the 1991 Act had a strong partnership approach to decision-making. While this gave the legal aid system a regional focus, it reduced the government's ability to ensure accountability for public money and control over the legal aid system as a whole. It also limited the government's ability not only to ensure the legal aid system was achieving its core function of providing access to justice, but also its ability to use it as a social policy tool to achieve other goals.

Shared decision-making under the previous legal aid system

14. Under the 1991 legislation, decisions were made by the following
    - **the Legal Services Board**
      The Board was a Crown entity appointed to operate legal services schemes. Its membership was representative of various interests, which were prescribed in the Legal Services Act 1991. The Minister of Justice could nominate only one of the eight members. Other members included a nominee of the Minister of Māori Affairs, and two joint nominees of the Ministers of Women's Affairs and Consumer Affairs.
    - **District legal services committees**
      Nineteen committees were appointed by the Minister of Justice to carry out statutorily prescribed roles. Committees functioned in relation to their districts to
      - identify the needs for, and monitor the provision of, legal services
      - establish and monitor community law centres
      - administer the duty solicitor and police detention legal assistance schemes
      - use funds allocated by the Legal Services Board for these purposes
      - oversee the processing of applications for civil and criminal legal aid
      - make recommendations to the Legal Services Board on the provision of legal services.

- **Court registrars**
  The court registrars made decisions on criminal legal aid.
- **District legal services sub-committees**
  These sub-committees were appointed to process applications for civil legal aid and to process criminal legal aid claims referred by a court registrar.
- **Legal Aid Review Authority**
  Members of the Authority were appointed by the Governor-General on the recommendation of the Minister of Justice. The Authority heard appeals against decisions of the district legal services sub-committees.

15. As well as administering various legal aid schemes, the Legal Services Board also administered funding to community law centres. Community law centres were developed to provide basic legal advice and representation, information, and assistance with submissions. They complement conventional law firms by providing legal services
    - at low or no cost to those people who cannot afford to go to a law firm
    - that law firms do not provide because they are not cost effective.

16. The make up of the Legal Services Board and the use of committees shows that the Legal Services Act 1991 took a democratic approach to decision-making and direction-setting. A weakness with that approach was that, while the Board had oversight of and accountability for government funding for legal aid, it did not have any direct control over decision-making on grants. The Board issued guideline instructions, but the application of these instructions varied considerably. The decisions were made by the court registrars (criminal legal aid) and the district legal services sub-committees (civil legal aid). This gave the Board only indirect control over the priorities and focus of the legal aid system as a whole.

17. The district committees, sub-committees, and court registrars appear to have had a high level of autonomy. It is only natural, therefore, that they would have focused on the issues before them – issues relevant to their communities – and would not necessarily have been interested in or responsive to issues at a national level.

18. A feature that was both a strength and a weakness of the 1991 system was its heavy reliance on volunteers. The district committees and, in particular, the sub-committees, comprised volunteers who were committed to the concept of access to justice and legal aid. Accordingly, their decisions would have been made conscientiously and with great consideration.

19. There are, however, risks with relying too heavily on volunteers in the legal aid system. Any system vulnerable to increasing demand will eventually reach the point where it requires too much of volunteers' time and goodwill. It is then at risk of volunteer shortages. Volunteers can walk away if they do not like the constraints imposed, or demands made, by the legal aid system. The heavy workload of district sub-committees was one of the issues that led to the creation of the Legal Services Agency in 2001.

20. There may not have been a comfortable fit between the sub-committees' focus on the legal aid applications before them, and the needs of the legal aid system at a national level, particularly regarding constraints on the system. There was always a risk of a mismatch between the focus of the sub-committees and the needs and priorities of the system as a whole.

21. While many lawyers pointed out to me that legal aid granting was once done far more cheaply by district sub-committees, others suggested there may have been favouritism by court registrars and sub-committees: it appears that some lawyers were more likely to be assigned legal aid cases than others. I suspect, too, that through assignment of legal aid cases the sub-committees and court registrars were able to exercise restraint over poorly performing lawyers. This restraint was, unfortunately, lost when granting decisions were centralised by the Act.

A changed environment

22. In short, the 1991 scheme had a regionalised focus, and was heavily reliant on the goodwill and availability of volunteers to run it. By 2000, the landscape had changed, and that approach no longer met the State's needs for administration of the legal aid system. This remains true today and, despite the comments made by some to me about the much cheaper administration in the previous regime, its drawbacks preclude any realistic prospect of going back.

23. The Act centralised and professionalised administration of the legal aid system. The LSA was established to administer the system, maintain the list of lawyers who could provide legally aided services, and grant legal aid. As a Crown agent, the LSA performs these functions at arm's length from the government. This avoids any conflicts of interest the government may have when funding legal aid to people who are involved in litigation with the Crown (such as where the Crown is prosecuting a crime or people are suing the Crown).

24. The needs and responsibilities of the State have continued to evolve. Credible government requires greater transparency and accountability for the use of taxpayer funds.[1] Accountability requires, amongst other things, that the use of public funds be authorised by law and that verification mechanisms be used to ensure public funds are spent as authorised. It can be difficult – and sometimes inappropriate – to impose these strictures on private citizens who are volunteering their time for no recompense.

25. The government is also accountable for the effectiveness of its services and programmes. Taxpayers' money is limited. While legal aid is an important and valuable service, it needs to be remembered that every dollar spent on legal aid is a dollar that cannot be put into other important services that taxpayers want, such as health, education, and roads. The government needs to be satisfied that legal aid expenditure does deliver value for money.

26. Value for money cannot be measured solely in terms of ensuring that people before the courts have legal representation. The government has to be concerned about issues such as the following
    - **the cost of legal aid**
      The system needs to find a balance between the cost, coverage, and quality of services.
    - **the quality of legal aid services**
      Poor quality legal aid services are in nobody's interests. They deny legal aid recipients effective access to justice, create downstream costs for the court system, and undermine confidence in the justice system.

1 See, for instance, the State Sector Act 1988, the Public Finance Act 1989 and the Crown Entities Act 2004.

- **dishonest behaviour by some legal aid lawyers**
  The system needs to ensure it does not create opportunities for lawyers and legal aid clients to game the system, either to maximise their income or manipulate a case to the client's advantage. That creates unnecessary expenditure and risks undermining confidence in the justice system.

27. Value for money also requires government to focus on the effectiveness of the services delivered, not just on delivering services that may or may not have any beneficial effect.

28. The justice sector has now developed a sophisticated set of outcomes that it seeks to achieve through delivering a wide range of services, including courts and legal aid services.[2]

29. The legal aid system is essential to the operation of the justice system: its effect extends beyond the individual who is represented by a legal aid lawyer. The way in which the legal aid system operates can help the courts run more smoothly, or it can bring the court system to a halt. The range and mix of services, and the delivery method can help people to resolve their problems, or can perpetuate social exclusion. The legal aid system needs to have a national focus: this kind of effectiveness cannot be achieved through a series of regionally focused committees.

30. In recent years, successive governments have become increasingly focused on joining up and coordinating public services, to deliver services more effectively and lessen the risk of people slipping through the cracks. As I demonstrate in this report, the legal aid system has an important role to play in this regard, sitting as it does on the cusp of the justice and social sectors.

"The legal aid system can no longer focus solely on legal representation one case at a time"

31. The legal aid system can no longer focus solely on legal representation one case at a time. As long as underlying problems remain untreated, a high proportion of people with legal problems will continue to have their cases drawn into the justice system. The legal aid system needs to focus on helping people to resolve their problems before they progress further through the justice system, and on helping people to leave the system by resolving the problems that led them there in the first place.

32. The legal aid system must do this by anticipating and meeting the legal needs of clients through a variety of means, not just through legal representation. It must be integrated with the community-based information and advice services, particularly the community law centres. This will require the legal aid system to have a national overview, and to be strongly linked to government agencies and non-governmental organisations throughout the justice and social sectors.

2 Ministry of Justice, New Zealand, *Statement of Intent 2008/09 – 2010/11* (Wellington: 2008). See also the *New Zealand Criminal Justice Sector Outcomes Report* (Wellington: 2008) and the *New Zealand Justice Sector Civil and Democratic Outcomes Report* (Wellington: 2009). All reports published on www.justice.govt.nz

33. This need for a national focus does not detract from the need for the legal aid system to respond to requirements at a community level. Communities and regions are not homogenous, and a "one-size-fits-all" approach will have limited success. A centralised mechanism can build in a community focus through the community law centres, Citizens' Advice Bureaux and other social services that do have such a focus. The legal aid system should also be considering and responding to legal needs at a regional level. The difference is that such a focus will be working towards a national objective of ensuring equitable access to justice across the whole of New Zealand.

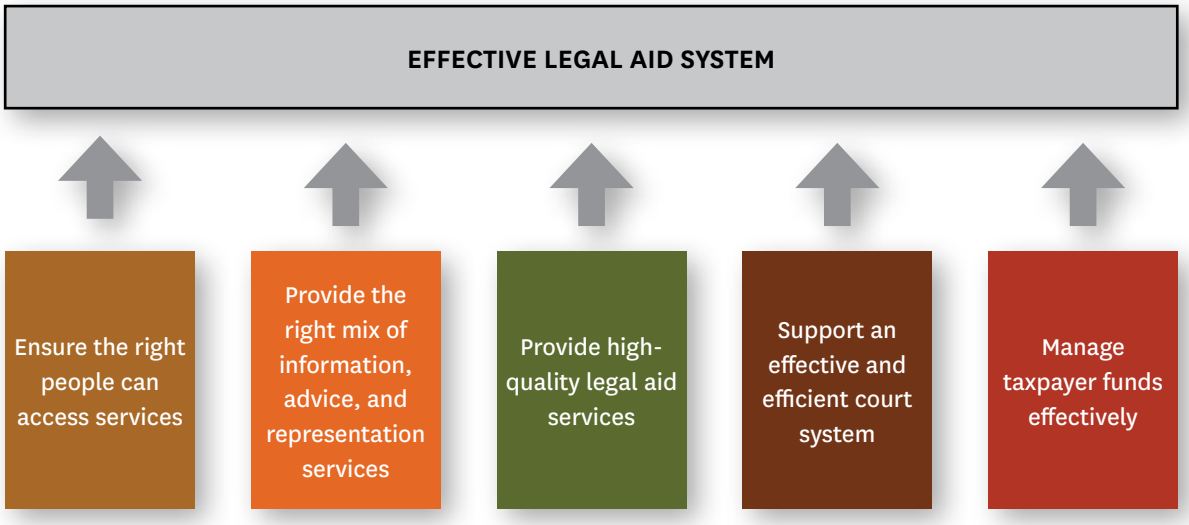
Recommendation

1. Because the legal aid system is essential to the operation of the justice system, administration of the legal aid system and procurement of legal aid services, I recommend it be centralised and close to the Crown.

COMPONENTS OF AN EFFECTIVE LEGAL AID SYSTEM

34. The discussion paper considered what constitutes an effective legal aid system, and set out its main components as outlined in figure 1.

Figure 1: Components of an effective legal aid system



ENSURE THE RIGHT PEOPLE CAN ACCESS SERVICES

35. An effective legal aid system should
    - **target resources according to need**
      Because the Government's resources are limited, there is a balance between the financial means of clients, their access to justice needs, the size of the pool of people that can be funded, and the social context within which people live.
    - **give the right people timely and appropriate access to legal services**
      Based on a sound understanding of legal needs, the system would use the whole continuum of services from information and advice through to representation and prioritise resources to the services and locations where the need is most pressing and where the benefit is likely to be greatest.
    - **balance universal and targeted services**
      The system would balance universal access to upfront information and advice (to help people to solve problems and to resolve disputes out of court) with more immediate and targeted criminal and civil representation needs.
    - **have an eligibility regime that is fair, transparent, and simple to administer**
      Targeting requires the development and administration of an eligibility regime that balances the circumstances of the client, the nature of the case, and its impact on the client. This may involve determining general entry thresholds that apply across the board and more specific criteria for different law types.
    - **create incentives for early resolution and discourage unnecessary delays and litigation**
      There is a balance to be achieved between the thresholds for eligibility for legal aid, access to justice issues, and value for taxpayer money.

PROVIDE THE RIGHT MIX OF SERVICES

36. An effective legal aid system operates within a continuum of services ranging from information and advice through to representation in the courts (the focus of legal aid in a traditional sense). It should be seen as part of a coordinated response to social needs. A system delivering optimal access to justice offers
    - **accessible advice, information, representation, and dispute resolution services**
      Services would be accessible and provided in a way that is appropriate to the circumstances of the individual and the nature of their legal need.
    - **assistance and support for families going through the court system**
      Defendants, litigants and their families are clients of the court system, and should be treated accordingly. The court system has traditionally focused solely on the individual appearing before it and has disregarded the fact that the individual is a member of a family that may itself be socially deprived and ill-equipped to cope with this crisis in their lives. The legal aid system needs to ensure that its clients have help to understand the process and their obligations at its different stages. The legal aid system should link families into community services that can address disruption during and after court proceedings. For those first-time defendants, and for the children of defendants, the system needs to link with other parts of the justice system to make the most of the "teachable moment", to try to reduce the risk of re-offending and offending by the next generation.

- **joined-up services**
  Close links between legal assistance and existing social services would enable people's problems to be diagnosed accurately and dealt with appropriately. When people first come into the justice system, particularly into the community-based advice services, those advice services should assess what social assistance people already receive and work with them to mobilise the social services needed to address problems such as budgeting, debt, housing, health, and unemployment. It is better to deal with these problems before they escalate into legal problems that need to be resolved in court.
- **empowerment**
  People would be empowered to resolve their own problems, with advice and information, and legal representation would be funded where and to the extent that was necessary (and where the person and their legal problem were eligible) in a way that achieved value both for the aided person and the taxpayer.
- **flexible service delivery**
  Services would be delivered in a variety of ways, with a mix of privately and publicly provided services. The Government would be able to fund services, or provide them directly where the market was failing to deliver services to an optimal quality, quantity, or cost.

PROVIDE HIGH-QUALITY LEGAL AID SERVICES

37. Effective legal representation can change people's lives. The nature and extent of that change depends on the quality of the services involved. A system that provides high-quality services to clients
    - **enables people to make informed choices** about their situation
    - **provides effective case management**
      This makes sure that representation is aimed at meeting the aided person's needs and representing them appropriately in the justice system. Effective case management would ensure cases proceeded in a way that was consistent with requirements of the justice system.
    - **contains quality standards**
      The standards ensure clients receive quality representation, appropriate to their needs. Many people are not in a good position to judge the quality of the legal services they receive. This is particularly so for people who face language or literacy barriers. Where those legal services are publicly funded, it is legitimate and, in many cases, necessary for people to rely on the Government to ensure their quality.
    - **uses quality assurance processes** such as entry criteria, mechanisms to ensure continuous improvement, feedback loops, monitoring, auditing, and complaints.

SUPPORT AN EFFICIENT AND EFFECTIVE COURT SYSTEM

38. An efficient and effective court system is central to effective access to justice. Cases need to be able to move through the system with less delay than is commonly experienced now, with fewer adjournments, using a more satisfactory process for victims and witnesses, and with increased efficiency overall. This involves parties discussing cases in an attempt to resolve them and ensure the issues in dispute are clearly identified, so unnecessary court appearances can be avoided and trial times shortened.

39. Efficiency can be undermined when cases go to court that should have been dealt with elsewhere, or when cases are not resolved early. Problems, if not addressed early, tend to escalate and become more difficult and costly to resolve.

40. An effective legal aid system should support and promote an effective and efficient court system by
    - providing early information and advice that enables people to resolve problems outside the court system so that only those problems needing court time reach the courts
    - delivering legal representation to those who need it as early on in the process as possible, especially in the criminal jurisdiction, with minimal administrative processes
    - reinforcing parties' requirements to comply with court processes, especially preliminary processes, to help dispose of cases as quickly as possible and ensure the court has all relevant information before it to make an informed and fair decision.

41. A poorly designed legal aid system could have an adverse impact on the court system, by creating incentives to prolong proceedings. Similarly, creating savings within the legal aid budget by tightening eligibility criteria may result in more self-litigants (people representing themselves in court), which would impose additional costs elsewhere in the justice system.

42. There already appears to be a trend towards people adopting a "do it yourself" approach to legal representation, including taking advantage of online forms to prepare and file their own legal documents. While self-sufficiency is a laudable goal, legal representation can help ensure that people's rights are protected, as the complexities in the legal system do not always lend themselves to "do it yourself" practices. Legal matters can be complex, and the involvement of experienced and competent lawyers can be of benefit to both parties and the court. Self-representation is a growing trend in the Family Court, and is causing problems for that court. It was raised as an issue by nearly every one of the family court judges and caseflow managers to whom I have spoken. This illustrates that changes to the legal aid system need to be considered within the justice system as a whole, particularly where they could result in more unrepresented litigants.

MANAGE TAXPAYER FUNDS EFFECTIVELY

43. Taxpayers are entitled to expect value for money from public expenditure. There are legitimate expectations of accountability over the purchase of services with public money, even when those services are provided by the private sector. An effective legal aid system offers value for money
    - **within the system**, by providing legally aided people with high-quality and appropriate representation, which meets their needs and represents them appropriately in the justice system, and contributes to the efficiency of the justice system
    - **to the government and taxpayers**, by building confidence in the justice system through enhancing access to justice, contributing to broader social outcomes, and controlling public expenditure.

44. The system should be transparent, so taxpayers can be confident that the legal aid budget is being spent well. Administration of the system needs to be as efficient as possible and unnecessary compliance burdens eliminated.

45. The government needs to pay a fair price for legal aid services so it can attract and retain a skilled and experienced workforce. There is a balance to be achieved between paying a fair price and managing taxpayer money efficiently.

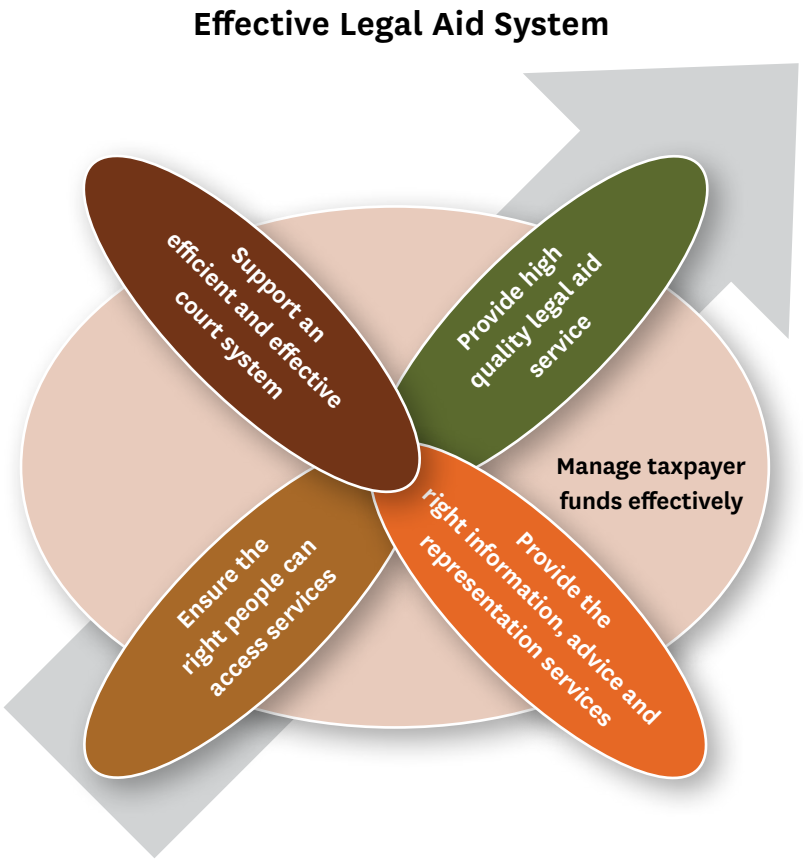
46. High-cost cases pose a significant fiscal risk to legal aid funding and the government. As an effective legal aid system aims to manage taxpayer funds effectively, it must also manage complex and high-cost cases to mitigate financial risk, and ensure these cases proceed as cost effectively as possible.

Interactions between the components

47. The components identified above do not operate in isolation. They are interdependent, which means that interventions can affect more than one component. Similarly, a change to one component will affect other components. For example
    - poor quality services are likely to result in poor outcomes for clients
    - poor performance by legal aid lawyers (for example, being unprepared or failing to appear in court, or gaming the system for pecuniary gain) can cause delays in the court system, which increases costs to the taxpayer and undermines trust in the justice system
    - there is a balance to be achieved between the size of the pool of eligible people, the range of legal services provided, the quality of those services, and effective management of taxpayer funds (not all cases require a Queen's Counsel and a supporting team of lawyers).

48. Figure 2 shows how the components overlap and interact.

Figure 2: Relationships between components of an effective legal aid system



49. The relationships between the components of an effective legal aid system need to be considered as changes are made to the system, to reduce the risk of unintended consequences that could undermine the benefits sought by those changes.

50. For instance, the mix of services can affect accessibility:
    - heavy emphasis on walk-in face-to-face services can exclude people who do not have access to transport, such as those who live in rural areas who may have to travel to reach the services
    - emphasis on web- or paper-based services can exclude some people with literacy problems or those who have English as a second language
    - emphasis on web-based services can exclude people who lack the means to own a computer or pay for internet access; and people who live in rural areas without broadband can find web access frustratingly slow
    - emphasis on telephone-based services can restrict access for people who cannot afford a telephone. People in rural communities will be disadvantaged if they have to use urban-based services that do not operate a toll-free number.

51. Similarly, a poor match between the legal needs of legal aid clients and the skills of their lawyers can result in legal services being ineffective and/or more costly than necessary.

52. Poor-quality services and poorly-managed services can undermine court efficiency, by making cases take longer to resolve, or resulting in mistrials. This can, in turn, undermine public confidence in the justice system.

Recommendation

2. The key elements of the legal aid system should be that it
   - ensures the right people can access services
   - provides the right mix of information, advice, and representation services
   - provides high-quality legal aid services
   - supports an effective and efficient court system
   - manages taxpayer funds effectively.

NEED TO ADDRESS SYSTEM-WIDE FAILINGS

53. The legal aid system needs to be transformed for it to become more effective. One of the challenges in administering the legal aid system is that it responds to external demand, and has limited influence over that demand. Demand for criminal legal aid is driven largely by levels of offending, numbers of apprehensions by the police, prosecution decisions, sentencing policy, and so forth. These are not matters that the legal aid system can control.

54. The legal aid system can control its own efficiency and effectiveness. It can do this by addressing the matters identified in the previous section, which should result in it delivering the right legal aid services in the right way. By making the connections with social services and seeking to resolve problems before they require legal representation, the legal aid system can try to reduce – in a small way – future demand for legal aid.

55. The legal aid system currently faces a number of issues, which are acting together to cause system-wide failings. Not all of these problems are internal to the legal aid system. Some may well have originated outside the legal aid system. It is, nonetheless, up to this review to try to address these problems, because they stand in the way of the transformation so urgently needed.

56. The failings include
   - **an overly operational focus**
     Through concentrating more on the day-to-day administration of legal aid services than the strategic issues facing the system, the LSA has unintentionally left the system vulnerable to an undesirable level of influence or control by the legal profession (which has a vested interest in the status quo). This situation makes it hard to achieve changes to the system with which the legal profession does not agree.

- **dysfunctional relationships between the Legal Services Agency and key stakeholders, including lawyers and the New Zealand Law Society**
  The difficulties in these relationships appear to originate, at least in part, out of mutual frustration and a lack of a shared understanding about the competing interests that the legal aid system needs to balance. The relationships the LSA has with the Law Society and the wider legal profession are so dysfunctional that I am concerned they will stand in the way of transformation of the legal aid system.
- **reluctance by the Legal Services Agency to exercise its discretion**
  Where the Legal Services Act 2000 does not prescribe matters, but leaves them to the LSA's discretion, I have detected a strong reluctance to exercise that discretion. The LSA tiptoes around lawyers, apparently for fear of legal challenge. This has enabled some unscrupulous lawyers to manipulate the system to their own advantage.
- **cumbersome administrative procedures**
  Some of these procedures originate from the Act, which seems overly prescriptive and, at times, overly protective of the market share of the lawyers who provide legal aid services.[3] These procedures add significantly to the administrative burden imposed on both the LSA and legal aid lawyers. Some of the procedures add no substantive value, and waste precious resources.
- **inflexible procurement provisions**
  The LSA does not appear to have the flexibility it needs in procuring services in the most efficient way possible. In part, this has resulted from the Act's piloting provisions, which limit the LSA's ability to trial innovative methods of service delivery and make timely decisions. Whatever the cause, the LSA generally funds services on a fee for service basis, and that encourages lawyers to do more and take longer than is necessary. Except in courts with a Public Defence Service, there is no real competition, which reduces the incentives to deliver services efficiently.
- **variable quality legal aid services**
  While the legal aid system is top-heavy with experienced lawyers, I cannot say that they are all competent or always interested in providing high-quality services to their clients. The system does not have effective barriers to entry to ensure that only competent and experienced lawyers can enter. Unlike the Crown Solicitor system, the legal aid system does not have mechanisms to ensure lawyers remain competent and continue to provide high-quality services, including through careful management of the training of junior lawyers. Neither does it have swift and effective mechanisms to eject poorly performing lawyers.
- **over-reliance on complaints as a quality mechanism**
  The legal aid system relies on complaints as an indicator of lawyers who are failing to perform. However, while everyone appears to know who the bad lawyers are, nobody will act. Few complaints are made because people are not prepared to be named on complaints to the LSA or to the Law Society. The LSA will not complain to the Law Society, because it fears legal challenges by lawyers and prejudicing the willingness of lawyers to provide legal aid services. The Law Society will not act until it receives a complaint. Thus the poor performance is allowed to continue, and the people who suffer are the clients, and others who are caught up in the court process.

3 See, for example, the provisions relating to the pilot plans in sections 80-84 of the Legal Services Act 2000.

57. These failings combine in a way that leaves the legal aid system open to abuse by lawyers and defendants. There is, unfortunately, a small but significant group of lawyers (and some defendants) who are taking advantage of that situation to the detriment of their clients, the LSA, the courts, and the taxpayer.

58. In the remainder of this report, I consider the problems identified above and make a large number of recommendations which are intended to transform the current legal aid system into one that is effective, that meets the needs of its clients, and does so efficiently. These recommendations will not reduce expenditure on legal aid significantly, but will ensure the best use of taxpayers' money by enhancing the quality of legal aid services. As I pointed out at the beginning of this section, legal aid expenditure is driven by largely external factors, and the legal aid system has little or no control over those factors. I discuss one of these in the final section of my report.

MORE EFFICIENT MACHINERY FOR THE LEGAL AID SYSTEM

59. The legal aid review is intended to ensure the legal aid system provides value for money, is simple and low-cost to administer, and complements efforts to maintain and improve the effective operation of the justice system. I have, therefore, considered whether changes are needed to the machinery that drives the legal aid system. This section considers the problems I have identified, and outlines my recommended solution.

PROBLEMS WITH MANAGEMENT AND GOVERNANCE IN THE LEGAL AID SYSTEM

60. During the course of this review, it has become apparent that the legal aid system has some significant problems with its governance and, in part, with the dynamics between the LSA and the legal profession. These problems seem to be so entrenched that they may not be able to be addressed without fundamental structural change that will enable everyone to begin afresh.

Power, relationships, and dynamics in the legal aid system

61. The Chief Executive of the LSA is fettered in how he can run his agency and administer the legal aid system. First, he is answerable to a Board, which is able to influence the priorities and projects undertaken by the LSA. Second, the Chief Executive is required to operate a public advisory committee. This committee is established under statute and includes representatives from several perspectives, including a representative of the legal profession.[4]

62. The Chief Executive of the LSA has to administer a system in which the participants will not take responsibility for the quality of the legal profession. They will not come forward with complaints about their colleagues, and the Law Society appears unwilling to take a proactive approach to help the LSA.

63. The Chief Executive needs to navigate through a raft of consultative provisions and restrictions on service delivery as set out in the Legal Services Act 2000. These structural and consultative provisions have set up expectations about how the legal aid system will be run. These provisions must cause frustration within the LSA, because they restrict its ability to make decisions, and to respond swiftly to change.

4 Legal Services Act 2000, section 104.

64. The expectations, too, are problematic, and appear to have contributed to a poor relationship between the LSA and the Law Society. The Law Society appears to consider that the LSA's consultation with it is inadequate and patchy: it does not always consult; it consults too late in the process; or it does not accept the Law Society's comments. I will not comment on the rights and wrongs of this. I am sure there will have been occasions when the conduct of both parties will have fallen short of the mark.

65. I am surprised by the extent of the consultation provisions, and particularly with the provisions on piloting alternative means of service delivery.[5] On seeing the provisions for the first time, and without knowing the history of how they came to be, I was struck by their apparent intent of entrenching the legal profession's control over the system. I consider that they hinder the LSA in managing services effectively and from trying to find other ways of delivering services. This may not have been the intent of the provisions, but certainly seems to have been their effect.

66. There is a balance that needs to be struck. As both the regulator of all lawyers and the representative of its members, the Law Society will often be able to bring a useful perspective to bear on proposed changes to the legal aid system. It should not be able to stymie progress. Working effectively with the Law Society would undoubtedly help the LSA to smooth the process for implementing changes.

67. In this context, I would expect the Law Society to draw a distinction between its regulatory and representative ("trade union") roles. In some cases, it will be appropriate for the Law Society to act as the representative of its profession. In other cases, particularly where the LSA is attempting to deal with quality or efficiency issues, I would expect the Law Society to wear its regulatory hat. It seems to me that greater role clarity might help to improve the dynamics in the legal aid system. Failure to draw a clear distinction restricts the Law Society's ability to make a positive contribution to a robust, modern legal aid system.

68. However, harnessing the Law Society's goodwill and advice should not amount to an abrogation of the LSA's control over the legal aid system. Control over the system, particularly its direction, configuration and priorities, needs to be close to the Crown. After all, the legal aid system consumes a significant amount of public funding.

69. The LSA's relationships with lawyers providing legal aid services also seem to be patchy. Some regional offices, such as the Napier office, appear to be run very well. For instance, the lawyers I spoke to in Gisborne and Napier were almost universally complimentary about the Napier office. Other offices, such as the southern office, have not fared as well. When I visited Dunedin, many lawyers were critical of the regional LSA office, which they said was extraordinarily slow in paying them. A Dunedin law firm told me of delayed payments of a bill running into thousands of dollars, covering many months, because the regional office was short-staffed and was concentrating on granting legal aid rather than on paying providers. The Chief Executive of the LSA appeared to be unaware of the situation until I drew the matter to his attention.

5 Legal Services Act 2000, sections 80-84.

70. The LSA seems to deal well with lawyers on relatively simple cases, where entitlements are clear and the case is resolved fairly quickly and without much cost. As high-volume low-cost cases comprise the bulk of the legal aid system (about 90 per cent of legal aid grants), it is important that they are processed efficiently and with a minimum of fuss. I discuss these high-volume low-cost cases further at paragraph 434 below.

71. I have heard, however, that the LSA deals less well with lawyers on more complicated matters. Some lawyers have complained that the end result of any difficulties with their bill is that the LSA just does not pay. For instance, one submitter has noted that it has substantial invoices that have been unpaid for over a year.[6]

72. Other lawyers have noted that the way in which the LSA deals with administrative issues can cause difficulties. For instance, one lawyer has noted that the LSA will combine several letters seeking amendments to grants as one amount, rather than referring to specific correspondence by date and the amount sought. This costs the lawyer time in sorting out the amounts between different legal aid clients.[7]

73. Another lawyer, who has a large number of legal aid clients with complex cases, has noted that the LSA does not always make decisions in a consistent way, and that the process negotiated with the LSA for dealing with these clients is liable to be changed without notice or explanation.[8] This can result in delay and frustration, which can lead to conflict with the LSA. This conflict tends to entrench the parties' positions, and so the vicious spiral continues.

74. I have also heard that the LSA's debts staff are considered to be difficult to deal with, particularly with requests for further information, which can be time consuming to manage.

75. The tone of the Law Society's submission and comments made to me by many lawyers demonstrates some real frustration with the LSA. However, I also see an unwillingness or inability on the part of the Law Society and many lawyers to see issues from the LSA's perspective.

76. As a Crown agent in the justice sector, the LSA must take into account wider government policy and work with other justice sector agencies in achieving justice sector outcomes. It needs to provide strong leadership and the ability to make hard calls when the situation warrants it. These perspectives will not always mesh with the approach preferred by the legal profession but I would expect the hard calls to be made anyway. The problem is that the LSA appears to have been paralysed by difficult relationships and the assertion of control by the legal profession. I believe the different perspectives are now so entrenched on both sides that nothing short of structural change will improve matters. In effect, a clean slate is needed to allow new relationships to form and a rebalancing of control in the legal aid system to occur.

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6 Submission LAR018. Submissions are referred to using the numbering system adopted by the review to track submissions. Some submitters wished to preserve their confidentiality, so the report does not identify individual submitters, except for the New Zealand Law Society, which has already publicised the broad thrust of its submission.

7 Submission LAR013.

8 Submission LAR018.

Holding lawyers to account

77. I consider that the LSA's attempts to hold lawyers to account for their performance in the legal aid system have not been as successful as is needed. The consequence is that some poorly performing lawyers have been able to stay in the legal aid system, to the detriment of their clients, the courts, and the whole legal aid system.

78. When the Legal Services Act 2000 came into force, the LSA rolled over all existing legal aid lawyers, so all legal aid lawyers could continue under the new Act. It did so to keep the legal aid system functioning with minimum disruption through the transition away from the 1991 regime. Unfortunately, this means a prime opportunity to weed out unsatisfactory lawyers was lost during the transition to the current system. Although the LSA has intended to review legal aid listings, other priorities (such as implementing the widened eligibility criteria for legal aid and piloting the PDS) have meant the work has been deferred for the past eight years.

79. Rigorous entry criteria are one valuable way of ensuring quality. So, too, are regular renewal procedures, to give lawyers the incentives to keep performing appropriately. I have two concerns with the LSA's approach to legal aid listing. First, the entry criteria do not seem to be sufficient to keep incompetent lawyers out of the system. Movement between provider levels is predominantly experience-based, but experience is not a substitute for competence. Second, the LSA does not impose a time limit on a listing, and there are no renewal processes. Once listed, lawyers can remain so, unless they withdraw or their listing is cancelled by the LSA. The Act appears to give the LSA plenty of discretion on the imposition of conditions on listing, even though it does not specifically refer to time limits or competence criteria. It is unclear to me why the LSA has not used its discretion to impose a competency test and to require regular renewal of listings, using a competency-based review.

80. Without sufficient rigour in the entry procedure, the LSA's only real control over lawyers is after the fact of poor performance. The LSA can withhold payments, and suspend or cancel a lawyer's legal aid listing. However, the LSA appears to have been reluctant to use its discretion in a way that could be challenged by lawyers. All employers and contract managers face hurdles in removing people whose performance is unsatisfactory. The hurdles faced by the LSA are higher than normal, given the nature of the legal aid workforce. Lawyers are well equipped to use the law to protect their own interests against the LSA.

81. In my conversations with court staff, judges, lawyers, the Law Society, and the LSA, I heard an overwhelming concern with the inertia in the system when it comes to complaints. Judges, lawyers and court staff appear reluctant to complain, even when they identify behaviour that is of significant concern. Judges are reluctant to make complaints for fear this may prejudice their impartiality (real or perceived), and create the risk of pressure to recuse themselves from a case. The LSA appears unwilling to take action on complaints about poor lawyer performance, or to refer complaints to the Law Society. Based on the nature of the workforce, and given the poor performance of the complaints system to date, I have concluded that the legislative framework is not strong enough to ensure that people feel able to make complaints and that those complaints will be followed up and acted on. The lack of a robust framework has allowed unscrupulous and incompetent lawyers to remain in the legal aid system.

82. The LSA appears to be concerned that lawyers will challenge its decisions, including through judicial review. I do not understand the depth of this concern. At worst, judicial review could help to clarify the ambit of the LSA's powers, which would make it easier for the LSA to exercise those powers. While the cost of defending legal action is obviously an issue to consider, the LSA's approach of resolutely trying to avoid it has effectively handed over control of the legal aid system to the legal profession. It is going to be very difficult for the LSA to regain control without some significant cultural changes both by the LSA and the legal profession. It may be that legislative change will be needed to reinforce those changes.

Leadership: vision and planning

83. I am not convinced that the LSA has utilised the direction-setting ability granted by the Legal Services Act 2000 and the Crown Entities Act 2004 to drive the legal aid system towards greater effectiveness.

84. Direction-setting in the legal aid system occurs at two levels. The first is the overarching direction set by Parliament through the Legal Services Act 2000. The Act establishes the LSA, which must operate within its statutory mandate. The purpose of the Act is to promote access to justice by
    - providing a legal aid scheme to assist people who have insufficient means to pay for legal services to have access to those services
    - providing other schemes of legal assistance
    - supporting community legal services by funding community law centres, education, and research.[9]

85. Secondly, but no less important, is direction-setting within the legislative boundaries. That direction-setting should involve planning and prioritising services to meet identified legal need. An effective strategic management process can help in the planning and deployment of resources, and the prioritisation of effort. Where strategic planning is done well, business plans can be aligned with strategic focus and plans, and day-to-day decisions can be informed by clearly understood strategic priorities.

86. Effective strategic planning aimed at achieving outcomes is how agencies shift from just delivering services to being truly effective by thinking about the effect of the services they deliver. In the legal aid context, managing for outcomes should have shifted the LSA's vision from paying legal aid grants to enhancing access to justice by identifying and resolving unmet legal need. While the LSA's budget would not allow it to meet all legal need, such a vision would help it to prioritise its resources to those areas where it is most pressing.

87. The LSA's approach to direction-setting at this level appears passive, with the major focus on reacting to individual applications for legal aid under the legal aid scheme. Little thought appears to have been devoted to the development of other schemes of legal assistance that could
    - meet other legal need
    - shape future demand
    - enable people to become more self-sufficient in meeting their own legal needs, particularly in resolving problems before they require legal representation in court proceedings.

9 Legal Services Act 2000, section 3.

88. The 2008 baseline review of the LSA found that staff did not have a consistent understanding of its strategy and vision.[10] I find this of concern, as it creates room for inconsistently applied criteria and variation in decisions between regions, which risks undermining the schema of the legal aid system.

89. I consider that the Act does give the LSA an opportunity to shape legal aid services to meet legal need, within the overarching directions set by Parliament. For instance, the provisions on the listing of legal aid providers, for other schemes of assistance, and for community legal services are relatively open-ended and allow the LSA to determine the direction of key parts of the legal aid scheme and the wider legal aid system as follows

- **listing criteria**
  The LSA has the discretion to develop and adopt listing criteria, and the Act puts some requirements around the process by which those criteria are developed, but there are no statutory limitations on the types of criteria that may be developed.[11]
  These provisions could be used to shape the legal services market and encourage the kind of behaviour desired in providers, including accountability for service provision, the expected quality of services, and training and mentoring requirements.
- **approved schemes**
  The LSA may establish and administer approved schemes for the purpose of providing legal services that cannot be provided under any other scheme.[12]
  These provisions could be used to respond to areas where legal need is particularly acute, either on a demographic, or regional, or service basis. This kind of service development is critical to enhancing the effectiveness of the legal aid system.
- **community legal services**
  The LSA has a role in helping to set up community law centres through assessing the extent of the community's need, providing advice, and providing financial support to establish centres.[13]
  These provisions could be used to: set the mix of services; focus on acute areas of unmet legal needs; and prioritise the development of information and education that will enable people to become more self-sufficient in meeting their legal needs.

90. The 2008 baseline review concluded that the LSA's key organisational processes for strategic management and business planning were under-developed. It also found a lack of policy and planning resources to meet the LSA's internal needs, as well as the government's expectations that the LSA would make a material contribution to the wider justice sector.[14] These shortcomings are apparent in the LSA's Statement of Intent, which reflects its strategic direction for the next five years. The Statement of Intent appears to be both passive and reactive, and does not make use of the opportunities outlined above.

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10 PricewaterhouseCoopers, *Legal Services Agency – Review of Administration Baseline.* (Wellington: December 2008), p 28.

11 Legal Services Act 2000, section 71.

12 Legal Services Act 2000, section 53.

13 Legal Services Act 2000, section 86.

14 Supra at note 10, p. 29.

91. Instead, the LSA's outcome framework sets out objectives and supporting activities that are focused on day-to-day operations rather than on understanding and responding to legal need, and to shaping the legal services market. For instance, the Statement of Intent sets out the LSA's objectives to
    - **effectively and efficiently manage the legal aid and related schemes by**
        - administering the decision-making and processing of applications (including establishment of debt), amendments and claims
        - managing repayments of legal aid debt
        - administering the Duty Solicitor and Police Detention Legal Assistance schemes
        - approving listed providers to deliver certain categories of legal representation and advice, and audit their performance
        - monitoring the supply, access and availability of listed providers.
    - **support and fund community law centres to deliver community legal services to their respective communities by**
        - consulting with community law centres in the planning and development of community legal services
        - contracting with, and allocating funding to, community law centres for the provision of community legal services
        - monitoring and evaluating the performance of community law centres.[15]

92. These objectives and supporting activities are profoundly operational. There is no sense of prioritisation or planning to meet legal needs as they change over time. Such a passive approach to direction-setting exposes the LSA to the risk of unanticipated events that could quickly turn into crises. Without strategic vision, the LSA is less likely to be able to deal effectively with the unexpected, such as a sudden withdrawal of legal aid providers in a particular area or judicial dissatisfaction with substitute providers, as occurred in Invercargill in June 2009. More recently, the Alexandra District Court has experienced a short-term lack of lawyers approved to take category 3 criminal cases, which has resulted in cases being held over.[16]

Planning informed by good quality data

93. Good-quality information and analytical capability underpin strategic planning. The LSA's data appears patchy and it does not have a strong focus on mapping legal needs and planning new ways of meeting those needs that are not met by the existing legal aid scheme. Strong data is critical to driving change.[17] The legal aid system needs to map legal needs across New Zealand, taking into account the geographical, social, cultural and economic factors that can contribute to or exacerbate legal need. At the same time, the system needs to map service providers (lawyers, and community-based legal and social services) across regions, to highlight gaps and overlaps. This should enable impending service gaps to be identified and remedied before they reach crisis-point.

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15 Legal Services Agency, *Statement of Intent 2009 to 2012*, p.10 (available online at www.lsa.govt.nz, accessed September 2009).

16 "Legal aid shortfall delays hearings", Otago Daily Times, 22 October 2009. (Available online: www.odt.co.nz/the-regions/central-otago/79061/legal-aid-shortfall-delays-hearings, accessed October 2009.)

17 Rowe, E., *The role of local government in achieving social wellbeing for the Auckland Region*, background paper for the Royal Commission into Auckland Governance (December 2008). (Available online: www.royalcommission.govt.nz/rccms.nsf, accessed November 2009.)

94. One submission suggested that there should be a split between the LSA's procurement role (grants and administration) and the governance and strategic planning role.[18] It suggested that wider policy issues are best dealt with by other state entities with appropriate skills, perhaps by independent review bodies that involve representatives of relevant agencies and the Law Society.

95. I do not consider that a split between planning and procurement is advisable. First, it is likely to be wasteful by duplicating resources. Second, planning quickly becomes irrelevant if it is done in isolation from the people at the frontline. Planning needs real-world perspectives to keep it real and relevant. Planning can also be a way to keep people at the front line in touch with the organisation's goals and aspirations. It can help to create a shared understanding of the purposes that underlie the organisation's processes. This can help at a basic level of decision-making, to build increased consistency – people are more likely to apply tests consistently if they have a common understanding about what the tests are designed to do. In any case, for the reasons set out earlier (paragraphs 22 to 33), I consider management of the legal aid system needs to be close to the Crown. I believe the recommendations set out at the conclusion of this section will address the shortcomings in direction-setting for the legal aid system.

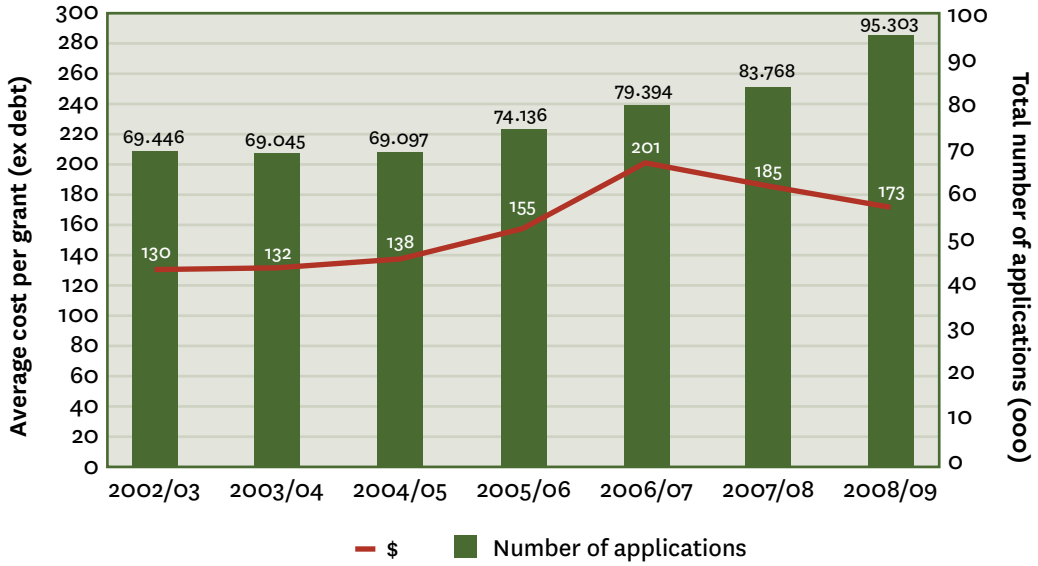
ADMINISTRATIVE COSTS ARE UNSUSTAINABLE

96. The problems I have identified are not just with the governance of the legal aid system. The LSA's administrative costs have risen significantly since 2002 (see figure 3), and have now reached a point where they are becoming unsustainable. I do not consider this is necessarily a result of poor management or wastefulness. Substantial drivers of administrative expenditure are the Act itself, expanded eligibility for legal aid in 2006, and increasing numbers of applications for legal aid. However, administrative costs have now reached $20.4 million and have therefore become a driver of legal aid expenditure in their own right.

> ***"The LSA seems to have become unwieldy and hidebound by bureaucracy."***
>
> *LAR 038*

18 Submission LAR080.

Figure 3: Number of legal aid applications and average total cost (incl. debt) per application 2002/03-2008/09



Source: Legal Services Agency

97. The LSA faces ongoing increases to demand for legal aid, and is now in a position where it now faces a deficit of $1.715 million. The level of Crown funding is insufficient to cover all of the costs incurred by the LSA in administering legal aid and related schemes.

98. The outlook beyond 2008/09 is for continuing deficits. Over half (56 per cent) of the administration expenditure is for personnel. The areas of expenditure that are traditionally viewed as being relatively more discretionary (travel, professional services) represent only 6 per cent of total expenditure. Efforts to save costs to address the large financial deficit will have to go well beyond saving money in discretionary areas.

99. The baseline review concluded that the LSA needs to be working toward a transformational change to its business in order to live within its appropriation.[19] I agree that significant change is needed to all aspects of the administration of legal aid. I also consider that significant changes are needed to the machinery. However, it should be emphasised that any savings made by these changes will be relatively small in terms of overall legal aid expenditure, because they will not affect the main drivers of demand for legal aid.

Demand forecasts and their effect on administration expenditure

100. The volume of applications seeking legal aid is a significant driver of the LSA's business. Figures 4 and 5 below indicate the overall trend in the number of applications administered, both historical and prospective, and the variability in growth rates from year to year.

19 Supra at note 10, p.22.

Figure 4: Legal aid application volumes (historical and forecast)

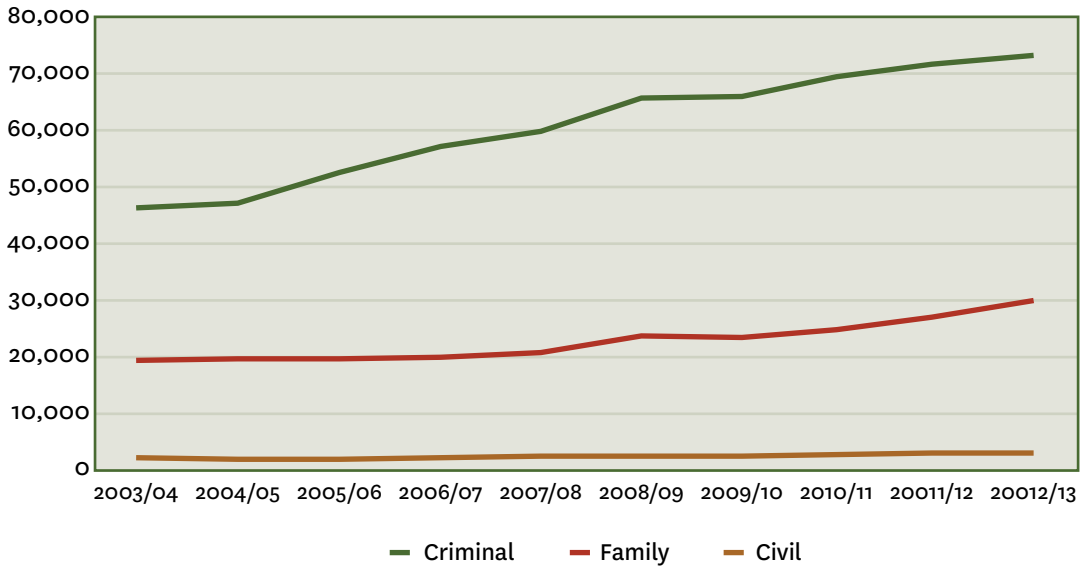


Figure 5: Application volumes – annual growth rates (historical and forecast)

Source: PricewaterhouseCoopers – LSA Baseline Review

101. The baseline review noted several points in relation to historical trends and the outlook for the next few years:

- **changes to eligibility for legal aid**
  Amendments to the Legal Services Act in 2006 significantly increased the pool of people potentially eligible for aid under the Act. The impacts of changes to the Act may not yet have fully flowed through. Draft figures for 2008/09 suggest a significant increase in family grants (up 25.9 per cent from 2003). This increase may be because of a number of factors, including the expanded eligibility thresholds, the recession, and the publicity campaign on domestic violence. Eligibility for legal aid is affected by other factors including increases in welfare payments. These changes have a more immediate and noticeable impact on the eligible population than general economic growth.
- **higher than expected growth**
  The LSA is currently experiencing higher than expected growth in the volume of criminal, family and civil applications. There is a significant degree of fluctuation from year to year in the growth of legal aid applications, which means that forecasts of future application volumes need to be treated with considerable caution.
- **complexity of applications**
  Volume data does not capture the full impact on the LSA because it does not take into account changes in the complexity of applications. Different law types present a range of complexity, which affects the amount of resource required to process an application. Generally, the merits test (which applies to civil and family applications) requires consideration of a wider set of factors than is the case for criminal applications. The LSA considers that dealing with an application for family legal aid is 30 per cent more resource intensive than a criminal application. The growth rates predicted for family and civil legal aid applications are substantially higher than the growth rates predicted for criminal applications.

102. There are specific types of application that present higher than normal workloads for the LSA. These include

- **applications in relation to historic sexual abuse claims**
  There is a large volume of these applications, and the cost of administering them has been substantial. These claims have the potential to be very costly and complex. Legal aid to date on four cases alone has cost $1.4 million. Lack of success in those four cases prompted the withdrawal of legal aid in many of the remaining cases (approximately 900), based on reconsideration of their prospects of success. This led to a review by the Legal Aid Review Panel (LARP), and an appeal to the High Court, which resulted in the LSA and LARP being directed to reconsider various decisions.[20] That has now been done. LARP has overturned the LSA's decisions on new grounds and the matter is returning to the High Court on a fresh appeal.
- **applications in relation to historic Treaty of Waitangi claims**
  There has been a spike in claims as a result of the deadline for lodging historic Treaty of Waitangi claims by 1 September 2008. It will be felt in the foreseeable future, given the government's intention to have claims settled by 2014.

20 *Legal Services Agency v KGR and others*, HC, WN, CIV 2009-404-3399, CIV 2009-404-3400, CIV 2009-404-3401, (6 August 2009), Dobson J.

103. Both types of application demonstrate the way in which changes to government policy can have significant effects on the LSA. The historic abuse claims in particular have the potential to place enormous pressure on the LSA's granting process and on legal aid expenditure, both because of the large number of claims and the high costs involved. Urgent consideration should be given to alternative ways of resolving these claims: the Crown's strategy of addressing these cases through the courts places pressure on the courts and benefits lawyers rather than claimants. It also leaves the problem to fester: the claimants are likely to consider that the Crown has won on a legal technicality. They will be left feeling aggrieved and that the Crown is not prepared to treat them or their claims with respect and compassion.

104. In short, the LSA faces growing volumes of business and increasingly complex applications. This last is due to the increasing proportion of family and civil applications (which are growing at a faster rate than criminal applications) and some specific types of application (for example, Treaty of Waitangi and historic sexual abuse) where the level of work per application is inherently greater.

105. The baseline review forecast the growth in applications workload for the Agency over the period 2009/10 to 2012/13 to be around four per cent per annum on a compounding basis. Managing that rate of growth will not be possible without significant change, given the LSA already faces a deficit.

Recommendation

3. The government should give urgent consideration to alternative ways of resolving the claims of historic abuse of people who were in the care of government agencies.

Legal aid grants

106. The major focus for the LSA is grants. The grants unit is the largest in the LSA, with approximately 140 full-time equivalent (FTE) staff for 2008/09. The unit's primary role is processing and deciding on applications for legal aid and administering grants of legal aid and administering the duty solicitor rosters. The grants function uses $16.5 million (see table 1) of the total $20.4 million of expenditure on administration, a large proportion of which goes on salaries.

Table 1: Legal aid grants: annual cost and cost per application

	2007/08	2008/09
Annual cost	$15,518,860	$16,524,767
Number of applications	83,768	95,303
Cost per application	$185	$173

Source: Law and Economic Consulting Group

107. The granting process involves two considerations: whether the person and their legal case are eligible for legal aid, and the extent to which the person has to repay the legal aid.

108. All applications must pass a means test, which, as currently administered, involves complex considerations around people's assets, as well as their income. There must be scope to simplify the test, including by leveraging off information gathered by other agencies such as the Ministry of Social Development for assessing benefit entitlements. The information needed for the means test contributes to the length of the legal aid application form. The test is at least partly automated: grants staff input financial information into a means calculator which then calculates eligibility. The staff have discretion to grant aid outside the financial thresholds taking into account any exceptional circumstances.

109. The grants process is paper-based, because the LSA does not have the information technology systems to facilitate electronic filing. The LSA has provided electronic templates to providers, which facilitate form-filling and invoicing. Some providers I have spoken to find these templates useful and labour-saving. One lawyer has shown me how she fills in the form electronically with her client beside her, which enables her to do all the paperwork in one simple step. However, having completed the paperwork electronically, she is then required to print off the forms and fax or post them to the LSA for processing. Other lawyers have spoken of the form's complexity and the frequent need to go backwards and forwards getting further information from clients for the LSA.

110. Once the paperwork is received by the LSA, the grants unit then has to enter the information into their computer system. Such double-handling is inefficient and creates room for error.

111. As I have already noted, a large component of the means and asset testing is aimed at determining whether applicants have to repay some or all, of their legal aid grant. Debts are established in around 25 per cent of grants. The determination is done by the grants unit and then handed to the debt management group.

112. The baseline review noted that significant rework is required because of inaccurate information provided by criminal lawyers and errors with grants decision-making and processing.[21] Re-work creates inefficiency, and is undesirable.

Debt management

113. The debt management group is responsible for the ongoing management of debt owing to the LSA. It comprises 17 staff. Before the amendment to the Legal Services Act in 2006, the debt team comprised only three people. The 2006 amendments included changes to the eligibility criteria and thresholds for debt establishment, which has significantly increased the number of people who may have to repay some or all of their legal aid.

21 Above at note 10, p.20.

114. Table 2 provides a snapshot of the LSA's debt operations for the 2007/08 financial year.

Table 2: Debt operations of the Legal Services Agency in 2007/08

Annual cost	$1,863,935
Value of debt repayments during the year	$7,054,155
Number of unimpaired debts being managed	39,776
Value of unimpaired debt being managed	$28,201,184
Average value of unimpaired debt	$709
Number of new debts established during the year	18,206
Value of new debt established during the year	$21,482,277
Average value of new debt established during the year	$1,180
Number of debts with instalment payments[22]	35,623
Annual admin cost per active debt	$46.86
Annual admin cost per active debt (excluding zero payment amounts)	$52.37
Number of debts written off	735
Average value of debts written off	$1,210

Source: Legal Services Agency Annual Report 2007/08[22]

115. The average debt established is less than the average written-off debt. The collection to cost ratio is approximately 4:1, or four dollars recovered for every one spent on debt recovery. Considering that 75 per cent of debt holders earn less than $30,000, this is a reasonably cost-effective recovery rate and cost. However, it is of concern to me that there appears to be a proliferation of debts that are being paid back in small instalments over a long period of time (for example $5 per week). That presents an ongoing expense for both the LSA and clients. I am inclined to think it would be more efficient to limit debt establishment to larger debts or to situations where repayments can be made in larger amounts at less frequent intervals. I also consider that the LSA should only establish debts where it is feasible for these to be paid back within a few months, especially when legal aid has been granted for cases that will not result in proceeds from damages or settlement (I refer to criminal and family legal aid in particular here).

116. I am also concerned with the reports I have heard that some of the debts staff appear to be unrealistic about clients' ability to raise money by, for example, taking out an additional mortgage or selling their cars. I am aware of one instance in which the LSA wanted to put a caveat on land for a $300 debt. This seems absurd, given the costs of lodging a caveat and administering the debt until the land is sold.

22 Excluding 4,065 debts with payment amounts of zero: these are people who have an 'interim repayment plan' in place although at the moment repayments are zero. They will either be signed up for a secured debt, or will be making a lump sum payment once they have proceeds of proceedings, or the LSA is trying to establish interim repayments, or various combinations of these circumstances.

117. I have a general concern at the reliance on charges and caveats over property, given the financial means of most of the LSA's clients. It is a heavy-handed response, and is administratively expensive (there is an up-front cost to register a charge over land). It results in payback over a long period of time, especially if there is no immediate prospect of selling the property. If left long term, this approach could effectively lock families into property, particularly where their equity in the property is low. The LSA's charge may mean the difference between some families being able to purchase a larger home and having to stay in a house that no longer meets their needs.

Service contracts

118. The Service Contracts Group manages legal aid providers in the system. Its roles include
- establishing and maintaining a legal service list
- managing contracts with legal aid providers
- developing criteria for listing
- working with practitioners to identify options for addressing areas where there is a shortage of listed providers
- evaluating applicants for listing against the listing criteria
- determining the conditions attached to listing (where applications are accepted)
- monitoring the performance of listed providers, which currently involves a random file audit programme managed by internal audit (the LSA has been developing and testing an audit programme to evaluate the quality and value of services provided by legal aid lawyers)
- investigating serious complaints received in relation to listed providers (the Service Contracts Group usually becomes involved only after complaints have been through a process administered by the Grants Unit and Debt Management Group, and the complaint warrants being escalated)
- temporarily suspending or cancelling a listing, where warranted.

119. The listing criteria have been in place since 2003. I understand that the LSA considers it timely to review the criteria, but has not yet commenced that process. Some submissions noted that the criteria focus on experience, which is not necessarily a proxy for competence.[23]

120. The conditions imposed on legal aid providers relate to the areas of law for which the listed provider is approved (for example criminal, family, immigration and so on), and the levels at which the provider operates (effectively, their level of experience). When accepting applications, the LSA can also impose conditions on the listed provider such as a requirement to undertake training.

121. There are 4,492 listed providers, with 2,135 active. The availability of listed providers varies throughout the country with rural areas, in particular, posing some challenges in terms of maintaining adequate coverage. The volume of provider applications is relatively constant from year to year.

23 For example, in its submission the New Zealand Law Society observed that the LSA criteria focus on education and experience, from which competence is presumed.

122. The annual cost of provider management is $826,659, which works out at $184 per provider. Provider management comprises only 0.58 per cent of the legal aid budget. There seems little scope for significant administrative savings, given the relatively small impact they would have. I do, however, consider that this money could be better spent by being focused on proactive management of providers and monitoring the quality of their services. This would help to create the incentives for lawyers to provide better quality legal aid services.

THE CROWN ENTITY MODEL: THE BEST MACHINERY?

123. The issues I have identified above appear to me to make the case for reconsidering whether the Crown entity model is the best machinery for running the legal aid system.

124. The LSA is a Crown entity, falling into the category of Crown agent. As such, it carries out its day-to-day functions at arm's length from the Minister of Justice (the Minister responsible for the LSA), but it is required to give effect to the policy of the government of the day as communicated by direction of the Minister. The LSA is supported by a governance board, which operates under the Crown Entities Act 2004.

125. When the LSA was established, it replaced the Legal Services Board, which had been constituted under the 1991 legislation as a Crown entity. The intention was to keep the LSA at arm's length from the Crown so that grants decisions would be independent from political influence, and both the government and litigants could be protected from accusations of possible interference.

126. Although a level of independence is necessary in granting decisions, and in decisions about how the PDS runs individual cases, in other respects it is desirable for the government to be able to direct the LSA to implement government policy, given the significant effect the legal aid system has on the wider justice system. This is most likely the reason why the LSA was classified as a Crown agent. Among the different categories of Crown entity, the Crown agent has the least amount of independence under the Crown Entities Act 2004.

127. The administration and operation of the legal aid system falls within the terms of reference for this review. Accordingly, I have considered whether the legal aid system's procurement agency should continue to be a Crown entity, or whether there may be a more effective way of configuring the system.

128. I have followed guidance from the State Services Commission that a public agency should be a Crown entity only where its functions fall outside the core functions of government or there are other compelling reasons for them to be performed at arm's length from the Minister.[24] Otherwise, those functions should be placed in a department.

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24 State Services Commission, *Reviewing the Machinery of Government* (Wellington, February 2007). Available online www.ssc.govt.nz/display/document/asp?navid=306 (viewed November 2009),

129. I consider that the provision of legal aid and associated schemes is undoubtedly a core function of government. State responsibility for the justice system and upholding legal rights and responsibilities imposes an obligation on the State to make justice accessible to all. The legal aid system plays a defining role in upholding the objective of access to justice, and is a core part of an effective justice system. In providing state-funded legal aid, the State upholds the principles of the rule of law and access to justice. This contributes to public confidence in the legitimacy and effectiveness of the justice system.

130. At the same time, it should be open to the government to determine the level of legal services it can afford to provide its citizens, and establish policies and mechanisms to manage this expenditure. The government has a key stake in devising a legal aid system under which decisions about resources, priorities, and targeting produce the most desirable outcomes in a principled, transparent, and accountable way. Public expenditure principles of equity, efficiency, and effectiveness should guide the nature and extent of the public legal services on offer.

131. While decisions on individuals' access to legal aid need to be – and to be seen as – free from political influence, there is no readily apparent reason to operate the entire legal aid system at arm's length from the government. That level of independence can be achieved in a form that requires less infrastructure and fewer overheads than a Crown agent.

132. I also consider it is time the administering body was brought closer to the government. It now has a key role to play in justice sector policy development, and needs to be resourced accordingly. It must also have the capability to be responsive to implementing the fundamental changes recommended by this review. I have some concern whether the LSA's size, structure and systems would allow it to achieve these objectives. The LSA already struggles as a small bureaucracy outside the mainstream of government bureaucracies. It is not able to keep abreast with trends and developments.

133. Finally, if the government adopts the changes to managing high-volume, low-cost cases that I propose in paragraph 444, that is likely to result in some downsizing of the LSA. That downsizing may make it far too small to remain viable, in undertaking the functions it will need to, as a standalone agency. Therefore, I recommend a new form of machinery for the legal aid system, as described below.

Statutory officer model

134. I consider that responsibility for the operation of the legal aid system, including the procurement and configuration of legal aid services, should be brought within a government department. A government department would have the critical mass to administer the legal aid system effectively. Efficiencies could be generated through the use of existing infrastructure and resources of a larger organisation, such as corporate overheads. It would support the alignment of legal aid policy and operations within the same organisation, and remove the additional layer of monitoring that the Crown entity model entails.

135. The department would be responsible for all aspects of operating the legal aid system, including accrediting and contracting with legal aid providers and administrating publicly provided legal services such as the PDS. The division or group with responsibility for these functions would include a person designated as a statutory officer who would make the decisions which need to be made at arm's length from the government. These decisions relate to the granting of legal aid and the running of cases by the PDS and need to be made independently of the chief executive and of the responsible Minister.

136. Locating legal aid procurement in a department also take advantage of synergies between departments: there are fewer barriers to information flow and collaboration between government departments than between departments and Crown entities, because of the relative degrees of separation from ministerial influence. Crown entities are intended to function at arm's length from the responsible Minister, to give them sufficient independence to carry out their functions. Therefore, there is a limit as to the extent to which a Crown entity, even one functioning as a Crown agent, can be "joined up" with other public sector agencies that do not have the same degree of independence.

137. Statutory officers within a department tend to be used where there is a clearly defined role that needs to be exercised at arm's length from the Minister and/or the department in which the officer is located. The power to act independently or to report directly to the Minister (and not through the chief executive of the department) is set out in statute. This model provides a specific point of responsibility for a discrete set of functions and powers. Lines of accountability are very transparent.

138. There can be challenges with this model, because it can blur the chief executive's responsibilities, for example for all financial management. However, it is a known model that is used from time to time. Examples include the Director of Public Health in the Ministry of Health, the Registrar of Immigration Advisers in the Department of Labour, and the Valuer-General, Surveyor-General, and Registrar-General of Land in Land Information New Zealand. The Chief Electoral Officer is a statutory officer charged with administering elections, and does so independently of the government, while being based in the Ministry of Justice for the purposes of infrastructure and overheads. The Chief Electoral Officer can put up advice to the Minister of Justice independently of the Chief Executive of the Ministry.

139. I am satisfied that a statutory officer making decisions independently will be sufficient to ensure the independence of the process for granting legal aid and associated tasks.

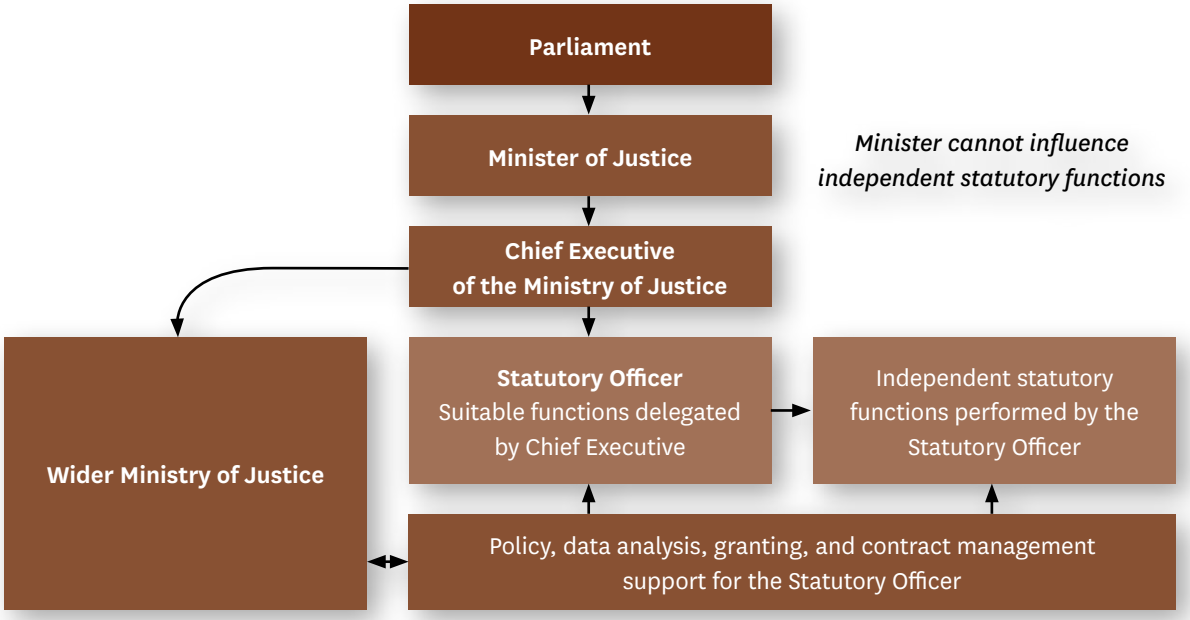
Where should administration of the legal aid system be located?

140. I recommend that the Ministry of Justice should be responsible for the administration of the legal aid system. The Ministry is the leading justice sector agency and has the appropriate strategic fit and compatibility, and would also be able to maintain the special characteristics associated with the legal aid system and link it into the wider justice system. Having a statutory officer located within the Ministry would ensure that granting decisions could be made independently from ministerial influence. Statutory officers provide a specific point of responsibility for a discrete set of decision-making functions, which are separated from those of the chief executives. This model is not new, and the Ministry of Justice has experience with managing statutory officers.

Roles and responsibilities

141. Figure 6 below sets out the roles and responsibilities under this model. The Chief Executive of the Ministry of Justice should have overarching responsibility for administering the legal aid system, including
- continuing to administer the legislation and policy settings for the legal aid system
- setting the direction for the system, supported by data capture and analysis
- monitoring unmet legal need
- administering the accreditation system for legal aid lawyers
- setting standards of service delivery, monitoring for quality of legal aid services, and establishing processes for removing poor performing lawyers from the legal aid system
- providing certain services, such as legal education and information
- planning for and trialling new methods of service delivery
- ensuring the legal aid system is linked into the wider social services network of government agencies
- providing support services, such as administering the legal aid debt repayment scheme.

Figure 6: Administration of legal aid procurement



142. The statutory officer would be required to act independently of both the Minister and the Ministry in making decisions in relation to the granting of legal aid and the running of cases by the PDS (and any other publicly provided legal services). I do not anticipate that these functions would occupy the whole of the statutory officer's capacity, so that person should be able to undertake other functions related to legal aid procurement. The Chief Executive should be able to delegate related functions to the statutory officer to take advantage of synergies, if she wishes. The statutory officer would need to have the ability to report directly to the Minister of Justice on matters relevant to the statutory officer's functions to preserve the statutory officer's independence from the Ministry.

Effect and transition

143. By being part of a larger department focused on the justice sector, the statutory officer will be able to leverage off synergies and ensure that administration of the legal aid system remains in line with modern bureaucratic practices. I do not anticipate significant savings to result from the shift in administration to the Ministry of Justice. There may be small savings through merging corporate functions, such as human resources and corporate finance. However, computer systems will remain an issue, and the move will not obviate the need to address them. The main advantage in moving the administration to the Ministry of Justice is that it will ensure strong control over the legal aid system by the Chief Executive and the Minister of Justice. It will also help to integrate the legal aid system more fully into the justice system, and maximise use of the legal aid system as a lever to achieve justice sector outcomes and to link across to the social sector.

144. To make significant savings, changes need to be made to how legal aid is granted, particularly for high-volume, low-cost cases, and legislative change will be required to support those changes. I discuss these changes later in the report.

145. The transition of functions from the LSA to the Ministry of Justice will need careful management. Obviously the transition will take time because legislative changes will be needed. The first priority will be to ensure the legal aid system continues to function. Legal aid must be granted and lawyers must be paid throughout the transition.

146. I suggest that the Chief Executive of the Ministry of Justice should consider appointing a senior public servant to manage the transition. That person needs to have experience in managing reform and restructuring government agencies, particularly where that reform has successfully shifted staff culture towards a customer service focus. The transition will also need people with specific skills in contract management, case management, and building a customer focus into business policies and practices.

Recommendations

4. The Legal Services Agency should be disestablished as a Crown entity and its functions moved into the Ministry of Justice.

5. Decisions relating to the granting of legal aid to applicants and in the running of cases by the Public Defence Service (and any other publicly provided legal services) need to be made independently of both the Ministry and the Minister of Justice. There should be a person within the Ministry of Justice designated as a statutory officer to make these decisions.

6. The Chief Executive of the Ministry of Justice should have overarching responsibility for administering the legal aid system, including
   - continuing to administer the legislation and policy settings for the legal aid system
   - setting the direction for the system, supported by data capture and analysis
   - monitoring unmet legal need
   - overseeing the accreditation system for legal aid lawyers
   - setting standards of service delivery, monitoring for quality of legal aid services, and establishing processes for removal of poorly performing lawyers from the legal aid system
   - providing certain services such as legal education and information
   - planning for and trialling new methods of service delivery
   - ensuring the legal aid system is linked into the wider social services network of government agencies
   - providing support services such as administering the legal aid debt repayment scheme.

7. The person appointed as statutory officer should be able to undertake other functions related to the procurement of legal aid services, as delegated by the Chief Executive.

8. The Chief Executive should consider appointing a senior public servant to manage the transition of the Legal Service Agency's functions into the Ministry of Justice. That person needs to have experience in managing reform and restructuring government agencies, particularly where that reform has successfully shifted staff culture towards a customer service focus.

Review mechanism

147. The Legal Aid Review Panel is funded and administered by the LSA, and has the function of scrutinising LSA decisions on legal aid. The grounds for review are that the LSA's decision is manifestly unreasonable or wrong in law. Applicants can apply for review in respect of decisions on: applications; conditions on grants; amounts repayable; the provider; the maximum grant; withdrawal of or amendment to a grant; enforcement of conditions; and charges on property. Listed providers can apply for review of decisions relating to the amount payable, on the same grounds.[25]

148. As a general principle, it is not appropriate to have a review body's funding controlled by the body whose decisions are subject to review. That gives rise to perceptions of conflict of interest and can create problems in the relationship between the two agencies.

149. The LSA and LARP appear to have fundamentally different approaches to their roles, which creates a tension. LARP members are practising lawyers and have an interest in access to justice. They appear to see their role as to loosen the eligibility criteria to ensure all eligible people receive legal aid in adequate amounts. The LSA, on the other hand, has an obligation to balance access to justice with responsible public expenditure. This creates some tension, which is exacerbated by the funding arrangements. LARP members feel some resentment towards the LSA, because it controls their funding, including remuneration. They consider they are underpaid. The LSA does not appear to see LARP as an aid to quality decision-making.

150. Finally, a significant stress has been placed on the LSA-LARP relationship by the deluge of historic abuse claims, which has caused congestion in the decision-making processes of both bodies. This has not been helped by difficult relationships between the providers and the LSA in relation to these cases.

151. It goes without saying that there should be a review mechanism. That is one very effective way of ensuring accountability within the system. It provides the procurement agency with a strong incentive to make high-quality and transparent decisions, and to follow appropriate procedures in making those decisions.

152. Whether or not the government accepts my recommendation to move the legal aid procurement function into the Ministry of Justice, I consider that the review function needs to be shifted. I suggest that constituting LARP as a tribunal and administering it out of the tribunals division of the Ministry of Justice is the simplest way of dealing with the conflict of interest and should be done as soon as possible. The Ministry has considerable experience in managing tribunals in a way that maintains an effective separation between executive functions (for example, administration of legal aid) and judicial functions (for example, LARP reviews of decisions on legal aid).

25 Legal Services Act 2000, section 54.

153. The Ministry of Justice would be responsible for administering LARP in terms of advising the Attorney-General on appointments, managing funding, and administering the Legal Services Act 2000. However, decisions made by LARP on review would be made independently of the Ministry and of the statutory officer, whose decisions were being reviewed.

154. In reviewing decisions of the LSA, the new tribunal should have regard to both access to justice considerations and responsible expenditure of public monies. I am not confident that a Chair drawn from the legal profession will necessarily achieve the appropriate balance between these considerations. Therefore, I consider that the opportunity should be taken to appoint a non-lawyer as the Chair of the new tribunal.

Recommendations

9. The Legal Aid Review Panel should be constituted as a tribunal and its administration moved to the tribunals division of the Ministry of Justice.

10. The new tribunal should have an explicit requirement to have regard to both access to justice considerations and responsible expenditure of public monies. To this end, the Chair of the new tribunal should not be a lawyer.

CHANGING THE FOCUS OF THE LEGAL AID SYSTEM

155. The legal aid review covers all aspects of initial criminal legal services, legal information, education, advice, and representation. The terms of reference are explicit in their desire for a legal aid system that delivers services to those who need them most.

156. The components of an effective legal aid system discussed earlier focus clearly on the importance of understanding legal need and giving the right people timely and appropriate access to legal services. It is critical to recognise that an effective legal aid system operates as a continuum of services from information and advice through to representation. It should be seen as part of a coordinated response to social needs.

157. While the terms of reference do not explicitly ask me to look beyond the legal aid system or to address problems outside the legal aid system, some problems became so apparent in my visits to courts around the country that it would be remiss of me not to highlight them. I appreciate that the government has limited resources at its disposal. I am also aware that the Ministry of Justice and Work and Income are doing some initial work to provide social support to court users. However, the social need of some users is so great that I recommend the government reprioritises social spending to extend existing services into courts. A whole-of-government approach needs to be taken.

A FOCUS ON DIRECTION-SETTING

158. As I noted in the previous section, I am not confident that the LSA and its Board are planning effectively for the legal aid system. Something needs to change. While the roles and responsibilities for direction-setting are clear, they do not appear to be functioning well. Consequently, opportunities are not being taken to be proactive in shaping legal services to make them more effective, or to address legal needs in a way that will make the system more sustainable in the long term.

159. The Ministry of Justice is the government department charged with administering the Legal Services Act 2000 and associated regulations, and monitoring the LSA's performance on behalf of the responsible Minister (the Minister of Justice). The Ministry also has a mandate to lead the justice sector and to provide advice and co-ordinate processes that ensure a collaborative, outcome-focused approach is taken to the sector's management.

160. The responsible Minister has a keen interest in the direction taken by the legal aid system. Therefore, I believe that the Ministry, in both its sector leadership and monitoring roles, should be prepared to advise the Minister on the LSA's planning and performance so that the system reflects government policy and contributes to the shared justice sector outcomes. Because the LSA has not demonstrated clear capability in direction-setting,[26] I would expect the Ministry to be advising the Minister accordingly, and actively monitoring the LSA's performance, given the importance of the legal aid system to the broader justice sector. This would help to strengthen the effectiveness of the relationship between the LSA and the Ministry, and to smooth the transition of functions in the longer term, should the government accept my recommendations.

161. In the short term, the focus of planning and reporting needs to be on transformation of the legal aid system. Long term, the transformed legal aid system will need to be supported by effective planning and reporting to help it remain effective and relevant. At a minimum, the system needs a new strategic plan, which needs to reflect the elements of an effective legal aid system as identified in this report.

162. Effective planning needs to be supported by reporting on progress. This does not require the creation of any new reporting requirements. If my recommendation that administration of the legal aid system be moved into the Ministry of Justice is accepted, the existing accountability framework for government departments should be sufficient to ensure effective monitoring and reporting.[27]

163. All organisations face the risk that the demands of day-to-day business will drown out the longer-term thinking work unless they take care to make time for thinking, reflection, and planning. It is evident that this has happened in the LSA. In learning from this experience, I would like to see the Ministry of Justice have capacity and capability, shielded from day-to-day operations, in order to think, plan, gather and analyse data, monitor for success, and trial new methods of service delivery.

164. Effective and strong leadership is critical to embedding planning and using it to drive change. The legal aid system needs a clear and shared vision about its purpose and strategy. All parts of the system need to support and work towards achieving the vision. "Push-back" by people used to the old way of doing things will jeopardise transformation of the legal aid system.

Recommendations

11. The focus of planning and reporting needs to be on transformation of the legal aid system, which needs to reflect the elements outlined in recommendation 2.

12. Strong leadership will be needed to drive change in the legal aid system, to overcome the risk that push-back by some people in the system will jeopardise its transformation.

26 LSA Baseline Review, supra at note 10, p.29.

27 This framework includes the State Sector Act 1988 and the Public Finance Act 1989.

Transformation based on information and benchmarking

165. Good quality information and analytical capability are critical to the active management of the legal aid system. In particular, it is going to be critical in driving change in the legal aid system over the next few years. Good information informs planning for service delivery. It helps to prioritise services to areas of particular need. It enables monitoring for performance, which is how the government can know whether the services delivered are effective in meeting legal needs. It gives the basis and rationale for changing tactics and trying something new if services are not effective.

166. In short, back-room information gathering and analysis is critical to the provision of effective, value for money legal aid services.

167. As I have noted, the legal aid system needs to map legal needs across New Zealand, taking into account the geographical, social, cultural, and economic factors that can contribute to or exacerbate legal need. At the same time, the system needs to map service providers (lawyers, and community-based legal and social services) across regions, to highlight gaps and overlaps, identify and remedy impending service gaps, and inform future service delivery. That mapping exercise can then be translated into effective planning and targeting of delivery and effort. It therefore benefits lawyers as well.

168. The LSA's sole attempt to gauge legal need has been the 2006 national survey of unmet legal needs and access to services.[28] That survey provided some information about legal needs, but had some significant limitations. It has not been repeated to date, and I am not aware of any plans to revise that survey to overcome its limitations and update it in the immediate future.

Recommendations

13. The legal aid system needs to map legal needs across New Zealand, taking into account the geographical, social, cultural, and economic factors that can contribute to or exacerbate legal need.

14. The legal aid system needs to map service providers (lawyers, and community-based legal and social services) across regions, to highlight gaps and overlaps, identify and remedy impending service gaps, and inform future service delivery.

28 Ignite Research, Report on the 2006 National Survey of Unmet Legal Needs and Access to Services (Auckland: November 2006).

A FOCUS ON CUSTOMER SERVICE

169. The terms of reference are explicit in their desire for a legal aid system that delivers legal services to those who need them most and complements efforts to maintain and improve the effective operation of the justice system.

170. I have concluded that an effective legal aid system needs to deliver a continuum of services to meet the differing needs of people and communities. Too strong a focus on legal representation risks leaving other needs unmet, which will most likely result in downstream costs to the legal aid system and/or the wider justice system. It makes sense, then, to resolve matters early. That requires consideration of people rather than problems, and it requires consideration of people in their context.

171. It seems to me that the legal aid system does not do this well, and that things would be greatly improved if the legal aid system could link more closely with social services. The court system and social services for court users tend to focus on perpetrators of crime (and, to a lesser extent, victims). They generally ignore the families of perpetrators and the potential that consideration of their needs has for enabling them to live better lives and to avoid patterns of offending into the future.

172. A lot of these people have very complex issues in their lives, and are already high-cost users of social services, particularly Work and Income services.

173. Although some of the issues discussed in the following section are not strictly within this review's terms of reference, they are too important to be left unsaid. They do affect the operation of the legal aid system and the court system, and have the potential to reduce crime and the resulting demand on those systems. I acknowledge that some initial work is being done by the Ministry of Justice, Work and Income, and at least one District Health Board to provide social support to court users, but I believe the social need of some court users is so great that a whole-of-government approach needs to be taken.

Ensure people know what to expect from their legal aid lawyer

174. I have been disturbed by stories I have heard about the behaviour of some legal aid lawyers, particularly where it appears that clients have paid not inconsiderable sums of money to their lawyers over and above legal aid. I have heard that some of these lawyers are getting backhanders, which strikes me as being a corrupt practice. In other cases, I suspect that unscrupulous lawyers are taking advantage of vulnerable clients who may be unaware that they do not have to pay their lawyer, or be too afraid of the lawyer to argue.

175. Particularly in the large urban areas, the courts are dealing with a mix of people from different cultural backgrounds, many of whom have English as a second language in varying degrees. For some of those people, in their countries it may have been a normal and accepted practice to pay their lawyers over and above state-funded legal aid, to ensure the lawyer did a good job. I was told this was not uncommon, and had a few instances drawn specifically to my attention. Although the information put out by the LSA notes explicitly that people are not required to pay anything to their lawyer, this information is clearly not getting through to some clients.

176. I have also been told about people who have been dissatisfied with their lawyer's conduct, but have not known what to do about it, and not had the confidence to make a complaint.

177. The LSA has produced helpful pamphlets about the legal aid system, and the process for applying for legal aid. They do state clearly that clients do not have to pay anything to their lawyers. These pamphlets are available in five languages. I am concerned, however, that these pamphlets may not be reaching everyone who needs them.

178. I also consider that there is a gap in relevant information, because the Law Society's rules of client care do not appear to be available in the same user-friendly format. People using legal aid are unlikely to appreciate the distinction between the legal aid system and the regulation of lawyers. I consider that this information should be put together in a user-friendly format for legal aid clients.

179. I recommend that the LSA and the Law Society work together to develop simple and clear information that can be made available in a variety of languages. The two agencies should work with organisations such as community law centres and the Citizens Advice Bureaux to improve distribution of the pamphlets over the current approach. They should be posted on the walls of courts, and in police and court cells.

Recommendations

15. The Legal Services Agency and the New Zealand Law Society should work together to develop simple and clear information for legal aid recipients that amalgamates
    - the requirements imposed on legal aid lawyers by the Legal Services Agency and, in particular, that people on legal aid do not have to pay their lawyers any money
    - the New Zealand Law Society's rules of client care.

16. The information set out in recommendation 15 should be made available in the languages most commonly spoken by New Zealand's immigrant communities, so it is accessible to those who do not have a strong command of English.

17. Distribution of this information needs to be enhanced so that it reaches more legal aid clients than currently appears to be the case. It should be posted on the walls of courts, and in police and court cells.

Meeting people's needs at court and beyond

180. In terms of granting legal aid, the LSA has a strong focus on facilitating access to justice through funding legal representation. Its performance measures are focused on processing applications for legal aid as quickly as possible, to ensure that people can access legal representation with minimal delays.[29] This has benefits for both legal aid users and the court system, because delays in granting legal aid can bring court proceedings to a grinding halt.

181. In focusing on legal representation, however, the legal aid system overlooks some equally important and basic needs. These needs are not currently being met in a consistent way by any government agency. This situation cannot be allowed to continue.

182. On my visits to courts, especially the criminal courts, I found that many of the clients there were the same kinds of people I had met when I was Director-General of Social Welfare. I recognised that many of these people would be inarticulate and not be able to read or write, and that many would not have English as a first language. Many of them, too, would be the most socially deprived people in our country. Most of them would be recipients of social services, and some would be high-cost users of those services, especially Work and Income services.

183. These people were usually with their families, including their children. I knew that many would not have had anybody with whom they could leave their children with confidence about their children's safety.

184. I watched these people coming into court, where the only greeting they received was from the contracted security guards as they were instructed to hand over their belongings for screening. Once in the court, they were confronted with an airport-type scheduling board telling them in which courtroom they were to appear. A loudspeaker summoned them into the courtroom when it was their turn.

185. People often had nowhere to turn if they could not read the signs or find the courtroom. The courthouse was, to my eye, a bewildering and unfriendly place. People milled around the waiting area, often with children underfoot. Meetings with duty solicitors and legal aid lawyers were hurried. I saw many legal advice discussions take place just outside the courtroom, with no privacy or peace for reflection.

186. Once inside the courtroom, things were even more incomprehensible to people unfamiliar with court processes. Duty solicitors engaged in dockside conferences, sometimes putting defendants in the position of having to make snap decisions that affected their future while the court and a full public gallery waited and watched.

29 The performance standards agreed with the Crown for 2008/09 were that 93 per cent of criminal applications would be processed within one working day, and that per cent of criminal applications would be processed within 15 working days. Supra at note 10, p.15.

187. I was horrified to see one defendant have to make a decision, based on dockside advice from the lawyer, about whether he would plead guilty on the spot and go to jail. He was told that it would be for three weeks only, and nobody seemed to be concerned about what an unplanned removal to prison – even if only for three weeks – would do to his employment and family commitments. Unbelievably, this appeared to have been the first time that anyone had discussed with him the penalties he faced.

188. I watched young men and women shuffle up to the dock and back, clearly without any understanding of what was happening as hearings were adjourned and further appearances were set down for some date in the future. Scheduling decisions appeared to be a conversation between court staff and judges, with the defendant an apparently irrelevant consideration in that discussion. Often these conversations concluded without any kind of verbal instruction to the defendant about the date and time of the next appearance.

189. I therefore have little confidence that some defendants even appreciated the fact that they were expected to turn up to court again. I have even less confidence that they would remember the date on which they were next due in court. This is highly significant, given that failure to appear in court can result in an arrest warrant being issued and denial of bail at future hearings, and impose unnecessary costs on the court system. If the court system is going to hold people to account for failure to appear, it needs to take reasonable steps to ensure people understand their obligation to appear.

190. The court system does not currently support defendants in a consistent way: some courts provide written advice about the next hearing date, others do not. A few of the courts have people from social services, and a few have individual volunteers to provide advice and support to court users. The Dunedin District Court has someone to greet people and give them assistance. The approach to the basic tenets of customer service is far too hit and miss, in my opinion.

191. I concluded that this lack of concerned support for people's social wellbeing at their most vulnerable time was because the court culture has developed with a focus on the perpetrator. The courts are struggling with the growing recognition of the need for social services wrapped around offenders' families and whānau because there appears to be no possibility of government finding the funding required to put social services (at the level required) into the courts.

192. One interested observer told me that "courts don't do customer service". In fairness, and faced with a lack of space, the Ministry of Justice is trying to organise volunteers to provide assistance and support in the courts. However, I do not believe this will be adequate.

Practical assistance for court users

193. The legal aid system is designed to deliver access to justice through legal representation, and is not focused on meeting other needs of legal aid users. I am primarily concerned with the practical needs of defendants, litigants, and their families as they navigate their way through the court system. Arguably, the court system should meet some of these needs, but from what I can see, much more should be done.

194. I believe people's experience in the courthouse would be greatly improved if there were staff at the courthouse whose primary function was to: meet and greet court users; provide directions and help people understand the court processes; and help people to find the duty solicitor, the right courtroom, and other facilities. In some courts, volunteers provide a meet and greet service, and as mentioned above, the Ministry of Justice is working on finding volunteers for other courts. Currently the arrangements are not consistently provided across different courts.

195. I consider this function is too important to be solely reliant on volunteers. The value that could be gained by a trained professional getting alongside and talking to vulnerable families while they are an essentially captive audience could be significant in terms of linking people into social services.

196. A significant proportion of defendants in the criminal justice system are on legal aid, although the proportion of legally aided defendants will vary from court to court. If the court system cannot respond to the needs of court users, then the legal aid system should. While other users of the court system would benefit from a spill-over effect, the need is sufficiently great that some cross-subsidisation should be tolerated. In effect, this could be seen as a universal scheme of assistance, because many of the people before the courts have been charged with offences that do not meet the threshold for legal aid. However, those people would benefit from the assistance I propose, because they are likely to suffer the same social disadvantage and offending risks. I am also aware of a tendency for offending to escalate: not all people who are on their first grant of criminal legal aid are first-time offenders. For some, it will simply be the first time that their offending has been sufficiently serious to meet the legal aid threshold. Up-front assistance that resolves some of the social disadvantage may have an effect on subsequent offending.

197. The system would also be improved if, following their first appearance in the criminal courts, people were given clear information about what would happen next, how they were to get in touch with their legal aid lawyer, when to come back to court, and so forth. While information about the next court appearance date and time, and contacts for legal aid, should be in writing to reduce the need to rely on the defendant's memory, I also feel it would be useful for this information to be given verbally, to help reinforce it and ensure the defendant understands it.

198. Therefore, where defendants are not remanded in custody, when their case has been heard and before they leave the courthouse, they should be walked through information about their case, including what happened in the court, the date and time of their next appearance, and any conditions they have to comply with in the meantime. Ideally, lawyers would perform this role for their clients although, as matters stand, I have my doubts as to how well some lawyers discharge that function. Having said that, one lawyer showed me a brief that she gives her clients. She walks her clients through the brief, using it to explain the court process to them.

199. If necessary, legal aid lawyers could be required to ensure their clients understand what has happened in court and what is to happen next as part of their funding. The primary issue, therefore, is where defendants are unrepresented. It may be possible for this role to be performed by either duty solicitors or court staff. I consider that the Ministry of Justice and the LSA should consider the options.

200. I also consider that a final check should be done to ensure any referrals for defendants or their families to social services have been put in train.

201. This check will be particularly important where defendants have been remanded in custody or sentenced to imprisonment. The defendant's family and whānau may not have been prepared for this and caregivers of children may need to be linked into Work and Income on their own account, and may need to change tenancy documents. Practical issues such as these and, indeed, how the family will travel home from the court, may not have been planned for. The waiting room support staff should be able to give families lists of things they will need to consider, and put them in touch with local services such as Iwi social services and local community link centres.

> ***"... every day hundreds of new young people enter the system and they are often on their own or supported by other unknowledgeable people and they are left to the mercy of incompetent defence lawyers."***
>
> *LAR 012*

Recommendations

18. The Ministry of Justice should explore the feasibility of having skilled and professional people at the court to welcome court users and provide directions and assistance to them. These people should have the knowledge and resources to refer people to social services.

19. The Ministry of Justice and the Legal Services Agency should consider options for ensuring that defendants leave the court with clearly understood information about what happened in the court, the date and time of their next appearance, and any conditions they have to comply with in the meantime.

Making the most of the teachable moment for first-time defendants and their families

202. I am of the view that one of the most important teachable moments in terms of improving the social deprivation of families, and crime prevention with children and young people is being lost.

203. While the courts see many recidivist offenders, they all start their criminal careers somewhere. Some, if not many, people entering the criminal justice system for the first time will be frightened, bewildered people stumbling into a life of crime. If they could be salvaged, not only would their lives and those of their families be improved, we would also save the taxpayers huge expenditure.

204. For people entering the criminal justice system for the first time, the process provides the opportunity to really tackle the causes of offending, the underlying social problems, and encourage defendants into changing course. It also presents an opportunity to link defendants' families into social services, particularly those aimed at children and preventing children from following their parents into crime.

205. I am aware that the underlying drivers of crime are intractable social problems such as poverty, family dysfunction, poor treatment of children, harmful drinking and drug use, poor mental health, and the intergenerational transmission of criminal behaviour. Many of these issues are concentrated within families and communities who are socially and economically deprived and often excluded from the most basic health, education, and welfare services.

206. I believe it is critical that government agencies work to identify alternative approaches to managing low-level offenders and to offer pathways out of offending. Reducing crime will have a significant effect on legal aid expenditure.

207. Low-level offenders have a range of needs that, I believe, require a joined-up government response to provide enough scope, capacity and funding to provide viable pathways out of offending. Alternatives are needed to charging, prosecution and imprisonment of low-level offenders, without allowing them to "get away" with offending. I believe effective case management is needed to address the underlying causes of people's offending. I think it critical that a whānau-centric approach be taken to this case management, to address the family's social deprivation and reduce the risk factors of children drifting into patterns of offending.

208. I appreciate that funding is not available to locate a social service in every court. However, I understand there could be at least $1 billion of taxpayer money going into social services, and a large number of court users and their families will already be high users of social service funding. I urge the government to assess how that money is being spent and to reprioritise some of it to extend existing social services into courts in four ways:
    - extend the Work and Income Community Link Centre case management system and staff into courts
    - wrap-around support for families and whānau going through court processes
    - early education services in busy courts
    - wrap-around services for young first-time offenders, including assistance into employment.

Recommendation

20. The government should reprioritise expenditure on social services to allow services to be extended into the courts to reduce the social deprivation of court users and their families and whānau.

Extend Work and Income case management system in courts

209. The case management system used by Work and Income in Community Link Centres should be extended into courts. This would ensure additional issues relating to their existing clients who enter the court system are identified. It would also enable Work and Income to pick up new clients in the court system who are in need of their services.

Recommendation

21. The case management system used by Work and Income in community link centres should be extended into courts.

Wrap-around support for families and whānau

210. Existing social service contracts should be extended to cover families and whānau already receiving care from social service providers and to enable new clients to be identified. The families of people going through the courts need wrap-around support services commencing from the time of arrest and running through to support following resolution of the court process. This needs to include assisting children back to school following the court process.

211. One initiative I learned of in the course of this review has been developed by the Police and Iwi social services based in and around Kaitaia.

> ***"We were worried kids would grow up thinking they lived at 13 Redan Road [the Kaitaia District Court]"***
>
> *New Zealand Police*

212. This initiative wraps support around Māori offenders and their whānau from the time of arrest. One of the objectives of the support is to ensure childcare arrangements are in place to avoid the children being in court while their parents appear. The families of offenders are supported in continuing to lead their daily lives while also coping with having a member go through a court process. With strong ongoing Māori representation in the region's crime statistics, offending was emerging as an inter-generational problem and both Iwi and the Police have committed to try to break this cycle.

213. The Iwi social service is alerted by the Police when an Iwi member is scheduled to appear in court. This means the family can be contacted in advance to discuss any assistance they might need to minimise disruption to the lives of family members during and after the court process. Iwi social services then help with transportation, child care, and so on to ensure children and partners remain in their routines as much as possible – at home, at work, or at school.

214. I see a real opportunity to leverage off these relationships to help to break the cycle of inter-generational offending. I would encourage other regions to work together to create similar initiatives, particularly in regions where there is high social deprivation. However, I am aware that no one solution is going to be sufficient to meet all the legal needs of Māori and Pacific peoples.

215. There are many social service organisations around the country that may be amenable to working with the legal aid system to provide a similar kind of assistance to that in Kaitaia. Some organisations will have a particular focus, such as on an Iwi, a Pacific community, women, or children. Others may have a focus on addiction or other health problems, or on social deprivation more generally.

216. I believe the legal aid system should try to leverage assistance from these social services to help the families of offenders who are going through the court system. In particular, I believe that more could be made of the links that community law centres have with the social service organisations in their communities. For many people, community law centres are the first point of contact with the legal aid system and/or the justice system. Community law centres currently link with their local social services and refer clients as appropriate. However the extent of those linkages, and the effectiveness of referrals, is not uniform across New Zealand. I believe more should be done to enable community law centres to link their clients into services – both government and non-government – particularly to ensure people are receiving all their entitlements. I consider that the community law centres' contract with the LSA should include an explicit requirement to build and strengthen links with social services.

217. The court system also has the potential to create linkages with the social sector. For example, there is an initiative being developed by the Ministries of Justice and Social Development to link support and intervention services into family violence courts. These services are aimed at addressing the causes of family violence, and the process being developed aims to get families and offenders into services as early as possible. I applaud such an initiative. To the extent that it may reduce re-offending, it has the potential to reduce pressure on legal aid expenditure into the future.

Recommendations

22. More needs to be done to enable community law centres to link their clients into social services.

23. Community law centres' funding agreements with the Legal Services Agency should include an explicit requirement to build and strengthen links with social services.

Services focused on the children of court users

218. The Kaitaia initiative referred to in paragraph 211 resonated for me because it addressed one of the sights that had most appalled me in my court visits around the country. That was seeing the small children whose parents were appearing in court. Watching your parent being sentenced to imprisonment and taken from the court in custody is something that no small child should have to see. Comforting your mother as your father is taken away to prison is a responsibility that no pre-schooler should have to bear.

219. There may be many reasons why people bring their children to court with them. One of those may well be a lack of people who the parents can trust to provide responsible, safe childcare. Some judges will not allow children into court, which may minimise disruption in the court, but may also force parents into making alternative arrangements that compromise their children's safety and wellbeing.

220. I have visited the Starship children's hospital, which has early childhood education facilities as a place for parents to leave their children when meeting with specialists, so the child can be shielded from the situation where parents may be first receiving distressing news. In the current context, this kind of arrangement would protect children from a highly charged environment.

221. I consider it advisable for the Ministry of Justice to seek support from the Ministry of Education in investigating the possibility of arranging similar temporary childcare for the children of court users who have been unable to make alternative arrangements. I am aware that crèches have been tried before in some courts and that there can be some problems with children just being left there for hours on end. I consider, however, that childcare could serve a dual purpose: it would keep children away from the courtroom; and it could be used to help to link them into the education system. This care should have an educational focus rather than being a babysitting service, given the educational deprivation of many of the children concerned.

222. Another necessary service, in my view, is for someone within the Police, legal aid, court system, or social services, to link with the school after the imprisonment of a child's parent or family member. For the majority of children, having a parent imprisoned will be a traumatic and shameful experience, and the first morning back at school will be difficult in the extreme. While some parents will have the social skills and the right relationship with the school to enable them to talk through strategies for the child, others will not. As part of the process for supporting families through the court process, someone needs to take responsibility to liaise with the school and ease the children's transition back into ordinary life after the conviction of a close family member.

Recommendations

24. The contracts with existing social services should be extended to provide wrap-around support to families of offenders from the time of arrest through to support following resolution of the court process, including assisting children back to school.

25. The Ministry of Justice and the Ministry of Education should work together to investigate the possibility of arranging for temporary childcare available for the children of court users. This care should have an educational focus.

Services for young, first time offenders

223. It is particularly important for there to be focus on first-time offenders. The first arrest and entry into the youth or adult court systems represent a key teachable moment for defendants and their families, particularly younger siblings or children. The first conviction can have a profound effect on a person's future, particularly for people who may already have limited job prospects. I was told that half of the jobs registered with Work and Income are not available to people with convictions. This means a considerable number of convicted offenders have severely constrained job prospects, which may just lead to further offending. Further offending will almost certainly bring those people into the legal aid system.

224. I recommend that the case management system of Work and Income be extended to provide wrap-around services to young people appearing in court who have not had a criminal conviction. These services should be aimed at reducing the risk of their offending in the future, and supporting them into employment.

Recommendation

26. The case management system of Work and Income should be extended to provide wrap-around services to young, first time offenders, to reduce the risk of their offending in the future, and to support them into employment.

Capability building

225. Legal aid lawyers and community law centres are an important point of contact for vulnerable people. It makes sense for them to be able to help link people into social services. That requires both time and skills to help identify problems and risk. Training should be available, where it is needed.

226. Legal aid payment rates should allow for sufficient consultation with clients to enable problems to be identified. Not all lawyers will want to take on this work or be good at it. It is a different skill set from legal skills. But following some very basic problem identification, I consider that referral to a community law centre for more in-depth triage should not be too difficult.

Barriers to accessing legal aid

227. The discussion paper asked whether people faced barriers in accessing legal aid services. The experience of legal problems is unevenly distributed across the population, with high prevalence and incidence amongst society's most vulnerable groups. Particular families are at most risk of developing groups of problems: victims of assault; lone parents; unemployed people; those living in high-density housing; those on welfare benefits (and their children); people with disabilities; and people who are physically or mentally ill. Not only are these people most at risk of developing a number of problems, they are also the least likely to be able to deal with those problems.

228. It seems likely that many of the most vulnerable people are already receiving services from other State-funded agencies for other social needs and are eligible to receive legal aid, given the current income thresholds. However, it is not clear whether eligible people face barriers in accessing legal aid. For instance, it is unclear whether people find it easy to access services, and whether the services provided are the right ones, and provided in the optimal way.

229. Submitters made a number of observations on barriers to accessing legal aid. They included comments about

- **the quality of information and advice about legal aid**
  As I have already noted, the LSA's information does not seem to be completely successful in reaching its audience. One submitter noted that many people are unaware they may be eligible for legal aid, and do not know how to apply for it.[30] Another submitter noted that duty solicitors do not always question people adequately about their entitlement to legal aid and do not necessarily appeal against decisions not to grant legal aid.[31]
- **language and literacy barriers**
  Submitters have noted that there are high rates of functional illiteracy in New Zealand, especially among Māori and Pacific populations.[32] This can mean that people who require services will not be able to find out about them from brochures and other written material. They are also likely to require literary support to fill out forms or understand what is written about them. Similarly, inarticulate people are likely to have difficulty instructing lawyers. New Zealand has a growing population of people who have English as a second language. Material written in English alone will exclude non-English speakers.
- **availability of legal aid lawyers**
  Submitters noted particular difficulty with finding legal aid lawyers for civil matters, which means people who might otherwise be eligible for legal aid cannot obtain legal representation.[33] One community law centre noted that its clients experienced difficulty in finding a lawyer prepared to have an initial meeting to discuss a possible matter that could be eligible for civil legal aid.[34] Similar shortages were noted in relation to family legal aid lawyers[35] and specialist lawyers in areas such as refugee law.[36]
- **fear of debt**
  Three submissions noted that people could be dissuaded from applying for legal aid because of the repayment regime. "Sometimes it is easier to go into debt rather than have a charge against one's land that is required in some cases."[37]

230. The comments made by submitters have reinforced what I felt instinctively about the barriers some people face in accessing legal aid. However, I have not been able to commission sufficient empirical data to enable me to quantify the problem or make specific recommendations on how the legal aid system should respond. Therefore, I recommend that the legal aid system needs to include a focus on the barriers to accessing legal aid in its information gathering and analysis on legal need. Information about barriers needs to be benchmarked, so progress can be measured over time.

30 Submission LAR061.

31 Submission LAR013.

32 Submissions LAR016 and LAR059.

33 Submissions LAR015, LAR021, and LAR034.

34 Submission LAR032.

35 Submissions LAR016, LAR032, LAR 041, LAR057, and LAR059.

36 Submission LAR045.

37 Submission LAR079. Similar comments were made by submissions LAR030 and LAR039.

Recommendation

27. The legal aid system needs to include a focus on the barriers to accessing legal aid in its information gathering and analysis on legal need. Information about barriers needs to be benchmarked, so progress can be measured over time.

Legal needs of Māori and Pacific peoples

231. In the discussion paper, I observed that Māori and Pacific peoples feature strongly amongst those most likely to experience groups of problems and problems that are not easily resolved without legal assistance. Given the disproportionate representation of Māori in the criminal justice system, in terms of both offending and victimisation, it is imperative that the legal aid system is accessible to Māori and delivers services appropriate to their needs. Arguably, if the legal aid system fails Māori, the system fails altogether. It appears that Māori receive legal aid roughly in proportion to their reported legal need. However, it is not clear whether Māori face barriers in accessing legal aid and, if so, what those barriers are. Nor is it clear whether the services are provided in ways that best meet the needs of Māori. I have also spoken with members of the Pacific Islands community in Manukau and they tell me that information about legal aid just does not get through to them. Pacific peoples also have a strong sense of collective responsibility and struggle with the fact that the court system generally does not take this into account in its dealings with the offender.

232. Some submitters did respond to my questions and made a number of observations that, again, reinforced what I felt instinctively about the barriers faced by Māori and Pacific peoples. One submitter observed that people can exhibit a real shyness when talking to lawyers. "It takes skill, patience and a sympathetic understanding to extract all relevant information."[38] Many of the issues are identified above in paragraph 229. Other issues raised by submitters included

- **availability of legal aid lawyers from a particular ethnic background**
  Some Pacific peoples, in particular, will want a legal aid lawyer from their home countries,[39] and the availability can be patchy. Other migrant communities are also likely to favour lawyers who are fluent in their own languages.
- **knowledge of legal aid**
  Several submitters noted that some Māori and Pacific communities are not aware that legal aid may be available for their legal proceedings.[40]
- **cultural barriers**
  One submitter observed that there can be a reluctance to use lawyers for civil disputes.[41] Another observed that some people will not speak up if they are unsure or want to question something. Language can also be a barrier here, because there is a lack of qualified and experienced interpreters.[42]

38 Submission LAR013.

39 Submission LAR017.

40 Submissions LAR017, LAR030, and LAR060.

41 Submission LAR079.

42 Submission LAR039.

233. My ability to make useful recommendations on responding to the legal need of Māori and Pacific peoples has been limited by a lack of robust data that quantifies the problem. Therefore, I recommend that the legal aid system should include a focus on the legal needs of Māori and Pacific peoples, and the barriers they face in accessing legal aid in its information gathering and analysis on legal need. Information about legal need and barriers should be benchmarked, so progress can be measured over time.

Recommendation

28. The legal aid system needs to include a focus on the legal needs of Māori and Pacific peoples, and on the barriers they face in accessing legal aid. Information about legal needs and barriers should be included in the system's information gathering and analysis, and it should be benchmarked so progress can be measured over time.

A FOCUS ON INITIAL ADVICE AND ASSISTANCE

234. The bulk of legal aid expenditure goes on legal representation. However, initial information and advice services are the entry point into the legal aid system for many. This
- provides an opportunity to direct people to the services and organisations that can help to resolve problems
- creates an opportunity to reduce demand on court systems and on legal aid by resolving problems early.

235. Legal services can be viewed on a continuum that increases in complexity as people move further into the legal services spectrum. Initial advice and assistance are at the beginning of this spectrum, which progresses through to legal representation, as shown in figure 7 below.

Figure 7: The spectrum of legal services

236. Strengthening some of the services at the early end of the continuum could benefit a wider group of people than the current population eligible for legal aid, in a cost effective way. Early advice and information can help to

- prevent cases escalating and requiring expensive legal solutions, such as representation in court
- reduce the knock-on effect on other public services, particularly heath services and income support, which can result where people who cannot resolve problems end up in cycles of decline (this creates a significant unseen cost to public services, such as healthcare, housing, and income support services)
- prevent the creation of additional related problems, which would create further costs.

> ***"CABs and CLCs provide a focal point for many in the community who would be reluctant to directly approach private law firms or government agencies for legal assistance."***
>
> *LAR 075*

237. With its focus on legal representation, the legal aid system tends to look at problems one case at a time. There is a role, especially at an early information and advice stage, for the legal aid system to help people resolve groups of problems. One submitter noted this in relation to women who have been victims of domestic violence:

> "... there are often many areas of unmet legal need in families where abuse occurs. Women may need help with tenancy claims caused by damage to houses, with claims from WINZ [Work and Income], they may have criminal charges themselves as a result of being forced into criminal activity, have debt related to gambling or financial abuse, or they may have employment problems as a result of their partner continuing to harass and abuse them at work. It would be useful if these issues could be referred to a Community Law Service so that women can try and solve a number of legal problems at the same time. This would make their lives less complicated and stressful and would allow women more energy to concentrate on recovering and remaining free from abuse."[43]

43 Submission LAR016.

The benefits of initial advice and assistance

238. Initial advice and assistance services such as Citizens Advice Bureaux and community law centres generally fill a gap within the legal services delivery spectrum that is unlikely to be filled by the private sector because the services are not sufficiently profitable. The gap is unlikely to be met through legal aid because the matters are unlikely to be sufficiently serious or complex. There is also insufficient public interest to attract lawyers to provide these services *pro bono* (free of charge) on a large enough basis.

239. The services are aimed at those who cannot otherwise afford them. The *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* found that 76 per cent of those accessing community law centre services earned less than $30,000 per annum. [44]

240. Initial advice and assistance services help people to resolve disputes in the civil and family law areas, and assist them in dealing with criminal matters. They also help people to deal with legal issues involving government services, which improves people's access to entitlements and gives them a better understanding of processes. This can help to make people more self-sufficient in the longer term.

241. There are flow-on effects, which may bring benefits for the courts, government agencies, and taxpayers. These include
    - reductions in court and tribunal pressures
    - unquantifiable reductions in health and social sector spending (there is evidence that shows that non-addressed legal issues lead to increases in stress related illnesses, physical ill health, loss of confidence, loss of income, and relationship problems)
    - unquantifiable savings through more efficient government processes (for instance accident compensation, education, immigration and citizenship) because of better understanding of client rights within those processes and support to interact with them. At least 15 per cent of community law centres' work is within areas that directly relate to the work of government agencies.

242. On a more general level, initial advice and assistance services support the rule of law by helping to ensure that people can understand their rights and responsibilities under the law and hold state sector agencies to account. The full range of benefits is shown in table 3.

44 Supra at note 28, p.59.

Table 3: Benefits of initial advice and assistance services

Equity and Access

Efficiency

Rule of Law

Initial advice and assistance services	Benefits to the client and public	Flow on benefits to agencies
Clients ***Legal assistance*** ***Legal advice*** ***Legal representation***	*Clients:* • Issues and problems resolved, including: • civil disputes; • family breakup and care of children; • problems with government services; • criminal charges; • Māori legal issues. • Improved access to justice through better understanding of, involvement in processes, and help with representation in courts and tribunals.	• Less use of court system, especially family and civil. • More efficient use of courts and tribunals through better informed users – especially Family Court and Disputes Tribunal. • Improved engagement with government agencies and their dispute resolution mechanisms. • Reduced pressure on social and health sector services.
Public and clients ***Legal information***	*Clients and public:* • Improved understanding of rights and entitlements and dispute resolution methods.	• Efficiencies as clients better able to engage with government agencies. • Agencies more likely to achieve goals (as entitlements met and issues resolved).
Public ***Law reform and community advocacy*** ***Law-related education*** **(both through community law centres)**	*Public:* • Improved decision making processes based on better information. • Citizens with better understanding of the law. • Citizens with more respect for the law. • Improved respect for democratic institutions.	• Better understanding of legal needs of vulnerable groups and how proposals affect them.

Recommendation

29. I recommend that better use be made of initial advice and assistance services in the legal aid system.

The problem: fragmented services

243. Initial advice and assistance services are almost exclusively community based. While this means the services are closely linked into their communities, it also means they are fragmented and lack a national overview. The nature of the services provided varies across the country, and there is no real co-ordination within the system to assist anyone moving through it.

244. Services are predominately provided through community law centres, the duty solicitor scheme, and the police detention legal assistance scheme. All three are largely reactive towards the problems that are put before them, although community law centres are able to take a more proactive approach towards early intervention.

245. I am particularly concerned about variation in the kinds and quality of some of the services provided by community law centres. I am also concerned that there is too little cooperation between all services within this area. There is scope for greater coordination and standard-setting in the services provided as well as with the wider social sector to stop problems becoming justice issues.

Community law centres

246. Community law centres provide community legal services across New Zealand. There are currently 26 community law centres nationally, and 91 per cent of territorial authorities have access to a centre. They are widely used: 229,525 people received services from community law centres in 2008/09.

247. Most community law centres are generalist centres that provide a variety of services across the range of law areas, although community law centres often target services to their strengths or interests. Their aim is to meet the unmet legal need of their community. Three centres provide specialist services targeted to a particular area of law: Auckland Disability Law Service; Ngāi Tahu Māori Law Centre; and YouthLaw Tino Rangatiratanga Taitamariki.

248. Services can be grouped into six work areas. These are
    - **legal information**
      The provision of general information about law, rights, and responsibilities includes telling the enquirer what legal information is available and where to find it, and checking the enquirer can understand the information they have been given.

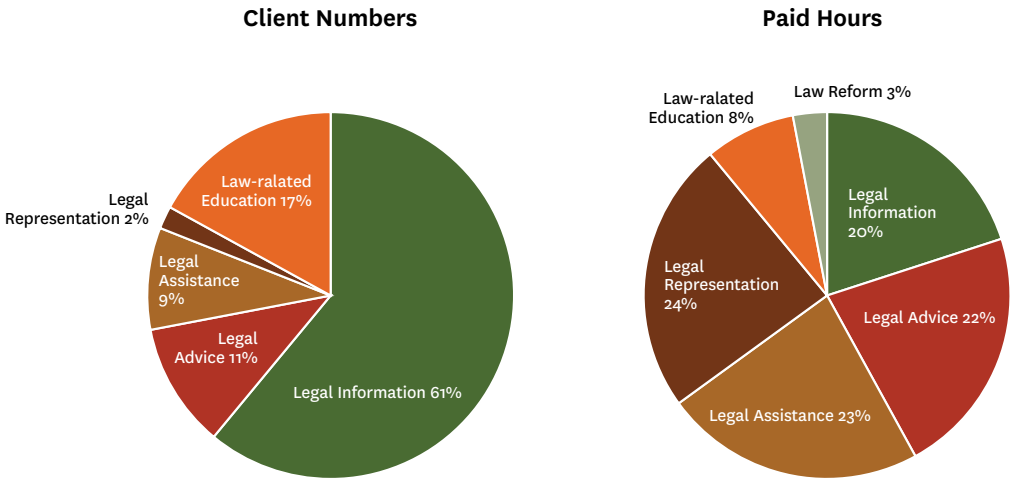
- **legal assistance**
  This can include assisting a client to take steps to address a legal problem or dispute, supporting a client in dispute resolution and settlement processes (not judicial proceedings), and helping with administrative processes and documentation.
- **legal advice**
  This is a service directed towards resolving a specific legal problem faced by a client. Advice includes explaining the options for resolving a dispute, advising clients how to prepare a submission, and advising on the relevant law.
- **legal representation**
  Representation involves appearing for clients before a court, tribunal, judicial authority, or other body that can hear legal matters. It also includes making written submissions, letters, and phone calls, holding meetings in respect of a legal matter, and negotiating for the client.

> ***"... to be able to give people the help they need for the range of interrelated issues they often have, information and advice services should be universal in nature...".***
>
> *LAR 065*

- **law reform and community advocacy**
  This involves promoting change to law-related issues, customs, or to statute on behalf of the community through, for example, making submissions.
- **law-related education**
  This is the structured delivery of information on law-related matters in the form of courses, seminars, or classes for members of the public, for groups with specific interests.

249. Figure 8 illustrates the respective proportions of the total workload for community law centres in 2008/09.

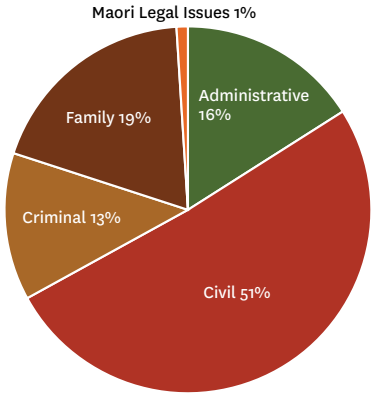
Figure 8: Service areas for community law centres



250. The work of community law centres is, for the most part, demand driven and reactive to the problems of clients. Centres do provide proactive services through their community education programmes, although this is only a small proportion of their business (around 17 per cent).

251. Community law centres operate primarily within the civil jurisdiction (including family law). Civil law makes up 86 per cent of the workload of community law centres (including general civil law, administrative law, and family law), as shown in figure 9 below.

Figure 9: Community law centre (work areas)



252. Services are provided by a combination of paid employees and volunteers. Most community law centres have a core of paid employees who are supplemented by volunteers. Volunteers tend to come from two sources: local lawyers and, for community law centres located close to a university law faculty, law students. In 2008/09, nine per cent of services were delivered by volunteers.

253. Community law centre services are targeted at vulnerable groups within the community, particularly those assessed to have an unmet legal need. Fifty-four per cent of clients were women, 20 per cent were Māori, at least 40 per cent were unwaged, and at least 56 per cent were eligible for some form of government assistance.

254. Community law centres provide an important service facilitating access to justice. There is, however, a lack of knowledge about the work of community law centres in the community. Only 48 per cent of people have an awareness of community law centres.[45] Of those seeking legal advice, 11 per cent seek assistance from a community law centre.[46]

255. Funding for community law centres is primarily provided through the Lawyers and Conveyancers Special Fund which consists of the interest income on solicitors' trust accounts. In 2008/09 funding amounted to $10.97 million. The funding is distributed according to the population and unmet legal need within a centre's area of work and across New Zealand, based on the LSA's National Funding Policy. Currently, there is also some account for the loss of historical funding sources for a few centres, as well as some provision for services that support community law centres as a group.

45 Supra at note 28, p. 81.

46 Ibid, p. 40.

256. Community law centres faced large funding cuts of up to 68 per cent in 2009/10 because of the reduction of interest rates and slowing housing market. The income of the Lawyers and Conveyancers Special Fund is driven by interest rates and housing sales (which drive the bulk of the volume in trust accounts). The Minister of Justice secured an additional $7.2 million to supplement the Special Fund for 2009/10 to ensure there was no overall reduction in funding. This funding was for one year only. The Minister of Justice also announced a review of the funding model for community law centres. That review is running concurrently with this review of legal aid.

Benefits of community law centres

257. Community law centres provide valuable services that benefit both their clients and the wider justice and social sectors. They help
    - clients to resolve issues for themselves, by giving them information and advice
    - to resolve the issue for the client
    - clients to find the right assistance for their issue, including through referral to an appropriate service or lawyer.

258. Anecdotally, it seems that community law centres already play a role in preventing problems by referring people to social services. For instance, when assisting to resolve a civil debt issue a community law centre will often refer the client to budget services to assist them in managing their finances in the future.

259. If the services provided by community law centres were not available, many of their clients would be unable to afford private legal services, so would go without. It is also likely that, without community law centres, a number of government departments would receive significantly increased enquiries and would have to invest more heavily in resolving problems with clients. Around 10 per cent of issues dealt with by community law centres relate directly to various issues that affect government departments.

260. Community law centres provide wider positive benefits for society in general. For instance, community law centre clients can transfer the information they have learned to the people around them. This experience, as well as the community law centres' education work, helps to increase legal knowledge and awareness within the community.

261. Community law centres provide a lower cost service than legal services provided by either private practitioners or legal aid providers. The average hourly rate for community law centres was $75.18 in 2008/09, whereas the average hourly rate for comparable matters in the legal aid system is closer to $120. While the lower cost of services partially reflects the lower complexity of cases, it is unlikely that these services could be met by other providers at a comparable rate.

Issues with the current services

262. As I have already indicated, I am concerned about the variation in the kinds and quality of services available. Not all community law centres provide services within all areas and there is significant variation in the quantity of services provided. I understand that in 2008/09, four out of 27 community law centres had difficulty in meeting relatively low minimum targets for hours of services provided. There is also significant variation in the cost of services provided. The cost of services in 2008/09 ranged from $40.51 per hour to $173.82 per hour. This says to me that there is room for improvement in the way some community law centres are operating.

263. Not all community law centres provide a full range of services. For instance, one community law centre has told me it does not provide any family law services.

264. I consider that there should be a national standard of services for community law centres to ensure equitable access to services across New Zealand.

Opportunities for enhancement

265. The Ministry of Justice is currently reviewing the funding for community law centres, and I do not wish to pre-empt that review. However, I do have some suggestions for that review to consider.

266. First, a way needs to be found to keep community law centres viable. I believe they are too important to be allowed to fail, or to have their services restricted significantly. With the suggestions I make below, I consider that community law centres could become a significant and valuable part of the legal aid system in the future. I urge the Minister of Justice to find a way of ensuring adequate funding for community law centres.

267. There needs to be stronger coordination between community law centres and central government (through the purchasing of community legal services). A more active purchasing approach would give both government and community law centres greater certainty over the services that are being purchased.

268. I think it would be advisable, through the contracting process, to introduce a national standard for the services that should be available from community law centres. All community law centres should provide initial advice and assistance services within the family and civil jurisdiction, particularly within areas like civil debt and consumer issues (for example) that are not met by either legal aid or the duty solicitor schemes. It would be beneficial to include services within the criminal jurisdiction (such as drink driving) that are not covered by legal aid. I also consider that more emphasis should be placed on enabling some service delivery mechanisms, such as a single web- or telephone-based service to be provided on a national basis. Citizens Advice Bureaux provide such a service in a way that increases the visibility and branding of those services to the public.

269. The LSA has proposed several principles that could be used to guide the focus of community law centres:
- protecting people from harm or abuse
- ensuring people can live in a safe environment
- ensuring people receive income/benefits to which they are entitled
- ensuring people have acceptable living conditions
- ensuring people receive entitlements to education and health
- ensuring the State exercises its powers properly.

270. I consider that these principles would provide a good basis for focusing and prioritising the services of community law centres in a way that would help them to meet the needs of their communities.

271. I believe the focus of services should be on initial advice and assistance where services are able to help the greatest number of people for the funding provided. The core of services within this area should be available across New Zealand. Where individual community law centres have the capability to provide additional services, like legal representation or legal education, these should be provided.

272. A standard of services that can be expected across New Zealand should improve the access of New Zealanders to legal services and ensure more equitable access across New Zealand.

Recommendations

30. A more active purchasing and monitoring approach is needed to give both the government and community law centres greater certainty over the community legal services being purchased and the standards to be met.

31. The review of funding for community law centres should focus on
- developing stronger national oversight of community law centres, to maximise their contribution to the early resolution of legal problems
- standardising the kinds of services that should be provided by community law centres across New Zealand
- developing quality standards that can be implemented through community law centres' funding agreements.

Duty solicitor scheme

273. The duty solicitor scheme protects the human rights of people charged with a crime. It ensures that people who cannot afford legal advice are able to access legal services in order to inform their decisions about how to respond to charges laid against them. The scheme gives unrepresented defendants charged with a criminal offence free access to a lawyer for assistance, advice, and representation on the day of their first appearance at the District Court. This on-the-spot assistance explains charges and advises on pleas, bail, and the sentencing options available to the court.

274. Lawyers in the private sector and in the PDS can provide duty solicitor services. To be listed as a duty solicitor, lawyers must meet the general listing criteria for legal aid (hold a current practising certificate and have no upheld complaints within the last five years or criminal convictions) and complete the Law Society's Duty Solicitor Training Programme. In 2007/08, 1,008 lawyers were listed under the duty solicitor scheme, of whom 766 actually provided services.

275. In 2007/08, 102,674 hours of advice were provided by duty solicitors (excluding the PDS), at a cost of $8.703 million.

Issues with the current services

276. The scheme does not appear to be working as well as it once did, or as intended. In one court I was told that to ensure three duty solicitors were present, it had to roster on nine. Clients are rarely seen until just before a first court appearance, which means there is no time to provide substantive advice. The scheme has become limited to seeking adjournments to allow a legal aid lawyer to be instructed and filling out lengthy and complex legal aid application forms. Staff at one court told me the form was too big to go through their facsimile machine. Simplifying the legal aid application form would enable non-legally trained staff to help applicants to complete forms. Currently, duty solicitors complete the application forms. This takes most of the time defendants have with duty solicitors and is an expensive, and wasteful, use of skilled lawyers' time.

Opportunities for enhancement

277. Introducing clerical staff to act as form-fillers would free up duty solicitors. The LSA has already introduced form-fillers into some courts, and I understand they are making a real difference for duty solicitors. Having done that, it should be possible to shift the emphasis of the duty solicitor scheme back towards helping clients to resolve issues on the day of their first appearance, where appropriate. While not all cases can be dealt with on a first appearance, I consider that duty solicitors should focus on providing legal advice on legal options rather than on filling in forms or seeking adjournments as a default position.

278. The main problem I see is that the duty solicitor currently provides advice on the day of the client's first appearance, within the pressure and tension of a court appearance. This leaves little time for the client to consider any advice or options for anything but the most basic of cases. This is why the default position is for duty solicitors to seek an adjournment to retain counsel and take further advice in all but the most basic of cases. This is leading to waste in the court system: 78 per cent of cases are disposed of at an administrative stage, but only 35 per cent of these are disposed of at first appearance. Had better use been made of duty solicitors, I am sure that significantly more of these cases could have been disposed of without the need for a second appearance.

279. I recommend altering the duty solicitor scheme to allow people charged with an offence to meet the duty solicitor in the days leading up to their first court appearance. The summons should inform defendants that a duty solicitor will be available before their first appearance and how to make an appointment. People could have a reasonable length appointment, which would allow the duty solicitor to outline the legal options for the person to consider before the first court appearance.

280. That would give defendants a better understanding of the charges they are facing and help them to make a decision on their best option. For clients who choose to plead guilty, the duty solicitor could represent them at their first appearance, as they currently do. Clients who wish to defend the charge could either retain a private lawyer or apply for legal aid with help from the duty solicitor and administrative support staff.

281. I consider that these changes would result in better outcomes for both the client and the court system. Clients would be better informed about their options for resolving charges laid against them. It would encourage them to engage legal representation or to resolve the issue using the duty solicitor at first appearance, where appropriate. For clients who resolve the case at first appearance, the impact on their lives – and on those of their families – of a pending court case would be lessened.

282. It would also enhance efficiency in the court system and reduce the cost to taxpayers. An increased number of cases resolved at first appearance would result in savings in court time and contribute towards reducing court delays.

Recommendations

32. The duty solicitor scheme should be changed to allow people to meet the duty solicitor in the days before their first court appearance, to enable meaningful engagement with the duty solicitor and time for proper consideration of the defendant's options.

33. The legal aid application form should be simplified so that it does not require a lawyer to complete it.

34. The legal aid system should not use duty solicitors to complete lengthy and complex legal aid application forms. This function should be performed by clerical staff, to free up duty solicitors to provide substantive legal advice.

Police detention legal assistance scheme

283. The police detention legal assistance scheme ensures that any person questioned or detained by police can obtain free legal advice or assistance by telephone or in person from an approved lawyer. Since June 2008, police throughout the country have had online access to police detention legal assistance lists and rosters that are regularly updated by the LSA.

284. To provide services under this scheme, lawyers must be listed with the LSA. They must meet the general listing criteria for legal aid and have a Criminal – Proceedings Category Two Listed Provider approval.

285. In 2007/08, the scheme made 14,876 contacts through the scheme, 95 per cent of which were through a phone call. Expenditure amounted to $498,000.

286. There sometimes appear to be difficulties in contacting lawyers to provide services, as there can be shortages of lawyers in some areas. I have been told that police may need to make several calls before a lawyer can be contacted. However, I have not been made aware of any really significant problems with the scheme.

PEOPLE, QUALITY, AND ACCOUNTABILITY

PROBLEM CLIENTS AND REPEAT CLIENTS

287. The reality that the legal aid system has to face is that some of its clients can only be described as difficult. They do not enter the legal aid system with the aim of resolving the legal action in which they are involved as quickly and efficiently as possible. Instead, some clients will seek to prolong proceedings, particularly in criminal law cases.

288. Some criminal legal aid clients, particularly those who are being held on remand and facing prison sentences if convicted, have every incentive to delay proceedings. That lengthens the time spent on remand, which will be discounted from the prison sentence. This can be a real incentive in Auckland, where the remand prison is more pleasant than the other prisons to which defendants may be sent upon conviction. I have been told of experienced defendants telling a lawyer that they were prepared to run the case through to depositions so the lawyer could get the maximum legal aid fee, which suggests that these defendants are used to colluding with their lawyers to prolong a case for mutual gain.

289. I have also heard of defendants engineering the dismissal of their lawyers in an attempt to prolong proceedings, as a way of delaying the inevitable. In family violence cases, where offenders have been charged with breaching protection orders, this behaviour may have other purposes. It may be used as a way of preventing victims from moving on; forcing them to wait for proceedings to go ahead, all the while losing confidence in the power of a protection order to protect them. This kind of delaying tactic may dissuade victims and witnesses from cooperating in proceedings, and increase the risk that witnesses' recollection will become hazy and less reliable.

290. Perhaps the most startling example of this behaviour is where defendants in large, complex defended drug trials produce legal arguments to engineer the dismissal of their lawyers in the final phase of a lengthy hearing, in order to get a new hearing. Again, the intention appears to be to delay the inevitable. I have been told that this engaging in "musical lawyers" is aimed at destabilising the court and is a way of dissuading witnesses from cooperating in future. The effect is one of huge cost and disruption to the court system and to all of the people involved with the trial.

291. I have also heard of defendants engineering the dismissal of their lawyers at a late stage in proceedings in order to engineer grounds for an appeal.

292. This kind of gaming by defendants risks undermining public confidence in the justice system, and creates unnecessary expense for the legal aid and court systems.

293. The legal aid system also has a high number of repeat clients. Not all are "problem" clients. Repeat clients on family legal aid will receive new grants when they go back to court because court-ordered care of children arrangements change over time. Some repeat clients may be experiencing groups of problems that are addressed one grant and one issue at a time. However, the legal aid system also has repeat criminal legal aid clients, who are recidivist offenders.

294. Between 2003 and 2008, 37 per cent of legal aid expenditure went on people receiving only one grant. That means 63 per cent of legal aid expenditure went on multiple grants to the same clients (see figure 10). This is a significant cost to the system, and it must be possible to manage this expenditure better.

Figure 10: Proportion of clients receiving multiple grants; proportion of expenditure on multiple grants (2003-2008)

Source: LSA data.

295. I consider that it may be possible to address the problems I have identified above by instituting a case management system for repeat clients who reach a certain threshold. I leave it to the Legal Services Agency and the Ministry of Justice to determine the correct threshold. Obviously, they will not want to set the bar too low, otherwise they would be case managing more than 30 per cent of legal aid clients. However, based on figure 10 above, it seems to me that a threshold could be set somewhere between three and six grants, which would result in case management of between 10 and 20 per cent of clients.

296. I also consider it appropriate to move clients into the case management system if they show a pattern of abusing the system or dismissing their lawyers. Again, I leave it to the LSA and the Ministry of Justice to determine the threshold at which this should apply. Having said that, I have had a case drawn to my attention in which the defendant in family violence proceedings has recently dismissed his ninth lawyer in three years.

297. Once clients reached that threshold, some limitations would be imposed on the way they received their legal aid services. I do not advocate any changes to the means test, but I consider it would be worthwhile giving more stringent consideration of the interests of justice test (for criminal cases) and the merits test (for family and civil cases).

298. I consider that clients who reach the threshold should not be entitled to their choice of lawyer. Instead, their lawyer should be assigned. In centres with a PDS, cases could be allocated to that service. Otherwise the choice of lawyer would be left to the procurement agency. I suspect that for some clients, a particularly experienced lawyer would be needed, to minimise the risk of appeals based on allegedly inadequate legal representation.

299. The aim of this case management system would be to ensure that legal aid clients are fairly represented in the justice system, in a way that ensures their cases proceed efficiently and with as little wasted resource as possible. It may also be possible to case manage these clients into other social services such as housing, budgeting, and health and addiction services, where that would help to resolve the underlying problems are contributing to their repeat grants of legal aid.

Recommendations

35. A case management system should be instituted for clients who
    - reach a certain threshold of repeat applications
    - demonstrate a pattern of dismissing their lawyers or consistently behave in such a way that their lawyers withdraw from representing them.

36. The case management should start with stringent application of the interests of justice tests (for criminal cases) and the merits test (for family and civil cases).

37. Clients in the case management system should not have their choice of lawyer. Their lawyer should be assigned by the agency responsible for the procurement of legal aid services.

THE SYSTEM'S LAWYERS

300. As officers of the court, the legal profession has a special status. Lawyers hold dual obligations to their clients and to the courts. When these obligations rub up against each other, it can be a delicate task to walk the line that best reconciles both obligations. The nature of the obligations that go with being officers of the court are such that there is a restriction on who may practise as a lawyer. Intending lawyers must obtain the appropriate qualifications and meet character requirements to be admitted to the bar. Lawyers are subject to a regulatory regime with a number of requirements aimed at ensuring standards of professional behaviour and integrity are observed.

301. In short, lawyers belong to a profession. With the status of that profession goes obligations.

302. One of those obligations is to enhance access to justice for people who would otherwise find it difficult to access legal services. Lawyers in New Zealand have a long association with this kind of work. They
- set up community law centres, in conjunction with students, and continue to donate their time to community law centres and Citizens Advice Bureaux
- helped to initiate the police detention legal assistance scheme, initially making themselves available without charge
- initiated the duty solicitor scheme
- will often provide limited initial advice by telephone or in person in urgent circumstances *pro bono* or without the certainty of receiving a fee
- volunteered their services for the administration of legal aid grants under the 1991 legislation
- accept legal aid work at rates that are generally less than those charged to private clients, although there are certain components of fee setting structures which are relevant for private clients that are not relevant for legal aid.

303. Another longstanding characteristic of the legal profession is the concept of tutelage, under which senior lawyers took responsibility for the training and mentoring of junior lawyers. Although the logic and reasoning disciplines, and knowledge of specific aspects of the law, are taught in the law degree, much of a lawyer's day-to-day work involves other skills. These include interviewing people, preparing court and other legal documents, case and time management, mediation, negotiation, and advocacy. These latter skills in particular are life-long in the learning. Young law graduates do not emerge from university or the pre-admission professionals course as fully fledged competent advocates. Instead, entry into the legal profession marks the beginning of a whole new learning process. Unfortunately, that learning process is not working as well as it should, and I am concerned that the legal aid system may be, in part, to blame.

304. Before 2000, tutelage was done at the instigation of senior lawyers. It was not, as far as I am aware, a mandatory requirement, but was so ingrained in senior counsel that they felt it was their duty. Senior lawyers took young lawyers under their wings to develop them. Tutelage involved a process of seeing and doing. For instance, junior lawyers would be exposed to large and complex cases through working (under close supervision) on matters such as synopsis and research work, and opinion work. Junior lawyers would also sit in the court with senior counsel and see how things were done. Observing the interactions between the judge, the Crown, defence, and court staff is critical to the learning process. While doing this, junior lawyers would apply these skills in simple cases over which they had more responsibility.

305. Legal practice really involves learning by doing, and the trick is to ensure junior lawyers learn in a way that does not prejudice their clients or the courts. Junior lawyers need to be involved in the day-to-day management of cases, because this teaches them how to manage a case, meet deadlines and work efficiently. Junior lawyers need to spend time in court with senior counsel beside them, working their way up to leading the relatively structured opening address and cross-examination, and progressing to conducting jury trials with senior counsel sitting beside them.

306. The Crown Solicitors still follow this kind of process, and it seems to result in a steady and sustained flow of high-quality lawyers being available to the Crown.

307. What has happened to undermine the tutelage process amongst legal aid lawyers, criminal defence lawyers in particular? First, let me say that the practice has by no means ended. I have spoken to lawyers around the country who remain committed to the practice of tutelage and mentoring. Particularly in the regions, I have found senior lawyers (and a few law firms) who train law graduates with one eye very much on the future of a long-term local senior bar. Even these lawyers, though, have observed that it has become harder to absorb the costs of training junior lawyers in the legal aid system.

308. I think the legal aid system has had a role to play in the breakdown of tutelage. In part, it is because many firms have left the legal aid system. Some will have done so through dissatisfaction with the pay rates and administrative burden associated with legal aid. As the law firms have left criminal legal aid, their place has been taken by "car boot lawyers", who are often young, with few or no overheads, and few ties to their profession.

309. I suspect that, more recently, as standards have dropped (particularly in areas like Manukau) other reputable firms will have left through a desire not to be tainted by association. This risks exacerbating a race to the bottom, as more poorly performing sole practitioners have filled the vacuum left by the firms.

310. I do not think it is entirely a coincidence that Auckland has a significantly higher proportion of barristers sole (77 per cent of criminal cases there were taken by barristers sole in 2008/09) and a strong theme of dissatisfaction with lawyers' practices in the Auckland courts. Many of these lawyers appear to be operating in competition with each other, and in isolation. Judges have noted that some of these barristers are the people least interested in receiving support from others. The problem is not, however, confined to Auckland. Concerns with poorly performing barristers sole were reported at every single one of the courts I visited. The ties that held lawyers together as a profession appear to be breaking down, and some lawyers appear to be operating more as a business than a profession.

311. Many criminal legal aid barristers head into sole practice when they are barely out of law school. Sole practice can be a lifestyle choice, and a strong preference for some practitioners, not all of whom pose quality issues. I have no desire to exclude competent and experienced sole practitioners from the legal aid system. However, I am pleased to see that the Law Society has now acknowledged the quality issues posed by inexperienced barristers sole. It has proposed that, from 2010, barristers will have to have at least three years' experience before they can practise on their own account. If that proposal is implemented, it should help to ensure that lawyers entering the legal aid system will be appropriately experienced. That will not be sufficient, of itself, to address all of the quality issues I have identified.

312. Somehow, lawyers need to find the professional ethos again. While the legal aid system has an interest in achieving this, it cannot drive the change without help from the legal profession itself. The legal aid system needs to do more to encourage quality in legal aid lawyers, and should do this in seven ways:
- raise the barriers to entry: only lawyers with competence and integrity should be able to enter the legal aid system
- create incentives for lawyers to maintain their competence, quality and integrity
- create a mechanism for the swift ejection of incompetent and/or dishonest lawyers from the legal aid system
- build ties between legal aid lawyers to limit their isolation and minimise the risk of cases falling over because of the lawyer's absence
- require legal aid lawyers to train and mentor junior lawyers to ensure long term sustainability of the legal aid workforce
- pay legal aid lawyers in a way that recognises the services they provide
- clarify the roles and responsibilities of the two regulators with an interest in the area: the LSA and the Law Society.

313. These issues are discussed in the section below.

314. I am optimistic that better quality legal aid services, combined with measures I propose for other procurement and contracting models, will be sufficient to entice law firms and high-quality lawyers back into the legal aid system. I am hopeful that, in the long term, these changes will undo some of the unintended effects the legal aid system has had on the legal profession, and that professional values will once more be uppermost.

315. In this context, I would like to respond to the submission that asked why the standard of quality should be higher for legal aid cases, simply because the government is meeting the fee.

316. The answer is simple. It is precisely because the government is meeting the fee with taxes collected from the New Zealand public that we care about the quality of legal aid services. I use the word "we" here advisedly. Over half of the submissions received took the time to suggest ways in which the quality and performance of legal aid lawyers could be improved. Quality is an important component of value for money, and the government has an obligation to ensure that expenditure of public funds provides good value. Public funds come from taxes, which are a limited resource, and there is a strong public expectation that public funds will be spent well: every dollar spent on legal aid is a dollar that cannot be spent elsewhere. Taxpayers will hold the government to account for that. Therefore, the government must be able to impose standards on people providing services with public funds, and expect those standards to be met.

> ***"I don't think that the private Bar is held in much esteem and firms do not want to be identified with criminal legal aid lawyers."***
>
> *Stakeholder*

317. Secondly, people receiving legal aid services will expect the government to have screened providers to ensure they will provide high-quality services and that they are honest in the way they provide those services. Legal aid services should not be second-rate, just because they are publicly funded. They should be as high quality as possible for the available funding. There is a trade-off between quality and quantity of services, but that is a decision for the funder to make, not for service providers. Crown Solicitors are top quality lawyers, as are many defence lawyers. I see no reason why all defence and prosecution lawyers could not be of equal quality.

Problems with some lawyers

318. Some might consider the strong words I have used to describe some lawyers in the legal aid system to be unfair or unrepresentative of the legal profession. I have, for instance, received submissions from lawyers describing the "car boot lawyer" as a model of service provision that is sensitive to clients who could not hope to aspire to luxurious legal premises and who may well be intimidated by them.

319. I certainly do not wish to intimate that all, or even many, legal aid lawyers are causing problems. During the course of this review, I have travelled up and down New Zealand and met with many conscientious barristers and solicitors of considerable experience. These lawyers are committed to providing the best services they can to their clients, and are a credit to their profession.

320. However, I must be clear about the small proportion of very poor lawyers who are tarnishing their colleagues' reputations. I am inclined to think that these lawyers have led to some practitioners and firms leaving the legal aid system: they do not wish to be tainted by association.

321. The legal aid system is perceived by some as being a second-rate service, and its clients deserving of a lesser standard of care. This is unacceptable, given that many (if not most) clients of the legal aid system are already disadvantaged and at risk of social exclusion. If anything, these people need a higher standard of care, because the legal problems they face can have a disproportionate effect on their lives.

322. I have heard a litany of complaints about the practices of other legal aid lawyers, from their colleagues, from police officers and prosecutors, from non-government organisations who represent some of society's most vulnerable people, from judges and court staff. I have been horrified by what I have heard and seen about behaviour that includes callous and arrogant indifference to clients' needs, and an absolute disregard and disrespect for the court, its processes, and the people who participate in it. Worst of all, I have heard about behaviour that appears to be corrupt and worthy of disbarring the lawyers at issue.

> ***"There should be a cap on what individuals can take in overall assignments."***
>
> *LAR 047*

323. What concerns me is that, while many people were prepared to tell me about problems they had seen, few were prepared to provide me with any evidence. None were prepared to have their names associated with a complaint, for fear of the repercussions. I consider that it is important to shine a light on the problems identified by this review. While it may not be possible to substantiate some of the allegations set out below, they combine to form a picture that is a sad indictment on the legal profession.

324. The examples of poor practice set out below are a representative sample of matters brought to my attention. They include lawyers making sentencing submissions without having read the pre-sentence report, which can lead to judges standing the matter down, requiring everyone to come back to court on a later date.[47]

325. I have also heard of lawyers who simply fail to turn up to court hearings. This was certainly true for a client in one court I visited. He was in the dock for the third time, having taken a day off work each time, and had yet to enter a plea because he had been unable to contact his lawyer. Sometimes these lawyers phone the court, sometimes they do not. Some lawyers engage in a pattern of failing to appear, and provide new excuses each time, such as their car not starting. Frequently, these lawyers are absent because they are over-committed and have scheduling clashes.

326. This kind of behaviour is simply unacceptable. It leaves a court full of people – judges, court staff, prosecutors, defendants, victims, witnesses, and jurors – waiting. It throws the court schedule into turmoil. It can affect the employment of people who have had to take time off work. It causes distress to defendants and victims, and their families. A far stronger line needs to be taken with lawyers who behave in this way, particularly when they do so routinely.

327. I have also heard that some lawyers who have recently come from different countries and are able to practise in New Zealand, have not been provided sufficient support to gain an awareness of New Zealand's legal and cultural frameworks. In some cases, these lawyers appear to make decisions to defend their clients on the basis of the legislation or cultural values in the country from which they come (for instance where the rules and conceptions of corruption may be different from New Zealand's legislative provisions). This is of concern because their clients will not receive the best representation possible, and it may lead to a view that they have been disadvantaged by New Zealand's legal system, rather than having a poor lawyer. The Law Society should ensure that all practising lawyers have sufficient knowledge of New Zealand's legal and cultural frameworks.

328. "Car boot lawyers" are a problem, particularly in the Manukau District Court. The term is used to describe lawyers who have dispensed with offices and the structural support they offer, such as fax machines, photocopiers, and administrative assistants. Instead, these lawyers are completely mobile, with laptops and cellphones that enable them to carry on their business wherever they are. Whilst there are advantages to this, there are also downsides. Primarily these relate to the lack of a consistent and private location in which to meet clients and prepare for cases. The practice seems to be for clients to meet their lawyers for the first time on the morning of a court event, rather than preparing for the court event in advance. This cannot be in the best interests of either party or the court.

47 Submission LAR013.

329. Other problems I have heard about include
    - An experienced lawyer whose listed phone number in the New Zealand Barristers and Solicitors Directory is that of the District Court law library, which makes it difficult for clients to contact the lawyer.[48]
    - Lawyers using interview rooms at district courts as their offices, which restricts the use of those rooms by other court users.
    - Defendants facing difficulties contacting their lawyers, because their lawyers rely on cellphones, and defendants may not have the means to pay for calls to a cellphone.
    - Lawyers consistently failing to return their clients' calls, with flow on effects into the provision of legally aided services.
    - One lawyer who wanted to meet me arranged to do so in a pub. When I asked if he had an office, he told me his office was at his home. I thought it unlikely that a criminal lawyer would really have his clients visiting his home.

330. I have also heard on numerous occasions of lawyers gaming the system by delaying a plea, or encouraging clients to plead not guilty until the beginning of a defended trial, in order to maximise legal aid payments. I have been told of experienced defendants telling a lawyer they were prepared to run the case through to depositions so that the lawyer could get the maximum legal aid fee. I have also been told that up to 80 per cent of the lawyers practising in the Manukau District Court could be gaming the legal aid system.

331. Apart from adding to legal aid costs and court cases, this practice wastes time for the court, prosecutors, and witnesses; and puts victims through additional unnecessary stress. In defended hearings, it can also cause problems for jurors, particularly those who have had to arrange leave from work to perform their social obligation.

332. This practice also works against the interests of the client because the practice means defendants do not have the mitigating factor of an early guilty plea, which can reduce the sentence imposed. I have heard from police officers who have asked defendants why they pleaded not guilty, and were told the lawyers had advised them to wait until the status hearing, and then to wait for discovery, and then to wait until the defended hearing to see what the prosecution could produce. By that stage, it was too late.

333. I have more serious concerns about an allegation I have heard that lawyers in one particular region had devised a system to defraud the LSA by $75 per invoice. The person told me that a complaint made about this scam to the Law Society was not acted upon.

334. I am quite satisfied, from what I have been told, that the practice of top-up payments to legal aid lawyers does occur. In some courts, they are quite common. Lawyers have told me of taking on experienced clients who have asked them when the lawyer required the "additional cash payment". When these clients have been so fortunate as to have had a scrupulous lawyer refuse the payment, they have been surprised to learn that there is no need to top up legal aid payments. Less fortunate clients have claimed to have paid lawyers in the order of $10,000 over and above legal aid. These practices appear to me to be corrupt, and should have been reported to the Police. I consider that lawyers who have defrauded clients in this way should be disbarred.

48 Submission LAR013.

335. I have also found widespread abuse of the preferred lawyer policy. First, although successive reviews have struggled to find concrete evidence – as has this review – there seems to be a widespread acceptance of abuse of the policy by duty solicitors. Although expressly prohibited from nominating themselves or anyone else as preferred lawyer, it seems that duty solicitors can and do influence legal aid applicants' choice of lawyer. A recent decision by the Legal Aid Review Panel considered this issue.[49] A legal aid applicant had nominated the duty solicitor as his preferred lawyer. The applicant's submissions to LARP noted that the "duty solicitor acknowledges that he draws on his work as duty solicitor to build up his legal aid client list". That is contrary to the duty solicitor protocols, which are intended to prevent this kind of abuse. LARP upheld the validity of the duty solicitor protocols and declined the application.

336. I have heard about lawyers
- not receiving any referrals in the weeks they are not rostered on as duty solicitors – referrals tend to go to lawyers who are rostered on
- doing "favours for mates" – lawyers having mutual arrangements to recommend lawyers to legal aid applicants
- accepting backhanders in return for recommending particular lawyers to legal aid applicants.

337. I think the attention-seeking behaviour adopted by some criminal lawyers is also aimed at achieving a level of notoriety that makes the lawyer memorable and therefore more likely to be selected as a preferred lawyer.

338. In these ways, the preferred lawyer policy is undermining its own objective, which was to allow the market to exclude poorly performing lawyers from the legal aid system.

339. The problems identified above are not evenly spread. Generally, problems seem to be more serious and more entrenched in relation to the criminal bar. I have been told that the family bar tends to be smaller, and has a more consistent, collaborative bar and better mentoring. Most family lawyers start in firms, unlike their criminal law counterparts, many of whom seem to be going into sole practice soon after qualifying.

IMPROVING QUALITY IN THE LEGAL AID SYSTEM

Raise the barriers to entry

340. Given the nature of the legal aid system's client base, it is vital that only competent lawyers should be able to provide legal aid services. It goes without saying that legal aid lawyers should behave with integrity, particularly in their use of public funds.

49 Application for review by ASP, LARP 082/10, 23 October 2009.

341. The LSA assesses legal practitioners' applications to become listed providers against a set of published criteria pursuant to section 71 of the Act. Applicants are required to demonstrate competence to take responsibility for the completion of a legal aid matter. This includes each applicant describing why they are suitable to undertake the type of work required and the provision of written references from referees. The LSA is able to designate a lawyer as a "lead" provider or, if they consider them insufficiently qualified (no demonstrated competence), as a "secondary" provider who must be supervised and is responsible to, a "lead" provider.

342. The LSA's "provider management" function encompasses maintenance of the list of currently active and inactive providers, and assessment and processing of applications by new prospective providers.

> ***"... little consideration is given to the abilities of a lawyer, the depth or breadth of their experience or the quality of their work."***
>
> *LAR 050*

343. The LSA has also established local consultative groups to assist with assessment of applicants for listing as lead providers and for moving providers between experience categories. The consultation process differs depending on the type of provider and approvals sought.

344. Generally, local consultative groups
- provide general comments on the applicant's competence and ability to practise in the area(s) of law for which they are applying, including the applicant's abilities in court, their interaction with clients and other counsel and in particular impart their local knowledge of the applicant
- note any observations of the applicant's skill and, if adverse comments are made, provide examples to demonstrate any concern
- assess whether the applicant's experience is relevant to the area of law for which they are applying
- advise what further information may be required if the recommendation is for deferral of a decision
- advise what further experience the applicant requires if the recommendation is for decline.

345. Once the LSA has received the local consultative group's recommendation, it continues with the application process and makes a decision about an application except, for example, where further information may be required from the applicant as a result of the local consultative group's feedback.

346. I consider that lawyers should have to be accredited to enter the legal aid system. Accreditation needs to be based on assessment of a combination of competence, experience, and character. The process described earlier is a useful basis for an accreditation system. However, it clearly needs to be strengthened, because the process is demonstrably incapable of excluding incompetent lawyers from the system.

347. I consider that competence should be assessed by a panel of suitably experienced people. Representatives of the regulator (the Law Society) would offer a useful perspective on the competence of applicant lawyers, but I do not consider that the control over accreditation should be given to lawyers. It should be controlled by the LSA and have members drawn from the Law Society, the judiciary, court staff, and community law centres. The views of people who are in a position to provide informed comment on the applicant should be sought, including prosecutors and/or police. The panel may need statutory immunity from civil proceedings for decisions made in good faith, although there will need to be a mechanism to enable lawyers to appeal the panel's decisions.

348. The criteria for accreditation may need to be strengthened. At the least, I consider they need to be reviewed. I suggest that this needs to occur in consultation with the Law Society. Given the regulatory nature of this process, I think the Law Society's regulatory perspective will be more useful than its trade union perspective.

349. It should be possible to impose conditions on accreditation, consistent with the current system for listing providers. There may be merit in specifying the types of conditions that may be imposed, to remove any doubt as to the power to impose conditions. If that is done, it needs to be done in a way that does not unduly limit the kinds of conditions that may be imposed.

350. Once accredited, lawyers should be accountable to the LSA in relation to the provision of legal aid services. They should be given information that very clearly sets out the legal aid system's requirements of them, including the core values of the legal aid system such as the prohibition on topping up fees and abuse of the duty solicitor scheme.

351. I recommend that the development of an accreditation system should proceed with urgency, given the pressing need to remove incompetent and/or corrupt lawyers from the legal aid system.

352. When that system is implemented, it is critical that it avoid repeating the mistakes of the past. I strongly recommend against rolling over all currently listed lawyers into the new system. Every listed lawyer who wishes to be accredited must proceed through the full accreditation process.

Recommendations

38. There should be a new accreditation system to ensure incompetent and/or corrupt lawyers are excluded from the legal aid system. The development of this new system should proceed with urgency, given the pressing nature of the problem.

39. Lawyers should have to be accredited before they can provide legal aid services.

40. Accreditation decisions should be made by a panel of suitably experienced people, including representatives from the New Zealand Law Society, the judiciary, court officials, and community law centres. The accreditation system should be controlled by the agency responsible for legal aid procurement.

41. There should be an appeal mechanism, although the panel should have statutory immunity from other civil proceedings for decisions that are made in good faith.

42. Criteria for accreditation should be developed in consultation with the New Zealand Law Society in its capacity as regulator of the legal profession.

43. Accreditation should be subject to such conditions as are necessary to enable effective accountability for the provision of legal aid services.

Focus on groupings of lawyers

353. As I noted earlier, one of the problems I have identified with the legal profession is a growing isolation of lawyers, particularly around the larger urban courts. Lawyers seem to practise apart from each other and in isolation from their professional bodies. They appear to be suspicious of each other, and I have been told that the rivalry for work can produce a toxic working environment. This means, of course, that some lawyers are most unwilling to support each other, particularly in covering for each other in court where there is a scheduling conflict or an emergency that means a lawyer cannot attend court. Similarly, senior lawyers seem to be less likely to take lawyers aside and speak to them where they have observed poor conduct or mistakes made in court.

354. This is not universal by any means. I spoke to several senior lawyers, some of whom practise in the most problematic courts, who still adhere to the professional ethos and share their experience with and help their colleagues. These practitioners are often to be found in the regions, where they take pride in the quality of the local bar and encourage all lawyers in the district to maintain the standards. It is a matter of pride for these lawyers that visiting judges enjoy coming to their courts.

355. As I have already observed, I believe the legal aid system itself has caused or contributed to some of the breakdown in professional values within the legal profession. I consider, therefore, that the legal aid system should try to remedy the problem.

356. I consider that the legal aid system needs to encourage lawyers to organise themselves into groupings, where they can get peer support and feedback on their performance.

357. Groupings will also help to ensure coverage of files in emergencies, where lawyers are unable to meet their court commitments. The legal aid system needs to facilitate this, by not placing unnecessary barriers in the way of this kind of coverage.

358. I consider that links into some kind of grouping, whether it be employment in a law firm, or being part of barristers' chambers, or a looser arrangement of lawyers based around a court, should be a condition of accreditation in the majority of cases. There will always be a role for very experienced senior barristers sole in the legal aid system, but I envisage that the majority of legal aid lawyers (particularly the less experienced lawyers) should be affiliated to other lawyers.

359. Although it should go without saying, I think it critical that lawyers have premises from which they operate. They need infrastructure around them, and a place to meet clients away from the court. Some will undoubtedly benefit from administrative staff to support them, whereas others may function efficiently without. The "car boot" model is not conducive to quality, and should not be encouraged.

Recommendations

44. The legal aid system needs to encourage lawyers to affiliate themselves with other lawyers, to ensure they get training, supervision, mentoring, support, and feedback on their performance in providing legal aid services.

45. All lawyers should have premises from which they operate.

46. Affiliation with a group of lawyers should be a condition of accreditation for all lawyers, except the designated group of senior aid lawyers.

Incentives for lawyers to maintain competence, quality, and integrity

Time-limited accreditation

360. One of the main problems with the current system for listing legal aid lawyers is that listing is, effectively, permanent. While a lawyer's listing can be cancelled for cause, lawyers do not have to do anything to demonstrate their ongoing competence.

361. I believe that accreditation should be time-limited to, say, a three year period. After that, lawyers should have to go through a renewal process that involves consideration of their performance by the panel that accredits lawyers to the legal aid system. While it may be appropriate for this process to be more streamlined than the initial accreditation process, I do consider it needs to consider references from lawyers' peers and employers. The panel also needs to seek comments from court registrars, Police, prosecutors, and the judiciary. Again, the panel may need statutory immunity from civil proceedings for decisions made in good faith, although there will need to be an appeal mechanism.

362. Criteria for re-accreditation will need to be developed in consultation with the Law Society. As with accreditation, I expect this process would be undertaken with the Law Society in its regulatory role.

Recommendations

47. Lawyers' accreditation to provide legal aid services should be time-limited for a period of three years.

48. Renewal of accreditation decisions should be made by the accreditation panel described in recommendation 40.

49. The criteria and process for re-accreditation should be developed in consultation with the New Zealand Law Society in its capacity as regulator of the legal profession.

Verification, monitoring and auditing

363. As the discussion paper observed, the regulatory framework for lawyers and entry onto the legal aid list focus more on initial entry requirements than on ongoing performance or quality improvement. This contrasts with other types of contracting for the delivery of publicly funded services, where performance monitoring and quality management are taken as "givens" and are strongly encouraged by the responsible departments. There is a substantial amount of public sector "best practice" behind those practices, for example, the Treasury's *Guidelines for Contracting with Non-Government Organisations for Services Sought by the Crown* and the Auditor-General's guides on procurement and the management of public sector purchases, grants, and gifts.

364. I consider that the processes for verification and monitoring of service provision need to be strengthened in accordance with public sector best practice. The purpose of verification and monitoring should be two-fold:
- to verify that the services paid for have actually been provided (that is, to detect over-claiming)
- to provide incentives for lawyers to supply services in a way that meet quality standards and value for money objectives.

365. Auditing to detect fraud should involve a sample size that can give 95 per cent confidence that fraud will be detected at levels of less than 0.1 per cent of cases.

366. The LSA's current programme of auditing is a good basis from which to move forward, but more needs to be done. The LSA does around 110 random audits each year. Their focus has been on compliance by providers with statutory and contractual obligations. For the 2009/10 year, there will be more of a focus on value for money. The LSA's quality and value audits focus on criteria relating to the client, conduct of the case, the court (if appropriate), conduct of the lawyer, and adherence to professional standards. Senior legal aid lawyers undertake the audits for the LSA. Fourteen providers were audited in 2008/09, and the LSA aims to increase the number of audits to between 80 and 100 in 2009/10.

367. Audits are a useful part of a quality assurance system, although reliance on audits alone will not be sufficient. Over-reliance on auditing will be an expensive way of not gaining a full picture of quality and service problems.

Recommendations

50. The processes for verification and monitoring of service provision in the legal aid system need to be strengthened in accordance with public sector best practice.

51. The purpose of verification and monitoring should be two-fold: to detect fraud and over-claiming by verifying that the services claimed for have been provided; and to provide incentives for lawyers to supply services that meet quality standards and value for money objectives.

Augment feedback loops

368. As the discussion paper noted, one of the most significant influences on lawyers' behaviour is the opinion of their peers.[50] However, it appears that, in some regions, and in some law types, this influence is limited. In the metropolitan District Courts, the criminal bar appears to be operating in comparative isolation from the wider profession. This restricts the effectiveness of informal feedback mechanisms.

369. The legal aid system contains some avenues for formal feedback, but they are weak, and mostly reliant on complaints to trigger the process. The incentives are stacked against both formal and informal feedback mechanisms. Many judges are reluctant to report poor performance of lawyers, to avoid compromising their independence in future proceedings where those lawyers appear before them.[51] Many, if not most, clients are ill-equipped to identify poor performance. Even if they do identify poor performance, it is likely some will shrug it off, because their own money was not used to pay for the services. Clients are unlikely to be objective, because those found not guilty are likely to overlook any shortcomings in their lawyer's performance, and those found guilty can be inclined to blame their lawyer, regardless of performance. Many clients will struggle with the complaints mechanisms that are currently in place.

50 Tata, C and Stephen, F, "'Swings and Roundabouts': Do changes to the structure of legal aid remuneration make a real difference to criminal case management and outcomes?", *Criminal Law Review*, 2006, pp. 722–741.

51 Ministry of Justice and Law Commission, *Discussion document: Mechanisms to ensure compliance with criminal procedure obligations* (Wellington: May 2009), p. 13.

370. I understand that the Criminal Procedure (Simplification) project team is considering a new feedback mechanism to trigger action by the LSA and the Law Society in appropriate cases.[52] That mechanism would involve requiring the court registry to record and collate evidence of performance failures in order to pass the information on to the LSA or Law Society in the right cases. The focus would be on non-compliance with particular and objective procedural requirements, such as failure to file a case management memorandum within a specified time frame. Reports would be made only where there were repeated instances of non-compliance that amounted to a pattern of misbehaviour. This seems a useful option that could be made operational relatively quickly, whereas feedback loops as part of a quality system will take longer to develop.

371. It has also been suggested to me that the legal aid system should include a system enabling the anonymous notification of concerns about lawyers' conduct to a review panel. The idea is that the review panel would be able to investigate those concerns that met a threshold, without having to disclose the source. The review panel would reach its own conclusions based on its investigation and, based on those conclusions, the procurement agency would be able to take appropriate action against the lawyer. I appreciate the spirit with which this has been suggested to me, and acknowledge the need to create an environment in which people can feel safe to complain. However, I fear this system will be rendered toothless in its implementation and we will see little improvement.

372. I consider that the Law Society, the Ministry of Justice, and the LSA need to work together to ensure the competence and integrity of the legal profession. The legal aid system cannot be the guarantee of income for lawyers who are incapable of making a living in the private sector. The worst of the incompetent lawyers should not be able to practise at all. If, between them, the three agencies cannot create policy settings that will ensure the competence and integrity of the legal profession within three years, the government should institute a strong regulatory body for lawyers that is focused on the quality of legal services and is completely independent from the profession.

Recommendations

52. The feedback mechanism suggested by the Criminal Procedure (Simplification) project (using the court registry to compile reports on systemic non-compliance with procedural requirements) is a useful option and should be made operational quickly.

53. The legal aid system needs to strengthen other, less formal feedback loops as part of a quality framework for the provision of legal aid services.

54. The New Zealand Law Society, the Legal Services Agency, and the Ministry of Justice need to work together to ensure the competence and integrity of the legal profession working in the legal aid system.

52 Ibid.

Complaints

373. Hardly any complaints are made on a formal basis. As I have already noted in paragraph 369, the incentives are stacked against complaints from clients. In the absence of complaints from clients, the system relies on self-policing by the profession itself, and that is rarely a recipe for success. Nearly everyone I spoke to, ranging from judges, most lawyers, police officers, court staff, the LSA, and the Law Society, told me of examples of lawyers not meeting what I consider to be professional standards. Some of those examples contained allegations of fraud. When I asked why they had not made a complaint about the individual to the LSA, the Law Society, or the Police, people appeared to be concerned about the possible repercussions. I was left in no doubt that formal complaints were unlikely to be made. One senior stakeholder I spoke to appeared to be concerned that complaints against a lawyer could affect that person's livelihood.

374. In the absence of complaints, no action is likely to be taken against the lawyers at issue, and that will further entrench bad habits amongst pockets of the profession.

375. The law needs to be strong enough to ensure that
- judges, prosecutors, the Police, court staff, lawyers, clients, and others can complain
- formal avenues for complaints exist, with appropriate guarantees of confidentiality

Recommendations

55. The quality system for the legal aid system should contain a complaints mechanism, but should not rely on complaints as a trigger for action against lawyers.

56. The law needs to be strong enough to ensure that
- judges, prosecutors, the Police, court staff, lawyers, clients, and others can complain
- formal avenues for complaints exist, with appropriate guarantees of confidentiality.

Training and mentoring of junior lawyers

376. As I noted earlier (paragraph 303), I consider that the legal profession has lost something valuable with the demise of tutelage. I consider that training and mentoring of junior lawyers is critical to the long-term sustainability of the legal aid workforce and the maintenance of professional standards.

377. It is important to remember that the legal profession has an interest in training junior lawyers that goes beyond the legal aid system, and it is not necessarily appropriate for the legal aid system to fully subsidise that training. However, given the critical importance of well-trained and competent professional lawyers to the legal aid system, I consider that the legal aid system should contribute to the costs.

378. Lawyers in small firms have highlighted the difficulty they experience in funding the supervision of junior lawyers who are working towards lead provider status. The junior lawyer must be supervised in the court. For the duration of that supervision, the senior lawyer cannot do any other work, but the LSA pays for the junior lawyer only. Effectively, senior lawyers take a double hit: they cannot do any income-generating work of their own, and the rate paid by the LSA is less than they would get if they were the lead provider on the case.

379. Lawyers in small firms and rural areas can also find the travel and accommodation costs for training courses to be prohibitively expensive. I am aware that there are no easy answers for this, but I think that the LSA, the Law Society and the Ministry of Justice should put their collective heads together and come up with solutions.

Recommendations

57. The legal aid system needs to accommodate some of the costs involved for lead providers who supervise the training of junior lawyers.

58. The Legal Services Agency, the New Zealand Law Society, and the Ministry of Justice should work together to enhance access to training courses by lawyers in small firms and rural areas.

Enforcement and sanctions

380. As I have already noted, the legal aid system cannot afford to rely solely on complaints to trigger enforcement of provisions against legal aid lawyers. I consider that the agency responsible for the accreditation of lawyers needs to have the power to review lawyers' practices where there is cause to suspect problems. This might be triggered by a complaint, or by audit results, or (despite my reservations with the idea) notifications by people involved in the legal aid system or the courts.

381. I suggest that reviews be conducted by a specialist panel controlled by the LSA, comprising representatives from the LSA, the Law Society, the judiciary, court staff, and the community. The panel should have a wide-ranging remit to seek relevant information from anyone who can provide it, as well as from the lawyer concerned.

> ***"...it is wrong to say the only way to retain good quality lawyers is remuneration."***
>
> *LAR 010*

382. The specialist panel needs to have statutory immunity from civil proceedings for actions done and decisions made in good faith.

383. Where an investigation results in a finding that the lawyer's conduct has fallen short of the system's standards, I consider that the legal aid system should have a variety of sanctions to enable it to respond appropriately to the conduct at issue. These include
- temporary ineligibility for new legal aid assignments
- a reduction in payment for a case
- changes to the types of cases for which the lawyer is accredited
- supervision requirements
- training requirements
- suspension of accreditation
- removal of accreditation
- a bar on re-applying for accreditation for a specified period of time.

Recommendations

59. A specialist panel under the control of the agency responsible for legal services procurement should be used to review lawyers' conduct where there is cause to suspect problems.

60. The specialist panel should comprise suitably experienced people, including representatives from the New Zealand Law Society, the judiciary, court officials, and the community.

61. The specialist panel should have statutory immunity from civil proceedings for actions done and decisions made in good faith.

62. The legal aid system should have the following sanctions available to respond appropriately to problematic conduct:
- temporary ineligibility for new legal aid assignments
- a reduction in payment for a case
- changes to the types of cases for which the lawyer is accredited
- supervision requirements
- training requirements
- suspension of accreditation
- removal of accreditation
- a bar on re-applying for accreditation for a specified period of time.

Remuneration rates

384. Remuneration rates have been a strong and consistent theme from lawyers, both before and during this review. Most lawyers pointed out to me that the legal aid rates were significantly less than what they charged private clients. It seems to be a strongly contentious point that legal aid rates are significantly less than Crown Solicitor rates.

385. I appreciate that lawyers feel slighted by this last issue. However, it simply has to be acknowledged that not all legal aid lawyers can be compared with Crown Solicitors in terms of the quality of the services they provide and the complexity of the cases they undertake.

386. I do not consider that legal aid rates can or should be comparable with the rates charged to private clients. When lawyers calculate the rate they need to charge in order to cover overheads and make a profit, they have to take into account several factors that affect their profitability. These include
- acquisition costs – the costs involved in acquiring clients
- productivity of staff (actual, as opposed to planned)
- billing under/over recoveries
- bad debt
- one-off versus continuing assignment
- timing of workflows (marginal pricing).

387. Not all of these factors are relevant in relation to legal aid clients. For instance, the acquisition costs, risk of bad debt, assignment, and work flow timing factors do not arise. Other factors will arise, including the cost of accreditation and re-accreditation and the cost of auditing, if the system decides that lawyers should bear that cost (this is the norm in other sectors that use quality audits).

388. I recommend that remuneration rates should be reviewed, and that the factors used to determine the rates should be made transparent. There should be no expectation of parity with Crown Solicitors, at least until quality issues in the legal aid system have been resolved. However, in the long term (once the quality issues have been resolved), I think it would be advisable to move the remuneration of senior legal aid lawyers closer to the Crown Solicitor rates. I do not think the rates can be directly comparable, because of the restriction on Crown Solicitors taking on private work. Senior legal aid lawyers are not denied this opportunity.

Recommendations

63. Legal aid remuneration rates should be reviewed, and the factors used to determine the rates should be made transparent.

64. There should be no expectation of parity with Crown Solicitors until issues of quality in the legal aid system has been resolved.

65. Long term, it would be advisable to move the remuneration of senior legal aid lawyers closer to Crown Solicitor rates, once quality issues have been resolved.

Roles and responsibilities for quality and discipline

389. In the discussion paper, I said there appeared to be no one agency with clear primary responsibility for the quality of services provided by legal aid lawyers. I asked people to tell me whether they thought either the LSA or the Law Society should have primary responsibility, or whether it should be a shared responsibility.

390. Submissions on this point were split. Of the 22 submissions that commented, 11 said there should be a shared responsibility between the Law Society and the LSA. Seven said that responsibility rests (and should rest) with the Law Society. Two said responsibility should rest with the LSA. There appears to be some concern about the Law Society's approach to quality in this context, with some submissions noting that the Law Society has not historically taken a strong interest quality issues.

> ***"At the present time neither [the Law Society nor the LSA] seem to be keen to take a stand on obvious wrong-doing."***
>
> *LAR 017*

391. Submissions also noted that a combined responsibility will work only if the agencies can cooperate and decide together on steps to be taken.

Role of the New Zealand Law Society

392. The New Zealand Law Society is the regulator in the regulatory regime for lawyers. Its functions are set out in the Lawyers and Conveyancers Act 2006 and include
- issuing practising certificates, approving lawyers to practise on their own account, and to operate trust accounts
- maintaining a register of lawyers
- making practice rules that may be binding on all lawyers or on a specified class of lawyers
- law reform activities, including making submissions on legislation
- managing the lawyers complaints service
- operating a financial assurance scheme
- operating a fidelity fund
- assisting the monitoring and enforcement of the Lawyers and Conveyancers Act and regulations and rules made pursuant to that Act.

393. The disciplinary system for lawyers is a two-tier system. Standards committees operate at a branch (regional) level, and the Lawyers and Conveyancers Disciplinary Tribunal is a national body. The threshold for the making of an order by the committees and the Tribunal is "unsatisfactory conduct" on the part of a lawyer or former lawyer, an incorporated firm or former incorporated firm, or an employee or former employee of a lawyer or an incorporated firm. Ethical standards for lawyers can be enforced under this system.

394. The Law Society has noted that it does not have a statutory role, or specific targeted powers that enable it to deal with issues specific to legal aid providers. It notes that the LSA does have these powers.

Role of the Legal Services Agency

395. The Legal Services Act 2000 sets out the powers that enable the Legal Services Agency to administer the legal aid system. Those powers include
- establishing and administering the legal services list, which sets out the legal services that a listed provider may provide, and any conditions attaching to the approvals[53]
- approving lawyers to provide legal aid services, which includes the ability to impose conditions on approval, which must be complied with by the provider[54]
- suspending or cancelling a lawyer's listing[55]
- the ability to withhold payment for services provided by a listed provider who was not approved to provide those particular services, or for services provided in breach of any conditions attached to an approval[56]
- developing and adopting, in consultation with the profession, listing criteria for determining when a lawyer may be approved to provide specified services[57]
- prescribing the manner in which a person must apply for listing, which must be complied with.[58]

There is a shared responsibility for the quality of legal aid lawyers

396. The Law Society is critical of the LSA for not having dealt with poorly-performing lawyers. It says that the LSA has not usually made specific complaints to the Law Society's legal services committee and, despite having a good knowledge of certain lawyers who are under-performing, the LSA has not used its own systems to deal with that conduct. I have some doubt as to how well the Law Society, as the regulator of the legal profession, has worked constructively with the LSA to identify and address the conduct at issue.

397. The Law Society clearly considers that the LSA has responsibility for quality issues regarding legal aid providers, and so do I. Undoubtedly, some of the conduct of concern to the LSA will be relatively minor, perhaps causing difficulty in terms of administering the legal aid system, but not causing real difficulties for clients, and not amounting to criminal conduct. I can accept the Law Society's position in relation to this kind of conduct. Behaviour that is inconvenient to the LSA will not necessarily reach the "unprofessional conduct" threshold of the Law Society's disciplinary mechanism.

398. However, that is not always the case. Some of the conduct I have described in this report seems downright unprofessional, if not criminal, and the Law Society should be taking a close interest, given its role as regulator of the legal profession. There are some lawyers in the legal aid system who should be excluded from that system, and disbarred altogether, in my opinion. As noted in paragraph 334, I have been told that corrupt behaviour has been drawn to the Law Society's attention and the complaint does not appear to have been acted upon. The fact that this has not occurred highlights a fundamental flaw in the legal aid system and in lawyers' professional regulation.

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53 Legal Services Act 2000, section 70.

54 Legal Services Act 2000, section 69(1) and (2).

55 Legal Services Act 2000, sections 72A and 73.

56 Legal Services Act 2000, section 69(3).

57 Legal Services Act 2000, section 71(1) and (2).

58 Legal Services Act 2000, section 72.

399. The problem I see is that the Law Society's regulatory role does not always sit comfortably with its role as representative of its members. I believe that its representative "trade union" role may have influenced some of its interactions with the LSA, and this has contributed to the quality problems that exist today.

400. The time for the two agencies to sit on the sidelines sniping at each other is long past. The government, through its procurement of legal aid services, clearly has a role to ensure the quality and effective provision of legal aid services. The Law Society – which has been entrusted by Parliament as regulator of the legal profession – has a role to ensure that the legal profession meets professional standards. In many cases, I expect those roles to overlap. The LSA should be able to assume that someone issued with a practising certificate is both competent and honest.

401. Lawyers who act incompetently or who defraud their clients or the LSA risk failing to meet professional standards. I doubt members of the public would consider these lawyers fit to practise. As I have already noted, I believe the LSA, the Ministry of Justice, and the Law Society need to find a way of ensuring that standards are met and that lawyers who fail to meet them have appropriate restrictions placed on them so they cannot harm innocent and vulnerable people.

402. Equally clearly, the government is going to need to work with the Law Society in developing a quality framework for the legal aid system, given the Law Society's superior knowledge of the legal profession, its strengths and its weaknesses. I would urge the Law Society to come to these discussions with its role as regulator uppermost.

403. I am concerned that, without the right incentives for change, the regulators will lose momentum. I anticipate that both the LSA and the Law Society will experience push-back from those lawyers who stand to lose the most from the quality-related changes I have proposed. The regulators will need a lever to help them make the necessary change.

404. I appreciate that the Law Society's regulatory role is quite new, and it may not yet have fully bedded in. I would expect to see significant improvements in the Law Society's exercise of its regulatory functions over the next two to three years. The quality issues with legal aid lawyers are so serious, however, that the situation cannot be allowed to continue for more than three years at the most.

405. I recommend, therefore, that a review of the quality of legal services, including legal aid services, should be undertaken in three years' time. That review should be carried out in much the same way that I have conducted this review, with visits to courts and lawyers around New Zealand. If that review concludes that the issues identified in my report have not been rectified, the government should institute an independent regulator for the legal profession.

Recommendations

66. A further review of the quality of legal services, including legal aid services, should be undertaken in three years' time to see if the issues identified in this review have been rectified.

67. If the issues have not been rectified within three years, the government should institute a strong regulatory body for lawyers that is focused on quality of legal services and is completely independent from the legal profession.

PROCUREMENT OF LEGAL AID SERVICES

406. I consider that taking a new approach to the procurement of legal aid services for criminal, civil, and family (including mental health) cases could reduce the inefficiencies that exist in the current system, and lead to some savings. This new approach would involve changes to how legal aid is funded and the administrative processes associated with procurement.

PUBLICLY PROVIDED SERVICES

407. I see a role for a mixture of publicly and privately provided services. The evaluation report for the PDS has shown that, where the volumes of work are sufficient, the PDS can provide services more efficiently than private lawyers, with no perceivable drop-off in quality.[59] While I have heard some disquiet from some lawyers, and am aware that the Criminal Bar Association has commissioned its own evaluation report, I see no reason not to accept the findings of the report commissioned by the LSA. The PDS is regarded as a high-quality and efficient service, staffed by lawyers with integrity. It is positively supported by most of the judges, court staff, and police with whom I have spoken.

408. The PDS is low-cost, in part, because it does not have to earn a profit. It also has an advantage for the government, because any efficiency gains go to the Crown. The main attraction, though, from my perspective, is that the PDS provides value for money.

409. I favour using the PDS in courts in the major centres – Auckland, Wellington, and Christchurch – where the case volumes are sufficient to make it an efficient option. I also favour using the PDS in centres where there are particular problems with quality: it can be used to spark competition where local lawyers' performance is sub-standard. It should encourage defence lawyers to enhance their own performance and would ensure defendants in those centres are not unfairly disadvantaged as a result of poor advocacy by their lawyers. For these reasons, I suggest that a PDS be established in Palmerston North as soon as possible, because that centre seems to have some serious quality issues.

410. Modelling commissioned by the Ministry of Justice for this review of the legal aid system suggests that extending the PDS to these centres could result in legal aid savings of between $1.4 million and $8 million, depending on the caseload taken on by the PDS.[60]

411. I also consider it worthwhile considering an expansion of the types of cases that can be taken. Similar efficiencies may be able to be gained in some civil and family cases with public provision of legal services.

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59 Davis N & Clarke P, *Value for Money Review of Public Defence Service*, MartinJenkins (Wellington: March 2009).

60 Pauls, R & others, *Review of Legal Aid: final supporting analysis report*, Law and Economic Consulting Group (Wellington: November 2009).

412. I do not favour rolling out the PDS (or publicly provided legal services more generally) across New Zealand because I believe that competition between public and private providers ensures the best quality service to people. Bureaucracies without competition have a way of taking on a life of their own. The Ministry-commissioned modelling suggests that there are diminishing marginal returns once publicly provided services are rolled out beyond 20 locations.

Recommendations

68. The legal aid system should use a mixture of publicly and privately provided services.

69. The Public Defence Service should be used in courts in the major centres – Auckland, Wellington, and Christchurch – where the case volumes are sufficient to make it an efficient option.

70. The Public Defence Service should be used in smaller centres where there are particular problems with the quality of legal aid services.

71. To address the quality problems I have identified in Palmerston North, a Public Defence Service should be established there as soon as possible.

72. The government should consider expanding publicly provided legal services to civil law and family law cases, where necessary to achieve efficiency and/or quality gains.

FLEXIBILITY IN PROCUREMENT

413. I consider that the Legal Services Act 2000 does enable some flexibility in the procurement of legal services, but more is needed. The Act[61] currently requires extensive consultation and piloting of alternative means of service procurement or provision, which restricts and slows down the development of new approaches.

414. Legal aid services are currently funded on a fee for service basis. The LSA has an extensive provider manual that sets out payment steps for matters such as preparation, bail applications, hearing times, pre-sentence reports, and so forth. There are basic problems with fee for service procurement. First, it does not encourage lawyers to be efficient or innovative. By setting out payment steps, it encourages lawyers to follow those steps, rather than taking the steps that will resolve a case most effectively. Related to this, fee for service procurement based on prescriptive payment steps does not cope with situations that are out of ordinary, and that do not fit the payment steps path. As I have already demonstrated, the LSA does not always cope well with unusual cases, and this can lead to long delays in payment and protracted correspondence with lawyers.

61 Legal Services Act 2002, sections 80-84.

415. While I have no doubt that many legal aid lawyers will run a case in the way that accords with their clients' best interests, as I have noted at paragraph 414, the fee for service model is undoubtedly open to abuse.

416. Finally, the fee for service model carries with it a significant amount of administration. The cost of granting legal aid is currently $173 per application, and that cost is the same for very low-cost cases (for example, $500) through to significantly more expensive cases.

417. Most proceedings category 1 cases (the most common and least serious cases) will cost on average between $500 and $900, so there are significant advantages to reducing the granting costs associated with these cases.

> ***"Many lawyers are discouraged by the 'red tape' in getting assignments."***
>
> *LAR 040*

418. In general, I consider that fee for service should be avoided, in favour of other funding models such as bulk funding or fixed fees. Where work volumes permit, I see advantages in bulk funding law firms or groupings of lawyers to provide specified legal services.

Bulk funding of groups headed by senior lawyers

419. I consider that the legal aid system needs to move away from a focus of dealing with individual lawyers for individual cases (which has led to many of the problems identified in this report). Most lawyers, and certainly those who are less experienced, need to work within a system that provides them with ongoing support and supervision from their peers. They should have access to office support, ongoing training, and other professional support. I consider this can best be achieved by shifting to a system where the bulk of non-publicly provided legal aid services are contracted to be provided within a supportive grouping.

420. Under this system, the procurement agency would contract with senior lawyers (akin to the warrant holders in the Crown Solicitor system), who would take on responsibility for delivering legal aid services within the contract. In this way, a senior lawyer would be responsible for ensuring the quality of the services provided under the contract. In order to obtain the contract, the senior lawyers would need to demonstrate that they had appropriate 'infrastructure' in place to ensure that a quality service would be provided, including
    - an office and office support systems
    - ongoing training and development of lawyers in the grouping
    - peer support and the ability to collaborate with others in providing the services (this would enable files to be passed to another lawyer where there were schedule clashes, for instance)
    - mentoring and supervision of junior lawyers by more senior lawyers.

421. Such a contracting system should be very flexible, and should not exclude any quality lawyers who want to participate in it. It should be open to any groupings of lawyers who can demonstrate they have the infrastructure outlined above, whether it is a relatively loose grouping of barristers sole in a chambers-type arrangement or a more formal arrangement within a specific law firm.

422. I consider that bulk funding will generally be the best way to contract through these groupings It gives lawyers the incentives to seek efficiency gains in terms of the administration of cases and the matching of staff to cases. Lawyers are best placed to manage their use of resources. Bulk funding gives them the power to do this, and it keeps the government out of trying to manage matters for them. I envisage that lawyers' efficiency gains might include better case management, avoiding unnecessary deferrals, and not spending excessive time on pursuing low-probability outcomes. Lawyers would be able to take advantages of "unders and overs" from case to case.

423. Lawyers with a bulk funding arrangement would not need to enter into unwieldy administration on each individual legal aid application; the funding arrangements would enable streamlined administration. I envisage that this will be attractive to many, and law firms in particular.

424. If the infrastructure outlined above is to be required, it follows that the contracts with these groups will need to provide funding appropriate to the needs of that infrastructure. Bulk funding will likely involve lawyer groupings taking on much of the administration currently undertaken within the LSA, and will also involve lawyers taking on a level of risk that there are more "overs" than "unders". Groupings should be remunerated in a way that recognises the additional work and the risk.

425. This funding model may not, therefore, be a way to make significant savings. However, I do view it as a way to ensure the taxpayer is getting the best value from the money spent on legal aid. It is a crucial mechanism for addressing many of the quality issues I have identified in this report.

426. While I consider that bulk funding will generally be the best option for dealing with most services, other procurement options may be needed to deal with case types and volumes that may not be amenable to bulk funding. The procurement agency should be able to bulk fund legal aid services where that is the most efficient funding method and where it can find willing providers.

Capitation-based funding

427. Capitation-based funding is a variation on the bulk-funding theme. However, instead of fixing a contract fee for a defined case load or number of hours to be provided, it is a type of capacity contract, similar to a retainer. It involves lawyers agreeing to reserve the capacity to provide all required services over a given period to a pre-defined population. A "defined population" could mean, for example, all cases presenting at a particular court, or all mental health cases involving people resident in a given area.

428. The contract value would be calculated on the basis of a fixed fee per capita of the defined population. That fixed fee can be thought of as an insurance premium; it is developed in such a way that it reflects the probabilities of a given member of the population requiring the contracted services during a specific period. A capitation formula normally includes demographic and social risk adjusters such as age, gender, ethnicity, deprivation indices, and so forth.

429. Capitation contracts are standard in private health insurance, and are increasingly used in the public health sector to determine funding levels for primary and secondary care providers. For example, there are annual contracts between the Minister of Health and the District Health Boards, which set funding levels to provide health services for defined eligible populations.

430. I believe capitation may be a viable option where there is a defined population and a reasonably stable and predictable cost of services per person, such as some of the high-volume, low-cost criminal cases. A risk that would need to be managed would be that lawyers with a capitation contract might try to deter "expensive" potential clients.

431. In the health context, there is concern that capitation contracts may provide opportunities for reducing service quality because it is difficult for clients to judge the quality of service provided. I see this as less of a concern in this context, given the other measures that I have proposed be put in place to enhance the quality of legal services.

Recommendations

73. The Legal Services Act 2000 should specifically enable flexibility in the procurement of legal services. Services should be procured using the most appropriate funding model in the proportions that will enable the best value for taxpayers' money. Sections 80-84 of the Legal Services Act 2001 should be removed.

74. The government should introduce bulk funding of groupings of lawyers to provide legal aid services.

75. Bulk funded groups of lawyers should be headed by senior lawyers who would be responsible for the quality of legal aid services delivered under the contract.

76. Bulk funded groups of lawyers should have appropriate infrastructure in place to ensure a quality service would be provided, including
    - an office and office support systems
    - ongoing training and development of lawyers in the grouping
    - peer support and the ability to collaborate with others in providing the services
    - mentoring and supervision of junior lawyers by more senior lawyers.

A role for senior specialist lawyers

432. I consider that the legal aid system would benefit from being able to call on the expertise of lawyers who are at the top of their field in appropriate cases. These would be specialists, to be called on when a particular case required their skills, at the discretion of the agency responsible for legal services procurement. These lawyers should be contracted on an individual basis at a rate that suitably reflects their experience and expertise. That rate will need to be determined, but I envisage it would be closer to the Crown Solicitor rates than the current level 3 rates. A discount would need to be made from the Crown Solicitor rates to recognise that these lawyers, unlike Crown Solicitors, can take on private work.

433. These experienced lawyers are also likely to be able to add value to the wider legal aid system by effectively sub-contracting for services to the groupings outlined above or to the publicly provided services. They might be contracted to do this type of work where
- the matter is of a level of complexity that cannot be dealt with by other legal aid service providers (where, for instance, the more senior lawyers within a grouping are already committed)
- there are conflict of interest issues (for instance, where a family law matter is being dealt with in a publicly provided service, and another party to that matter requires representation)
- overflow work is required because a grouping of lawyers is already fully committed
- they would be providing senior-level support to junior lawyers
- specialist expertise is required that is not available within the service or grouping (for instance, issues such as mental health matters).

Recommendations

77. The legal aid system should retain suitable senior lawyers for use in appropriate cases, at a higher rate than is currently paid in the legal aid system.

78. Senior lawyers could also be contracted for services to bulk funded groupings of lawyers or to publicly provided services. These contracted services might include work where
- the matter has a level of complexity that cannot be dealt with by other legal aid service providers
- there are conflict of interest issues
- overflow work is required because a grouping of lawyers is already fully committed
- they would be providing senior-level support to junior lawyers
- specialist expertise is required that is not available within the service or grouping.

STREAMLINED ELIGIBILITY ASSESSMENT FOR HIGH-VOLUME, LOW-COST CASES

434. I recommend that the government investigate introducing a streamlined eligibility assessment process for appropriate cases. Initially, I suggest the focus be on the high-volume low-cost criminal cases, which comprise about 90 per cent of legal aid grants. Consideration might also be given to extending the process to mental health and domestic violence cases, or to civil and family law cases more generally. Because low value cases comprise about 90 per cent of legal aid grants, this could result in significant administrative savings. Preliminary assessment from the Ministry of Justice-commissioned modelling suggests that the cost of administration per application could drop from $173 to $50. This is a significant saving, and would free up resource that could be used to monitor the quality of legal aid services.

435. Essentially, the procedure could involve a streamlined assessment process for applications likely to come in below a cost threshold. This procedure would use a greatly streamlined assessment process, with a greatly simplified means test (for example, using a community services card or evidence of benefit or income only), and the interests of justice test. Cases above that threshold would continue to follow the normal process.

436. The current process of assessing financial eligibility requires completion of a lengthy form, and can involve several further requests for information, all of which are done in writing, through the person's lawyer. This is inefficient, and lawyers become frustrated at being the intermediary because this part of the process is unfunded. They view this as extra administration that reduces their effective remuneration.

437. Simplifying this process should involve reassessing the information that is actually needed, and investigating how much of this information can be obtained and/or verified from other agencies such as Work and Income, and the Inland Revenue Department, in a manner that is consistent with the Privacy Act 1993.

438. Much of the information collected under the current process is collected for the purposes of establishing debt. While there are valid policy reasons for having a repayment regime, those reasons do not necessarily sit well with the high-volume, low-cost criminal cases, or with the domestic violence and mental health cases (which are already excluded from the repayment regime). With mental health and domestic violence issues in particular, the legal aid clients are vulnerable people whose interests need protecting and who may not be in a position to repay legal aid in the foreseeable future. With criminal legal aid clients, the prospect of repaying legal aid is probably not uppermost in their consciousness leading up to the actions that result in legal aid being granted.

439. Given the proportion of criminal legal aid clients who are on benefits or low incomes, it is likely that many would not be assessed as liable to repay legal aid under the current regime (repayment requirements are only imposed in around 25 per cent of grants). In my view, pursuing debts from socially disadvantaged people is unproductive and creates unnecessary costs for the government.

440. I recommend, therefore, that the government abolish repayments for these cases. Collecting information for the purposes of assessing debt where a debt is unlikely to be established seems a futile and expensive exercise. Abolishing repayments would allow a greatly streamlined eligibility assessment process.

441. In keeping with the theme of efficiency gains, I consider that cases passing through the streamlined process should not have choice of lawyer, but should have lawyers allocated on strict rotation and according to the lawyers' availability. Cases should proceed at the court's convenience, not the defence counsel's.

442. People who wish to choose their own lawyer should not be able to enter the streamlined eligibility assessment process. Instead, they should be shifted into the case management system for high-cost cases, and actively case managed. Their choice of lawyer (and any subsequent reassessment of that choice) should be scrutinised carefully. Because of the added cost and complexity that seeking the choice of lawyer entails, these people should be made subject to assessment for the purposes of repaying their legal aid. I discuss the preferred lawyer issue below.

443. The government will need to determine the threshold above which normal conditions would apply. The Ministry of Justice's modelling suggests that savings could range between $3.8 million and $6 million depending on which law types are included, and where the cost threshold is set.

444. I consider it would be worthwhile introducing streamlined eligibility assessment for all high-volume low-cost criminal cases. Although the savings would be smaller, because of the lower volumes, it may also be worthwhile considering including low-cost civil and family cases in the streamlined process.

445. Even if the government chooses not to include all low-cost family and civil cases, I consider it would be worthwhile including two sub-categories of cases in the streamlined process. I consider it should be available in domestic violence cases and in representing people who are being made subject to compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Although these cases are in much lower volumes, they involve people who are particularly vulnerable and for whom easy access to legally aided services is critical. The LSA has advised that a very high percentage of applications in these cases meet the financial eligibility criteria, and these applicants are already exempt from repayments. That being the case, there do not appear to be any problems with streamlining the application process for these cases.

Recommendations

79. The government should investigate introducing a streamlined eligibility assessment process for criminal, civil, and family cases that fall below a cost threshold.

80. Cases that proceed through streamlined eligibility assessment should not be subject to repayment requirements, and should have lawyers allocated by the legal aid system.

81. Cases above the threshold should follow the standard granting process and remain subject to assessment for repayments.

82. People whose cases fall below the threshold and who wish to choose their own lawyer should not be able to enter the streamlined eligibility assessment process. Instead, they should be shifted into the case management system for high-cost cases, and actively case managed. Their choice of lawyer (and any subsequent reassessment of that choice) should be scrutinised carefully. These people should be made subject to assessment for the purposes of repaying their legal aid.

PREFERRED LAWYER POLICY

446. I have had concerns with the preferred lawyer policy as it has operated in relation to criminal legal aid cases. Originally, I understand that the preferred lawyer policy was generally limited to serious cases, such as murder, that received legal aid. It has been extended so all legal aid clients can choose their preferred lawyer from the legal aid list in criminal, family, civil, and Treaty of Waitangi cases.

447. It seems to me that this policy has had some unintended consequences, and it is undermining its own objective, which was to allow the market to exclude poorly performing lawyers from the legal aid system. As I have noted in paragraph 335, there seems to be a widespread acceptance of abuse of the policy by duty solicitors.

448. I am also aware that the preferred lawyer policy is causing distortions in the legal aid system, by interfering with the efficient allocation of cases. It enables lawyers to take on too many cases, with no effective oversight of their caseload. Those lawyers who lack effective support systems do not always refer files on, and instead end up using court scheduling to manage their time, which leaves the court at their mercy.

449. For these reasons, I consider that for high-volume, low-cost cases, the preferred lawyer policy should not apply. Instead, cases should be allocated by rotation and according to lawyers' availability: cases should proceed at the court's convenience, not at defence counsel's.

450. The Law Society has submitted strongly in favour of the preferred lawyer policy, noting the importance that choice of lawyer has on building client trust, which is essential to the smooth running of cases and effective resolution of disputes. I can see the force in this argument for particular types of cases, such as mental health, domestic violence, and family law cases more generally.

451. While I have taken note of the Law Society's views, the abuses of the system that I have been told about far outweigh its benefits, and I consider that the preferred lawyer policy should be dispensed with in standard low-cost cases.

> ***"...preferred Counsel should become redundant. If it is retained the abuses will continue and the public will still be represented by a number of incompetent and lazy lawyers."***
>
> *Stakeholder*

452. If people wish to choose their own lawyer, they should be moved into the case management system for high-cost cases, and actively case managed. I consider, too, that the LSA needs to remain vigilant as to the use of preferred lawyers who are not local to the court where cases are being heard. I understand that there are restrictions on travel and the LSA should ensure they are adhered to so that out of town lawyers are engaged as the exception rather than the rule. I am aware, however, that some recent high-cost, high profile criminal cases have used out of town lawyers, which will have added significantly to the legal aid costs. I consider that the reasons should be compelling indeed before this kind of expenditure is agreed to by the LSA.

Recommendation

83. Where people choose their own lawyer, the Legal Services Agency needs to be vigilant that, even in complex cases, strong preference is given to using suitably experienced local lawyers, to minimise travel costs.

MANAGEMENT OF HIGH-COST CASES

453. The distribution of legal aid costs is highly skewed towards simple, low-cost cases. In 2008/09, approximately 850 cases (1 per cent of cases completed in the year) received more than $22,500 funding. However, these top 1 per cent of cases accounted for a significant proportion of total expenditure on service provision (27 per cent in 2007/08).

454. Even within this "elite" group, there is a heavy skew of funding towards very high-cost cases, with 75 cases receiving above $75,000, and 7 cases receiving above $500,000 in 2008/09. Of the top 75 cases by cost, 53.3 per cent were criminal, 41.3 per cent were Treaty of Waitangi, and the remaining 5.3 per cent were civil cases (there were no family cases costing more than $75,000).

455. The LSA targets high-cost cases for active management, as the following overview of their procedures shows[62]

> Lawyers provide estimates of work they will undertake and they seek approval from the Agency. They then invoice the Agency based on the estimates.
>
> The Agency operates a panel-based structure designed to provide consistent and more focused management of high-cost cases. A panel usually comprises two or three Specialist Advisers (in-house senior lawyers) and in some cases a senior private legal aid lawyer contracted to provide specialist advice. The panel may meet face to face, or more often in the case of an internal panel formed of two specialist advisers, via telephone.
>
> Each panel member reviews the application separately prior to the panel meeting, the outcome of which is a panel decision and, in some cases a recommendation(s) to the referring grants officer.
>
> The decision to form a panel is made by the Specialist Adviser Manager during his initial assessment of the file on its receipt by the unit. The decision is based on judgement, and the circumstances in which a panel may be formed are numerous.
>
> Grants for criminal appeals to the Court of Appeal and Supreme Court are administered by two dedicated Grants officers located in the Wellington regional office. This provides consistency, efficiency (stemming from knowledge and experience of what is quite a different process) and mitigation of risk. Most Court of Appeal and Supreme Court appeals involve to some degree a Panel of one or more Specialist Advisers.

456. I have not been able to identify any immediately obvious and significant opportunities for efficiency gains, although I consider that a more detailed and rigorous review and analysis of the effectiveness of the LSA's high-cost management procedures is desirable. I acknowledge that the very fact that the LSA targets high-cost cases is likely to provide some deterrent against indiscriminate and grossly inefficient expenditure by providers and their clients at the expense of the taxpayer.

457. Management of high-cost cases should be done on a case-by-case basis, and issues such as lawyer of choice, dismissal of lawyers, and engagement of counsel from outside the region should need approval from the case manager.

458. The scope for efficiency gains through active case management is likely to vary considerably across case categories. Case strategy has a major influence on case costs, but choices may be limited in criminal cases, which are substantially determined by the case put up by the prosecution (I discuss this further in paragraph 464). On the other hand, there may be more scope for active "investment" choices (value-for-money decisions) in Treaty of Waitangi and civil cases. I consider, therefore, that decisions about investments in case-management should focus on those cases with the greatest scope and the most degrees of freedom because this is likely to generate the greatest return on investment.

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62 Supra at note 60, pp. 15 & 16.

459. I am concerned by some examples I have had drawn to my attention. For instance, in a recent criminal trial, the lead counsel was a Queen's Counsel, and the second counsel was also a highly experienced lawyer. I suspect that the conduct of that defence did not require two quite such experienced lawyers. A less experienced second counsel might have done quite adequately.

460. I am also aware that in multi-defendant drug trials, each defendant is represented by a different lawyer. Each lawyer tends to be present for the whole proceeding, even when representing a defendant who may have a lesser interest in the case, which should require the lawyer's presence in the court for only part of the proceeding. I was also told of a lawyer who flew into town for a two minute court appearance.

461. The panels that manage high-cost cases are substantially staffed with senior lawyers, which means the perspective taken on case management is predominantly a legal one. I consider that this approach is insufficient to ensure an approach that focuses on responsible expenditure of taxpayer funds. I recommend, therefore, that the panels be chaired by a senior public servant, and include experts who bring legal, economic, and public policy perspectives. This blend of perspectives should give better decisions that are focused on value for money, without undermining access to justice for people on legal aid.

462. Economic modelling commissioned by the Ministry of Justice suggests that in general and on average, a five to ten per cent efficiency gain should be able to be achieved through active and value for money focused case management, without adversely affecting the quality of outcomes. Assuming such an efficiency gain would be applied to the top 1 per cent of cases (by cost), there could be efficiency gains in the order of $1.4 million to $2.7 million (from a total cost of $27.3 million in 2007/08).

Recommendations

84. The high-cost case management panels should be led by a senior public servant, and include experts who bring legal, economic, and public policy perspectives.

85. The focus of high-cost case management should be on balancing access to justice concerns with responsible expenditure of public funds.

Prosecution-defence escalation cycle

463. As I have noted several times in the course of this report, the legal aid system is exposed to external factors and, at times, has very limited influence over them. There is one particular external factor that cannot be controlled by the legal aid system, and has a direct effect on defence costs: prosecution decisions.

464. There appears to be an escalation cycle involving prosecution and defence lawyers. Prosecution decisions influence defence choices. Those decisions include charging practices, cooperation over discovery, and the use of expert witnesses and forensic evidence. For instance, if the prosecution chooses to use ten expert witnesses, the defence is likely to want to use ten of its own expert witnesses in order to counter the prosecution.

465. In turn, defence decisions influence prosecution choices in current and subsequent cases. These decisions include pleas and cooperation over evidence. For instance, lawyers and clients who make a habit of defending every indefensible charge are unlikely to gain much traction in change negotiations with the Police, even where the Police have over-charged the client. Conversely, I am aware that police in Manukau sit up and take notice if a lawyer from the PDS phones to say their client will be defending the charge. I understand this is a trigger for the Police to review the file and check the charges. I suspect the reason for that boils down to trust in the judgment and integrity of the PDS lawyer.

466. The decisions of prosecution and defence lawyers have a direct effect on legal aid expenditure. It would be unfair to try to curb this effect solely by addressing the defence side. As one submitter observed[63]

> There is thus a major discrepancy between, on the one hand, public expenditure on Crown Law, (at "Rolls Royce" rates) with its lack of transparency, controls for accountability, and on the other hand, public expenditure on payment at the lowest level to listed providers, who are subject to minute scrutiny by the [Legal Services] Agency.

467. Addressing just the defence side would also be ineffective, because it would leave other factors untouched that also affect prosecution choices. These other factors include the fact that we have multiple prosecuting bodies with multiple prosecution budgets. This makes it hard to identify total government expenditure on prosecution, and does not create incentives for efficiency in all Crown prosecutions, including financial decisions. Having multiple agencies with prosecution functions makes it difficult to get a uniform approach to the prosecution guidelines, and to training and court procedure.

468. Prosecuting bodies can be put under pressure by the weight of public expectations, particularly expectations created by the news media and popular television about scientific developments and forensic analysis. These can influence choices about how to run a case. There can be a similar weight of expectation imposed on in-house prosecutors in regulatory agencies, who have to make charging decisions once a regulatory breach has been identified. The lack of any external scrutiny of the evidence can influence the quality of charging decisions.

469. Finally, I understand that the existence of multiple prosecuting bodies can create incentives for defence lawyers to delay a guilty plea until a case has progressed to the next level: there is a perception that Crown Solicitors make better charging decisions than police prosecutors. This gives defence lawyers an incentive to work the court system so that their client's case is assigned a Crown Solicitor because, at that point, there is the possibility the charges will be downgraded.

63 Submission LAR066.

470. The responses to these problems need to come from a variety of angles. The legal aid system can provide some answers, by requiring better compliance with court procedure and providing incentives to run cases efficiently. The Criminal Procedure (Simplification) project can mitigate some of the problem through requiring better case management, including cooperation on discovery and the use of expert witnesses. The use of sentence indications is likely to influence defence decisions on pleas. These cannot, though, address the major issues relating to prosecution decisions. Those issues can only be addressed by a review of prosecution services. I understand that the Attorney-General proposes to look at this issue, but has not yet announced details.

ADMINISTRATIVE ARRANGEMENTS FOR WAITANGI TRIBUNAL CLAIMS

471. Waitangi Tribunal proceedings were included in the legal aid system after litigation by the New Zealand Māori Council against the Crown in relation to the sale of land owned by state-owned enterprises. In 1987, the Crown made a commitment to "making available legal aid for Māori claimants before the Waitangi Tribunal" as part the settlement of the proceedings between the *New Zealand Māori Council & Sir Graham Latimer v Attorney-General & ors* in the Court of Appeal, which was given effect to in the Treaty of Waitangi (State Enterprises) Act 1988.

472. That Act amended the Legal Aid Act 1969, as an interim measure, to give effect to the commitment to make legal aid available. The provisions were carried over into the Legal Services Act 1991 and have remained essentially the same ever since. The provisions are designed to ensure that the settlement and the protections of the Treaty of Waitangi (State Enterprises) Act 1988 are not made meaningless through the inability of Māori groups to bring their cases before the Waitangi Tribunal, and to recognise that the nature of claimants and proceedings before the Tribunal differ from other civil legal aid.

473. Before 1987 the Legal Aid Act 1969 did not recognise the specific characteristics of Waitangi Tribunal applicants, and legal aid was generally declined on the basis of financial criteria because the financial circumstances of all members of the applicant group were considered.

474. I have identified a number of issues in relation to legal aid for Waitangi Tribunal proceedings that make me believe an alternative approach to administration may well be needed. The Legal Services Act 2000 has not kept pace with substantial change in the wider environment. In particular, the Waitangi Tribunal process now leads to a Treaty settlement process. These are political and commercial settlements that, nonetheless, require legal support. However, this kind of legal support is not available to other parts of the legal aid system (that is, proceedings that are not connected with adjudicative proceedings), and the Office of Treaty Settlements and Crown Forestry Rental Trust both fund this general legal support. This is creating uncertainty for the LSA and risks duplication with those funding sources that do not fund litigation.

475. The LSA funds legal advice and representation services to claimants before the Waitangi Tribunal. After the Waitangi Tribunal has issued its report, the LSA funds claimants entering into settlement negotiations with the Crown, from the pre-negotiation stage, through to implementation of the deed of settlement. In 2008/09, the LSA funded $11.69 million in Waitangi Tribunal legal aid.

476. The Crown funds, through OTS, a contribution towards claimants' costs of
- pre-negotiations, including obtaining a mandate agreeing the terms of negotiation
- negotiation, including reaching a draft deed of settlement and setting up the post-settlement governance entity
- the ratification process to confirm acceptance of the package and governance by the claimant group.

477. OTS has provided a total of $19.84 million in funds to claimant groups between January 1996 and October 2008. OTS funding has ranged from $0.435 million to $0.866 million per claim. The funding available through OTS has recently been increased to allow for settlements up to 2014.

478. Some claimant groups are also eligible for funding from the CFRT. This funding is available to claims before the Waitangi Tribunal or in settlement negotiations that involve Crown forest licensed lands. The CFRT will fund specialist advisers, which can include legal advisers. In 2007/08, the CFRT disbursed $17.39 million to claimants. The CFRT funding is different from LSA and OTS funding in that its funds originate from a settlement and are administered by a trust. LSA and OTS funding comes from the Crown in an annual appropriation.

479. The existence of multiple sources of funding creates the possibility of multiple funding sources being used for the same claim. Although the LSA has memoranda of understanding with both OTS and the CFRT to manage the possibility of double-dipping, there is a real risk that double-dipping may not be identified. It is administratively cumbersome to manage multiple sources of funding in this way.

480. Having legal aid available for Waitangi Tribunal proceedings that go beyond litigation creates challenges for the LSA, as the majority of the rest of its business is focused on adjudicative proceedings. There is also an issue with managing these grants. Waitangi Tribunal grants are expensive and complex and will need different management from other grants. This requires specialist expertise at the administering agency that the LSA does not currently have.

481. A number of submitters raised concerns about the current funding of Treaty of Waitangi claims, with one suggesting that all cases should be fully resourced through the Office of Treaty Settlements and the Crown Forestry Rental Trust.[64] As a matter of urgency, the government should clarify the funding streams for Treaty of Waitangi claims and modify them to ensure there is no possibility of double-dipping by claimants or lawyers. There seem to me to be two possible options, and I recommend further work be done to explore them in detail. First, it might be possible to draw a clearer cut-off point between legal aid for Waitangi Tribunal proceedings, which are recognisable legal proceedings and therefore a relatively comfortable fit with the legal aid system, and financial assistance for settlement negotiations.

64 Submission LAR072.

482. I understand that the LSA grants aid for legal services associated with the settlement negotiations following a Waitangi Tribunal decision based on legal advice that this is incidental to the Waitangi Tribunal proceedings. The analogy is that, in a property relationship division, the LSA will fund conveyancing where a house is sold so that the assets can be divided. However, given the quantum involved in settlement negotiations, I believe this stretches the analogy more than a little. I am concerned about the lack of clarity on how to characterise and manage the associated legal services. It may be desirable to determine whether and to what extent legal aid should be available for legal services provided to claimant groups during the negotiation process.

483. Second, if it is too difficult to demarcate the points where funding streams commence and end, the other possible option is to extend the mandate of the Treaty of Waitangi Negotiations Cabinet committee to enable it to oversee funding, to ensure funding overlaps are identified and addressed.

484. The issues relating to Treaty of Waitangi legal aid are complex, and require careful and detailed consideration that has not been possible in the time allocated for my review of the legal aid system. I am conscious of the risk of proposing changes that may jeopardise the government's aim to have historic Treaty of Waitangi settlements concluded by 2014. Therefore, I consider that, if the Government wishes to give further consideration to the administration of Treaty of Waitangi legal aid, this needs to be done specifically and with deliberation.

Recommendation

86. As a matter of urgency, the government should clarify funding streams for Treaty of Waitangi claims and modify them to ensure there is no possibility of double-dipping or triple-dipping by claimants or lawyers.

APPENDIX

PEOPLE WHO MET WITH THE REVIEW CHAIRPERSON

Name	Title	Organisation/District
John Marshall QC	President	New Zealand Law Society
Kerry Dalton	Chief Executive	National Office of the New Zealand Association of Citizens Advice Bureaux
The Rt Hon. Sir Geoffrey Palmer SC	President	Law Commission, Wellington
Val Sim	Law Commissioner	Law Commission, Wellington
Dr Warren Young	Deputy President	Law Commission, Wellington
Tim Bannatyne	Chief Executive	Legal Services Agency, Wellington
Her Hon. Judge Carrie Wainwright	Deputy Chairperson	Waitangi Tribunal
Peter Hughes	Chief Executive	Ministry of Social Development
The Hon. Justice Randerson	Chief High Court Judge	High Court, Auckland
Brendan Horsley	Team Leader	Crown Law Office
Mark Bridgman	Service Development Manager	Public Defence Service
Bill Carran	Court Manager	Lower Hutt District Court
Chris Alleyne and team	Area Court Manager	Christchurch District Court
Andrew McKenzie	Chair	Community Law Canterbury
Paul O'Neill and team	Manager	Community Law Canterbury
Mollie McCaw	Area Coordinator	National Office of the NZ Association of Citizens Advice Bureaux
His Hon. Judge Colin Doherty and members of the Christchurch bench	District Court Judges	Christchurch District Court
The Hon. Justice Robertson	Court of Appeal Judge	Court of Appeal, Wellington
The Hon. Justice Glazebrook	Court of Appeal Judge	Court of Appeal, Wellington
Beth Bowden	Local Court Manager	Tauranga District Court – High Court
Hine Tihi	Satellite Court Manager	Whakatane District Court
Wendy Roberts	Local Courts Manager	Rotorua District Court – High Court
Fletcher Pilditch	Crown Solicitor	Gordon Pilditch
Bill Lawson	Partner	Lance Lawson
Ellie Herbert	Manager	Rotorua District Community Law Centre
Marcus Vettise	Local Court Manager	Palmerston North District Court – High Court
Ben Vanderkolk	Crown Solicitor	Ben Vanderkolk & Associates
Peter Coles	Barrister & Solicitor	Palmerston North
Mark Alderdice	Barrister	Palmerston North
Hon Christopher Finlayson	Attorney-General	Parliament Buildings

Name	Title	Organisation/District
Hon Dr Pita Sharples	Minister of Māori Affairs	Parliament Buildings
The Hon. Justice William Young	President	Court of Appeal, Wellington
Chief Judge Russell Johnson	Chief District Court Judge	Wellington
His Hon. Judge Peter Boshier	Principal Family Court Judge	Wellington
His Hon. Judge Andrew Becroft	Principal Youth Court Judge	Wellington
Howard Broad	Commissioner of Police	Police National Headquarters
Kelvin Smillie	Court Manager	Manukau District Court
Bill Alden	Manager	Māngere Community Law Centre
Colin Amery	Barrister	Manukau District Court
Dorothy Gaunt	Manager	Pakuranga-Eastern Manukau Citizens Advice Bureau
Graham Metcalfe	Regional Manager	Manukau Legal Aid Office
The Rt Hon. Dame Sian Elias, GNZM	Chief Justice	Supreme Court, Wellington
Dr David Collins QC	Solicitor-General	Wellington
Brian Reid	Criminal Caseflow Manager	Auckland District Court
Lydia Sharko	Team Leader Family	Auckland District Court
Ron Mansfield	Barrister	Auckland
Grant Illingworth QC	Barrister	Auckland
Margaret Lewis	Barrister	Auckland
Richard McLeod	Barrister	Auckland
Peter Moses	Barrister	Auckland
Anthony Rogers QC	Barrister	Auckland
Melanie Morris	Law Graduate	Auckland
Graeme Newell	Barrister	Auckland
Mike Douglas and team	Area Courts Manager	Hamilton District Court
Julian Maze	Convenor	Legal Aid Review Panel
Sacha Nepe	Barrister	Hamilton
Catherine Dodd	Court Manager	New Plymouth District Court – High Court
Eleanor Connole	Staff Solicitor	Billings, New Plymouth
Susan Hughes QC	Barrister	New Plymouth
Nina Elliot	Staff Solicitor	Govett Quilliam, New Plymouth
Chris Richardson	Court Manager	Wanganui District Court – High Court
Sandra Terewi	Manager	Community Legal Advice Whanganui
Hamish McDouall	Lawyer	Jack Riddet Tripe
Mark Bullock	Barrister & Solictor	Wanganui
Sheryle Proctor	Partner	Roger Crowley

Name	Title	Organisation/District
Robyn Rauna	Acting Manager	Tairawhiti Community Law Centre
Vicki Thorpe	Barrister & Solicitor	Gisborne
David Sharp	Partner	Burnard Bull & Co, Gisborne
John Mathieson	Partner	Rishworth Wall & Mathieson
Hayley Chambers	Caseflow Manager	Gisborne District Court – High Court
Trish Torrey	Caseflow Manager	Gisborne District Court – High Court
Chris Greaney	Local Court Manager	Napier District Court – High Court
Batt O'Rourke	Caseflow Manager	Napier District Court – High Court
Les Silson	Caseflow Manager	Napier District Court – High Court
Alan Davies	Partner	Willis Toomey Robinson, Napier
John McDowell	Barrister & Solicitor	Napier
Susan Hayward	Barrister	Napier
Bill Eccleton	Managing Solicitor	Hawkes Bay Community Law Centre
Alister Frengley	Court Manager	Invercargill District Court – High Court
Maree Hayes	Caseflow Manager	Invercargill District Court – High Court
Nola Wilson	Caseflow Manager	Invercargill District Court – High Court
Denise Lormans	Manager	Southland Community Law Centre
Tania Parker	Court Manager	Kaitaia District Court
Sue Tokumaru	Barrister	Kaitaia
Junior Witehira	Barrister	Kaitaia
Judith Hounsel	Barrister	Kaitaia
His Hon. Judge Timothy Druce	District Court Judge	Whangarei District Court
Julie Hooper	Court Manager	Kaikohe District Court
Grant Anson	Barrister	Kaikohe
Dorothy Owen-Tana	Barrister	Kaikohe
His Hon. Judge Duncan Harvey	District Court Judge	Whangarei District Court
Carla Campbell	Criminal Caseflow Manager	Whangarei District Court
Katene Eruera	Managing Solicitor	One Double Five Whare Roopu Community House
Peter Williamson	Chair	One Double Five Whare Roopu Community House
Stuart Henderson	Partner	Henderson Reeves Lawyers
Ian Reeves	Partner	Henderson Reeves Lawyers
His Hon. Judge Keith de Ridder	District Court Judge	Whangarei District Court
His Hon. Judge John McDonald	District Court Judge	Whangarei District Court
Debbie Masani	Court Manager	Waitakere District Court
Mick Brown	Retired Principal Youth Court Judge	Auckland
John Anderson	Barrister	Auckland

Name	Title	Organisation/District
Gary Gotlieb	Barrister	Auckland
Michael Antunovic	Barrister & Solicitor	Wellington
Noel Sainsbury	Barrister	Wellington
John Miller	Barrister & Solicitor	Wellington
Bill Bevan	Managing Solicitor	Whitireia Community Law Centre
James Wilding	Barrister	Christchurch
His Hon. Judge Stephen O'Driscoll, PhD	District Court Judge	Dunedin District Court
Robin Bates	Crown Solicitor	Wilkinson Adams
Sarah Saunderson-Warner	Partner	Aspinall Joel
John Huston	Manager	Dunedin District Court – High Court
Joy Smith	Manager	Ngāi Tahu Māori Community Law Centre
Peter Batchelor	Court Manager	Wellington District Court
Peter Riley	Manager	Nelson Bays Community Law Service
Dick Edwards	Chief Executive	New Zealand Law Society, CLE Limited
Garry Collin	Barrister	Christchurch
Carlyle Gibson	Solicitor	Cunningham Taylor
Tony Robinson	Barrister & Solicitor	Cunningham Taylor
Carolyn Brown	Barrister & Solicitor	Cunningham Taylor
Angela Corry	Barrister	Christchurch
Felicity O'Malley	Barrister & Solicitor	O'Malleys Barristers & Solicitors
Peter Brosnahan	Barrister	Wanganui
Debra Jackson	Satellite Court Manager	Blenheim District Court – High Court
John Houghton	Local Court Manager	Nelson District Court – High Court
Lisa Brooks-Hateley	Court Registry Officer – Criminal	Westport District Court
Elspie Mitchell	Court Manager / Registrar	Greymouth District Court
Michael Turner	Barrister	Blenheim
Robert Harrison	Barrister	Blenheim
Gary Sawyer	Partner	Gascoigne Wicks
Garry Barkle	Barrister	Nelson
Sandra Heney	Barrister & Solicitor	Nelson
Rob Somerville	Barrister & Solicitor	Nelson
Douglas Taffs	Barrister	Westport
Beverley Connors	Barrister & Solicitor	B H Connors
George Linder	Barrister & Solicitor	B H Connors
Kenneth Bailey	Director	Crimelawnorth Limited
Alan Kirkland	Chief Executive Officer	Legal Aid NSW

Name	Title	Organisation/District
Robert Fornito	Criminal Case Manager	Sydney District Court
Jane Mottley	Deputy Chief Magistrate	New South Wales Courts
Louis Pierotti	Litigation Manager	The Law Society of New South Wales
Aaron Thorne	Centrelink	Sydney, New South Wales
Paul Tait	Centrelink	Sydney, New South Wales
Belinda Gill	Centrelink	Sydney, New South Wales
Andrew Chambers	Centrelink	Sydney, New South Wales
Gary Eccleston	Centrelink	Sydney, New South Wales
Hannelore Schuster	Centrelink	Sydney, New South Wales
Marilyn Wilson	Court Manager	North Shore District Court
Simon Moore SC	Partner Crown Solicitor	Meredith Connell
Richard Marchant	Partner	Meredith Connell
Ross Burns	Partner	Meredith Connell
Kieran Rafferty	Partner	Meredith Connell
Susan Gray	Partner	Meredith Connell
Bruce Northwood	Senior Associate	Meredith Connell
Lorraine Smith	Barrister & Solicitor	Auckland
Charl Hirschfeld	Barrister	Auckland
John Angus	Children's Commissioner	Office of the Children's Commissioner
Louise Sziranyi	Partner	Thomas Dewar Sziranyi Letts
Gerard Dewar	Partner	Thomas Dewar Sziranyi Letts
Ross Tanner	Board Member	Legal Services Agency, Wellington
Lyanne Kerr	National Director	NZ Prisoners Aid and Rehabilitation Society
The Hon. Sir Edward Durie	Retired High Court Judge	Wellington
David Macdonald QSO	Former Auditor-General	Wellington
Grant Burston	Partner Crown Solicitor	Luke Cunningham Clere
Sergeant Paula Holt	New Zealand Police	Lower Hutt
Peter Fantham	Manager	Christchurch High Court
Kirsty Swadling	Barrister	Auckland
Rodney Harrison QC	Barrister	Auckland
Kevin McCartain	Civil Caseflow Manager	Whangarei District Court
Karen Wren	Civil Caseflow Manager	Whangarei District Court
Mane Allen	Solicitor	Public Defence Service
His Hon. Judge Peter Callincos	Family Court Judge	Wanganui Family Court
His Hon. Judge Michael Radford	District Court Judge	Wanganui District Court
His Hon. Judge Louis Bidois	District Court Judge	Tauranga District Court

Name	Title	Organisation/District
His Hon. Judge Christopher Harding	District Court Judge	Tauranga District Court
Lance Rowe	Crown Solicitor	Armstrong Barton
Colin Carruthers QC	Barrister & President, New Zealand Bar Association	Wellington
Bruce Bennett	General Manager - Membership, Standards, and Quality Assurance	New Zealand Institute of Chartered Accountants
Tom Davies	Director – Professional Support	New Zealand Institute of Chartered Accountants
Richard Moon	General Manager – Compliance, Quality, and General Counsel	New Zealand Institute of Chartered Accountants
Helen Colebrook	Principal Policy Adviser	Royal New Zealand College of General Practitioners
Jane Dancer	Group Manager, Education	Royal New Zealand College of General Practitioners
John Angus	Children's Commissioner	Wellington
John Anderson	Barrister	Auckland
Kate McHugh	Barrister & Solicitor	McKenzie Gray
Scott Williamson	Barrister & Solicitor	Hewat Galt
Phil McDonald	Partner	Cruickshank Pryde
Fergus More	Barrister & Solicitor	Scholefield Cockroft Lloyd
Peter Redpath	Partner	Eagles Eagles & Redpath
John Fraser	Barrister & Solicitor	Invercargill
Bill Dawkins	Barrister & Solicitor	Invercargill

The Chairperson also met with many groups of judges, lawyers, and court staff in various centres around New Zealand, whose names were not able to be included in the above list.

PEOPLE WHO MADE SUBMISSIONS ON THE DISCUSSION PAPER

Name	Title	Organisation/District
Colin Amery	Barrister	Auckland
Kersie Khambatta	Barrister	Papakura District Court
Robert Terry		Reefton
John W. Biggers	Retired Attorney	Arizona, United States of America
His Hon. Judge Duncan Harvey	District Court Judge	Whangarei District Court
Kelly Hennessy	Barrister & Solicitor	Kaikohe
Quentin Hix	Principal/Lawyer	Quentin Hix Legal, Timaru

Name	Title	Organisation/District
Steven Zindel	Lawyer	Zindels, Nelson
Mark A. Erskine		Auckland
J.B. Gerard	Barrister	Manukau
Aaron Martin	Director of Proceedings	Office of the Health and Disability Commissioner, Wellington
Lyanne Kerr	National Director	New Zealand Prisoners' Aid and Rehabilitation Society Inc.
Lorraine O. Smith	Barrister & Solicitor	Auckland
Gilbert A. Hay		
G. C. McArthur		Tauranga
Hazel Scott	Agency Manager	Inner City Women's Group, Auckland
Christine Rattray	Court Social Worker	Auckland
Sonja M. Cooper	Principal	Cooper Legal, Wellington
Richard Towle	Regional Representative	United Nations High Commissioner for Refugees
Loretta Lovell and Hemi Te Nahu	Partners	Te Nahu Lovell & Co Ltd, Wellington
Helen McCormack	Office Manager	Community Legal Advice Whanganui
Berry Zondag	Barrister	Thames
Cheryl Simes	Barrister	Hamilton
Jeremy Sutton	Barrister	Manukau
A.J. Hill, QPM		Auckland
Karen Dennison and Victoria Henstock	Directors	Legal Options, Christchurch
Tony Ellis	Barrister	Wellington
Desiree Mahy	Lawyer	Ngāi Tahu Māori Law Centre, Dunedin
Piers Davies	Consultant	Auckland
Caryl O'Connor	Coordinator/Supervising Solicitor	Dunedin Community Law Centre
Colin Burgering	Disability Advocate	Justice Action Group
Johanna Herbert	Manager	Manawatu Community Law Centre
Deborah MacKenzie	Interagency Coordinator	Shine (Safer Homes in NZ Everyday), Auckland
Murray Henderson	Manager	Wairarapa Community Law Centre Inc.
Michael White	Human Rights Commission	Wellington
Denise Lormans	Manager	Southland Community Law Centre
Rob Veale, MNZM	Sensible Sentencing Trust	Wellington

Name	Title	Organisation/District
Robert Kee	Barrister	Auckland
Helen Twentyman	Head Solicitor	Grey Lynn Neighbourhood Law Office
John Anderson	Barrister	Criminal Bar Association
Debbie Hagar	Coordinator	Homeworks Trust, Waitakere City
Noeline Reisch	Legislation Convenor	New Zealand Federation of Business and Professional Women Inc.
John Mather	Barrister	Byron Legal Chambers, Auckland
Kevin Kelly	National Manager, Policy and Legal Services	Police National Headquarters
Peter Moses	Convenor - Immigration and Refugee Law Committee	Auckland District Law Society Inc.
Paula Bold-Wilson	Manager	Waitakere Community Law Service
Dr Michael Kidd	Barrister	Auckland
Kyle J. Bendall	Barrister	Auckland
Paul Michalik	Convenor	Courts and Tribunals Committee, Wellington Branch, NZ Law Society
Anthony Trenwith	Barrister	United Kingdom
Ben Dalton	Chief Executive	Crown Forestry Rental Trust, Wellington
Paulette Benton-Greig	Agency Development Manager	Auckland Sexual Abuse HELP Foundation
Dr Vivienne Elizabeth, Associate Professor Julia Tolmie and Associate Professor Nicola Gavey	University of Auckland	Auckland
Professor Kim Economides	Director	University of Otago Legal Issues Centre, Dunedin
Geoffrey Roberts	General Manager	Wellington Community Law Centre
Bryony Millar	Barrister	Blenheim
Melissa Perkin	Committee Secretary – Family Law Committee	Auckland District Law Society Inc.
Sarah Eyre	Associate	Powell Webber & Associates, Auckland
Debbie Hager	Coordinator	WAVES Trust, Auckland
Kevin Campbell		Coalition of Community Law Centres Aotearoa Inc., Nelson
Auckland Disability Law		Auckland
J.K.W. Blathwayt	Lawyer	VCM Legal, Wairarapa
Julian Maze	Convenor	Legal Aid Review Panel, Hamilton
Lisa McKeown	Associate	Johnston Lawrence Limited, Wellington
Glenys Ashby	President	New Zealand Association of Citizens Advice Bureaux

Name	Title	Organisation/District
Linda Kaye		Northland
Rosaleen Taylor	Barrister	Wellington
Natasha Lewis	Student Director, The Equal Justice Project	University of Auckland Law School
Panama Le'au'anae	President	Manukau Professional Bar Association
I. Brown		Rangiora
Jonathan Hudson	Barrister	Shane Tait Barrister, Manukau
Hon Lianne Dalziel	Labour Spokesperson on Justice and Commerce	Parliament Buildings
Peter Tomlinson, Sanjay Patel	Barrister & Solicitor Barrister	Auckland
R. E. Lawn	Principal	Kumeu-Huapai Law Centre, Kumeu
Bill Bevan	Managing Solicitor	Whitireia Community Law Centre, Porirua
Trevor Forward		North Shore, Auckland
Elizabeth Bang	National President	National Council of Women of New Zealand
Christina Reymer	Convenor Justice & Law Reform Standing Committee	National Council of Women of New Zealand
Kevin McCormack	Secretary/Treasurer	New Zealand Council for Civil Liberties
Paul G. O'Neill	Manager	Community Law Canterbury
John Marshall QC	President	The New Zealand Law Society
John Hancock	Senior Solicitor	Youthlaw Tino Rangatiraranga Taitamariki, Auckland
Allan Mackey	Chairman	Refugee Status Appeals Authority
Paul Maskell	Chair	Family Law Section, New Zealand Law Society
Barry J. Hart	Barrister	High Court of New Zealand, and Supreme Court of Victoria
Thomson Wilson		Northland
Michelle Wilkinson-Smith	Lawyer	Auckland
Charl Hirschfeld	Barrister	Auckland
Tavake Barron Afeaki	Barrister	Auckland