

Legal aid for Waitangi Tribunal proceedings

Consultation

The Legal Services Agency is considering changes to some of the arrangements for Waitangi Tribunal legal aid.

Our first step is to consult about our proposed changes, and we invite your input on them.

Please send us your views by writing to us or by filling out the attached form, which has been designed to help you provide your input.

Please send your views to:

Sarah Azzarelli
Project Advisor
Legal Services Agency
PO Box 5333
Wellington

Or email your views to us at waitangi@lsa.govt.nz

Please ensure that you send your views to us by no later than 19 July 2011.

You can get additional copies of this paper and the attached submission form by going to www.lsa.govt.nz.

Introduction

On 13 April 2011, the Government announced a comprehensive package of legal aid reforms aimed largely at addressing long-term cost pressures on legal aid.

The cost of legal aid has increased by 55% over the past three years – from \$111 million in 2006/7 to \$172 million in 2009/10. The total cost of legal aid for Waitangi Tribunal matters and associated settlement negotiations has also increased markedly, from \$11.7 million in 2008/09 to \$16.4 million in 2009/10.

The average cost of legal aid for Waitangi Tribunal cases finalised in 2009/10 was \$108,492. During the same period the average cost of legal aid for finalised criminal cases was \$1,343; for family court cases it was \$1,876 and; for other civil cases it was \$3,474. As this shows, Waitangi Tribunal cases are high cost, relative to other types of cases. There are currently more than 800 active Waitangi Tribunal legal aid cases.¹

The April announcement indicated that there would be some new approaches to the way legal aid services are purchased to help manage the growth in cost. The Government's expectation is that ways will be found to better manage high cost cases along with a number of measures to contain the forecast rate of cost increase.

Suggestions have been made over a number of years by a range of participants and observers of Waitangi Tribunal processes, for changes to the way legal aid funding is managed. These suggestions have been focused on supporting the smooth functioning of the Tribunal while ensuring that claimants have access to appropriate legal representation.

Some commentators have expressed dissatisfaction or concern about aspects of the legal services provided to claimants, including their impact on the operation of the Tribunal and the overall quality of advice and representation received by claimants. Others have been concerned about some apparent inconsistencies or the lack of documentation about some legal aid processes and requirements. The proposals put forward for discussion in this document reflect many of the ideas that have been put to us, and the discussions that have taken place.

The proposed approaches outlined below recognise the uniqueness of Waitangi Tribunal cases, as well as the fundamental purpose of legal aid – to ensure that claimants have access to justice.

Purpose

The main area of concern is about the inefficiencies and the level of duplication of legal effort that occur in Waitangi Tribunal proceedings. Other significant areas of concern are expectations that legal aid funding will be available for historical research, and the number of possibly unwarranted urgency applications.

A further concern for both legal aid staff and lawyers is the lack of up-to-date documentation of legal aid policy in some areas.

The purpose of this consultation paper is to outline proposals for addressing these concerns, and seek the views of claimants, Treaty lawyers and others on them, and on the best way forward.

¹ These figures can be found in the Agency's Annual Report for 2009/2010.

RECEIVED

Waitangi Tribunal

22 June 2012

Ministry of Justice
WELLINGTON

Context

The Treaty of Waitangi is New Zealand's founding document. New Zealand's history includes instances when the Crown breached its Treaty obligations. The Waitangi Tribunal provides a forum for Maori claimants to air their grievances about those Treaty breaches and the Tribunal makes findings and recommendations to address those grievances.

Waitangi Tribunal historical claims hearings involve a large number of claimants and take place in a series of district-wide hearings. A large number of individuals and groups can be involved in the claims, for example, 30 lawyers might represent, between them, 400 or more claimants in a particular district hearing.

There is a lot of duplication, with many lawyers preparing for and attending hearings on overarching issues that are common to some or most claimants. Examples of overarching issues are:

- The Native Land Court regime
- How the Crown dealt with pre-Treaty land transactions
- Crown purchases of large land blocks
- Confiscation of large areas
- Crown policies on health and/or education and/or implementation of those policies
- Constitutional issues relating to sovereignty.

Some contemporary claims (claims for events after 1992) also involve large numbers of claimants and lawyers and will sometimes also involve one or more overarching issues – for example, rights in respect of natural resources such as petroleum, or rights to native flora and fauna.

This duplication has a number of impacts, including increasing the overall cost of legal aid. A number of claimants, lawyers, and other participants and commentators have expressed concerns about duplication.

Some claimants, lawyers and commentators have also expressed the view that the way that legal aid funding has been used has tended to promote lawyer participation at the expense of claimant participation and to support the continuation of disputes between claimant groups. Some of the proposals below are aimed at promoting claimant groups working together.

There appears to be a range of expectations about the availability of legal aid for historic research and a need for clarification. The use of legal aid funding for urgency applications, irrespective of prospects of success, has also been raised as a concern.

Principles for this review

It is proposed that any changes to processes or policies for legal aid for Waitangi Tribunal proceedings out of this review reflect these principles:

- a. legal aid funding should be available to ensure that Treaty of Waitangi claimants have access to legal advice and representation
- b. legal aid should be used to fund the provision of high quality legal services
- c. legal aid should encourage different claimant groups to work together and should support a constructive approach to resolving disputes between claimant groups

- d. legal aid should be managed in such a way that it supports the smooth and efficient running of the Waitangi Tribunal
- e. legal aid services should reflect an efficient use of taxpayer funding.

Proposals

Duplication: coordinating counsel will cover overarching issues

What happens now

At present, it is likely that most or all lawyers involved in the district hearing will expect legal aid funding to prepare for and appear on one or more overarching issues. It is important that the overarching issues are fully and fairly aired. However, more cooperation between lawyers could provide assurance that the aims and concerns of all Treaty claimant groups are fully covered, without the unnecessary duplication of funding and effort that is seen at the moment.

Proposal for coordinating counsel and criteria and process for selection

We propose that lawyers who are lead providers in Waitangi Tribunal matters (Treaty lawyers) be required to work cooperatively with other counsel and collaborate to avoid duplication on overarching issues. There are a number of examples of cases where lawyers have cooperated and agreed that one of the lawyers will act as coordinating or lead counsel on a particular issue. However, in many cases this has not occurred, or a large amount of duplication has occurred prior to such an arrangement being put in place.

In order to ensure that this cooperation occurs, we propose to select one or more legal aid lawyers to act as the legal aid funded coordinating counsel for particular overarching issues.

The criteria proposed for selection of coordinating counsel could include:

1. The extent to which the lawyer represents substantive iwi and/or hapu interests
2. The extent to which the lawyer has existing knowledge of the issues and jurisprudence in this area
3. The extent to which the lawyer has already read and digested relevant research reports
4. Any agreement amongst claimants and/or their lawyers on coordinating counsel arrangements and/or any views on who should be the coordinating counsel
5. Waitangi Tribunal directions or other indications regarding the structure of the hearings
6. Section 49 reports and any other information provided by the Waitangi Tribunal
7. Claimant consent to their lawyer liaising with other counsel on content
8. The price for doing the work.

The number of claimant groups (Wai numbers) represented by a particular lawyer or law firm would not be, in itself, a relevant criteria for selection as coordinating counsel.

The process would also consider:

1. Any inter-relationship between overarching issues which suggests it might be efficient and/or cost effective to deal with two or more overarching issues together, and
2. Any comments from the claimants or their lawyers on whether one coordinating counsel for each overarching issue will be adequate to ensure that issues are properly aired without prejudicing the interests of particular claimants.

The process for selecting the legal aid funded coordinating counsel could be triggered by a general identification of known overarching issues, or by one or more lawyers identifying additional overarching issues.

Under this proposal, we would make legal aid funding for work on overarching issues available only through this “selection of coordinating counsel” process.

What coordinating counsel and the other lawyers will do

If this approach was adopted, coordinating counsel would be expected to:

- Consider existing evidence relevant to the overarching issue (e.g. the Native Land Court regime across a broad area from 1872 to 1876) and develop the additional evidence and the legal arguments/submissions regarding it
- Liaise with other lawyers on developing this content
- Prepare for and appear at all relevant hearing days.

Legal aid funding would be available for other lawyers whose clients have an interest in one or more overarching issues for:

- A modest amount of liaison with coordinating counsel (possibly on a fixed fee basis)
- Dealing with specific matters that are unique to their particular clients (e.g. issues relating to a subdivision of a specific 2,000 acre block in the Native Land Court in 1874)
- Scanning research reports and reading parts of those reports that are unique to their particular clients
- Appearing only on hearing days relevant to the specific matters that are unique to their particular clients.

Other proposals to avoid duplication and unnecessary work

We propose that a number of other policies be set out clearly to help avoid duplication and/or unnecessary work, as follows:

1. Treaty lawyers must be well-versed in Treaty jurisprudence (law and practice)
2. Lawyers will only do the work when it is required
3. Lawyers will work constructively with others to avoid duplication
4. Lawyers will ensure there is no duplication of effort within the firm
5. Intensive management approaches may be used to ensure that legal services are efficient, of high quality, and that duplication does not occur.

In most cases, these proposals reflect existing policy and/or practice. The proposals are set out below in more detail.

1. Treaty lawyers must be well-versed in Treaty jurisprudence (law and practice)

Treaty lawyers will be required by the new Quality Framework for legal aid service providers² to have a sound knowledge of Treaty jurisprudence. This means that they will know enough of the jurisprudence to enable them to give their clients advice on the nature and extent of their Treaty claims, their prospects of success, and the evidence required to establish their claims.

Legal aid should not be used to fund providers’ education – whether for lead providers or for others doing work under the supervision of lead providers.

Treaty lawyers should already have read previous Waitangi Tribunal decisions, relevant Treaty of Waitangi case law, Treaty texts, the Waitangi Tribunal’s rangahaua whanui overview reports, and other generic materials, and they should have a reasonable overview of international jurisprudence as it affects Treaty of Waitangi jurisprudence.

Also, Treaty lawyers are expected to maintain their knowledge by keeping up-to-date with newly issued Waitangi Tribunal reports, recent case decisions, and recent articles on the Treaty and on international indigenous rights issues.

It is therefore proposed that legal aid policy make it clear that legal aid funding is not available for Treaty lawyers (or others supervised by Treaty lawyers) to read or re-read Tribunal decisions, case law, Treaty texts, overview reports, or other generic materials.

2. Lawyers will only do work when it is required

The timelines for Treaty claims can be long term – in some cases many years. Things can change during that period – claims may not be heard for some years, two or more claimant groups might merge, claimants may change their lawyers, the Crown might concede on some issues, iwi may go into direct negotiations and not proceed to hearings, etc.

For this reason, it is proposed that legal aid funding should only be available for work at the time when it is required to be done. This will often not be until hearing dates have been set. Where hearings are not imminent, applicants and their lawyers will need to show clear and convincing reasons why any particular work needs to be done now.

3. Lawyers will work constructively with others to avoid duplication

Because of the broad ranging nature of district hearings, lawyers are expected to cooperate with each other wherever possible. This might include instances such as lawyers grouping together to draft a joint memorandum and having one lawyer appear on behalf of the group and present the memorandum.

² For further information on the new Quality Framework, go to www.lsa.govt.nz and look at “Information for lawyers”.

4. Lawyers will ensure there is no duplication of effort within the firm

The current policy is that legal aid will only fund a single lawyer to do particular tasks, for example, that one lawyer attends judicial conferences or Tribunal hearings, attends claimant meetings, reads research reports and summarises or highlights relevant parts for others in the firm, etc. Nonetheless, legal aid funding is frequently sought for more than one lawyer within a firm to undertake these types of tasks.

It is therefore proposed that the policy of legal aid funding a single lawyer now be made absolutely clear, and that any requests for exceptions be considered against the following criteria:

- The claimants represent a significant iwi or other "large grouping" interest and/or there are a variety of complex issues, and:
 - having different people specialise in different issues is efficient, and
 - the firm has a management plan to eliminate overlaps and minimise the number of lawyers at particular hearing days etc
- Reporting to claimants involves going to a number of hui and it is efficient for the attendance to be split, with one lawyer going to some of the hui and another lawyer going to the others
- An additional lawyer would make a distinct and justifiable contribution.

The number of claimant groups (Wai numbers) represented by a particular lawyer or law firm would not be, in itself, a relevant criteria for exceptions to the policy.

5. Intensive management approaches may be used to ensure that legal services are efficient and of high quality, and that duplication does not occur

There are a number of situations where more intensive management might assist to ensure that claimants receive a high quality service, and that the service is provided efficiently and cost effectively in line with the principles outlined above.

Intensive management approaches could involve, for example, agreeing a price in advance for some portions of the work, or more intense scrutiny of what work is charged for and of what that work involves. This would be in line with the approach being taken with other high cost cases.

It is proposed that this type of case management might be used in situations such as:

- Where concerns have been raised or complaints made about a Treaty lawyer (any formal complaints will be dealt with through the complaints process)
- Where invoices appear to be out of line with what others are invoicing for
- Where lawyers are not acting in accordance with arrangements and expectations regarding duplication (see above)
- Where there are other concerns.

Historical research

Historical research is original research involving the investigation of primary and secondary information sources such as government records, Native Land Court records, letters or submissions written at the time, or old maps of subdivisions, etc. Historical research is funded through the Waitangi Tribunal and the Crown Forestry Rental Trust. That research results in a research report which is available for claimants and their lawyers, and everyone else to read.

There appears to have been some confusion about whether legal aid funding is available for historical research. The purpose of legal aid is to fund legal advice and representation, and legal aid does not cover historical research. Legal aid may, however, provide funding for lawyers to read specific historical reports that are on the Waitangi Tribunal's record of inquiry, and are relevant to their client's case. The legal aid policy will be updated to reflect this.

Urgency applications

Some participants in Waitangi Tribunal processes are concerned about the number of applications for urgent hearings being made which appear to have no real prospects of success.

Any application for legal aid to apply for an urgent hearing must satisfy the threshold test for legal aid, i.e. there must be reasonable prospects of success. The policy currently requires all applications for legal aid for urgency applications to be submitted for prior approval. They need to include sufficient explanation of the merits to establish that the application has reasonable prospects of success. This will also be clarified in the updated legal aid policy.

Updating operational policies

The current operational policy manual on Waitangi Tribunal legal aid is outdated in some respects and does not fully reflect some operational policies that have evolved through practices over time.

Over the next few months the operational policy manual will be updated and these existing policies will be clarified and documented.

The updated operational policy manual will also document the new approaches that will be developed following completion of this consultation process.

A new operational policy manual will be made available to all Treaty lawyers by October 2011.

Consultation process – what happens next?

During this consultation we will continue to work on documenting current practices and policies, and updating the operational policy manual.

At the end of the consultation, we will let those of you who send us your views know what feedback we got, and what our final decisions are.

Timing for implementation of any of the new approaches outlined in this document will depend on the options that are adopted. However, the aim is that the new approaches will take effect from the beginning of November 2011 at the latest.