



M E M O R A N D U M

To	Waitangi Tribunal Legal Aid Working Group	File reference
From	Sarah Kalmakoff, Arie Edmonds	Action required by
Cc	Michele McCreddie, David Howden	
Date	02 March 2012	
Subject	PROGRAMME OF WORK PRIORITIES FOR WTLAW GROUP	Attachments
For	<input type="checkbox"/> Approval <input type="checkbox"/> Review Comment <input type="checkbox"/> Action <input type="checkbox"/> Noting	

Purpose

1. The purpose of this memorandum is to provide a recommendation on the proposed programme of work for WTLAW group

Background

2. Delays in the consideration and approval of Waitangi legal aid invoices and estimates have resulted in problems for a number of legal aid providers. The Ministry has formed a working group with representatives of the Waitangi Legal Aid providers to work through the global concerns and reach resolution. There have been two Hui to date, and a programme of initial work has been agreed. The recommendations in the paper are a response to the initial work plan agenda items.

Current Position

3. There are 10 separate action points within the programme of work that have been delegated to the Central Region for a response. The recommendations are provided in the order of the programme of work:

Urgency Applications

4. Urgency applications are received for Waitangi Tribunal work only. These are specific applications to the Tribunal and are required to meet the following criteria:
 - *the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies ;*

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- *there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise ; and*
 - *the claimants are ready to proceed urgently to a hearing.*
 - *Other factors that will be considered by the Tribunal include whether :*
 - *the claim or claims challenge an important current or pending Crown action or policy ;*
 - *an injunction has been issued by the courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal; and any other grounds justifying urgency have been made out.*
5. In terms of process these urgency applications must be considered by the Waitangi Tribunal. However for a grant of legal aid to be approved these applications must still meet the merits test prior to legal aid being granted. Historically, aid has not been granted in all urgency applications.
 6. Considered for the purposes of a case study, urgency matters that all exceed \$20,000. The highest value legal aid file considered in the case study is \$59,000.
 7. It is noted that none of the urgency applications considered in the case study are finalised; therefore the possibility of increased funding is likely.
 8. Having spoken to the senior NSA David Howden there are concerns around the level of funding sought for these matters in comparison to say other claims in the Waitangi Tribunal. The rationale for this comparison is the discrete element to each application, the merits assessment that takes place for each application and the comparatively narrow argument that counsel has to address for their case to succeed.
 9. It is Legal Services view that the urgency applications for Waitangi do not require the significant level of funding they currently receive. The rationale is as follows:
 - The grievance that gives rise to the application for urgency is already known, as the application usually arises out of an existing claim. It is a specific crown action that gives rise to the application.
 - Counsel will already be familiar with the matters leading up to the urgency application
 - Counsel will have received instruction from their client as to the substantive claim - which will have identified the majority of the issues in relation to the urgency application
 - The Tribunal deals with urgency matters as a priority and so these tend to be heard quickly.
 10. From the information considered in the reviewed files, it would appear that a large volume of the work claimed and approved could be condensed. Further at least one of the applications is a second application for urgency following the failure of the first.
 11. This is of concern in terms of the merits test applied for the second application.
 12. In the case study example below the application for aid was received in June 2011. The matter is not yet concluded.

13. There were 269.9 hours of work completed and invoiced for, prior to aid being granted. This is in spite of clear instructions from the Ministry to not complete work other than that most urgent and necessary for the claim as aid has not yet been granted.

Application received	29 June 2011
Invoice for period 25 April to 05 June 2011	5.6 hours
Invoice for period 06 June to 19 June 2011	31.7 hours
Invoice for period 20 June to 30 June 2011	38.5 hours
Invoice for period 1 July to 17 July 2011	134 hours
Invoice dated 18 July to 31 July 2011	60.1 hours
Hours claimed prior to approval of aid	269.9 hours
Total hours paid for each activity prior to and after grant of aid	Preparation 7.9 hours Attendance 34.1 hours Reading 62.2 hours Drafting 192.6 hours Other 198 hours Total 494.8 hours

Recommendation

14. It is considered that rather than an open grant of aid the more appropriate option would be a stepped granting process as currently exists in Court of Appeal and Supreme Court to enable the better management of these applications.
15. Due to cost of the current files, it is proposed that no more than \$15,000 in aid is available in the stepped granting process for these matters from application to finalisation of the file. Should the urgency application exceed this granting limit providers will need to demonstrate that the work is relevant and necessary to progress the application for urgency and that they have taken all steps to limit the cost of services.

Invoicing

16. Currently the quality of invoices is variable between providers. There are, in some instances providers who have over 90% of their invoices returned for correction.
17. The largest issue with invoices is the current format does not cater to the complexity of Waitangi Tribunal matters.
18. Feedback from the November and December Hui with providers indicated that the level of administration required was burdensome.

19. It is noted however that as Legal Aid Services is funded from the public purse, there are fiscal and audit responsibilities that require a high level of accuracy and compliance from providers in their invoicing practices.
20. The level of detail required in the invoice is contained within the Legal Services Act 2011 regulation 19 which states :
 - (1) *"A claim for payment for legal aid services must be made for each day that the services are provided, unless the services are subject to a fixed fee arrangement, in which case the claim must be made for services that are completed in accordance with the fixed fee arrangement."*
 - (2) *"For the purposes of section 98 of the Act, the time frame within which a claim for payment for legal aid services must be made to the Secretary for Justice is 3 months after the day that the services are provided or, in the case of a fixed fee arrangement completed."*
21. There are also policy requirements that providers give sufficient information to demonstrate that the work invoiced has been necessary and relevant to the progression of the claim and fall within the definition of legal services.

Recommendation

22. The Waitangi Team are committed to streamlining this process, and propose that a review of the current invoice format occur to better fit within the requirements of the providers.
23. The level and volume of information can be further clarified, with some specific case examples given should the working group consider this helpful.

GST

24. The invoices, should the downloaded word template versions from the Ministry be used these will automatically calculate GST for all providers regardless of the area of law.
25. All amounts placed into the invoice should be GST exclusive. A number of providers are adding GST to their travel and disbursements which results in a return of invoice for correction.

Recommendation

26. Where it is noted that a provider has an ongoing issue with calculation of GST the Waitangi team take a proactive approach in contacting providers and in some instances have held individual clinics to assist in this regard. It is proposed that this continue.

New Grants of Aid

27. The application for aid is frequently made some months after work has begun by the Legal Aid Provider. In some cases applications have been received 3 years after work has begun.
28. The requirement for aid to be granted is that the application meets the merits test as all civil legal aid matters must, and a section 49 report be prepared and received from the Waitangi Tribunal.

29. Frequently the applications are incomplete. The current format does not provide the relevant information to enable Legal Aid Services to make an informed decision relating to approval of a grant of aid.

Recommendation

30. It is recommended that the application form be changed to reflect the area of law the grant is sought for. A proposed draft prepared by the Waitangi Team is attached for your consideration as Appendix A.

Estimates

Templates for estimates

31. Providers are required currently under policy to provide amendments/estimates of work to be completed for each file on a 3 monthly basis. These are to be received 1 month prior to that work being completed so that pre approval of work can occur.
32. The Ministry has received feedback in a recent forum with Te Rohe Potae providers that the current estimate process is overly bureaucratic. Following this feedback the Waitangi Team have, in conjunction with the provider forum group drafted a new estimate form that is currently under discussion. This is attached at Appendix B.

Recommendation

33. Should a trial of this new form prove successful it is anticipated that the new estimate form will be made available to all Waitangi legal aid providers.

Revision of estimates

34. Currently it is accepted that there is a backlog of estimates waited to be assessed. These are currently being prioritised.
35. What has occurred in Te Rohe Potae is that providers were asked to give a list of all legal aid files they were responsible for in this district. Less than 50% of the providers responded. However those that have responded have had all estimates reviewed and are being provided with responses to these.

Recommendation

36. Should providers have a particular concern relating to a file, they should in the first instance contact Arie Edmonds to enable the matters to be resolved. It is noted however that given the current backlog there will be sometime prior to all estimates being considered and responses given.

Transfers between activities

37. Estimates for legal aid are designed to be an accurate descriptor of the work to be undertaken. Practice however has shown that this is frequently not the case and in a large number of estimates providers under claim for hours.
38. This issue may be resolved with the introduction of the modified estimate template, however as the estimate is the basis upon pre approval for work to be undertaken

transfer of hours is not possible. Legislation determines that an application for amendments (estimates) must be

An application for an amendment to a grant of legal aid -

- *(a) must be made by either the aided person or the provider; and*
- *(b) must be made in the prescribed manner to the Commissioner*

39. Following this the Commissioner confirms the grant and or amends it in a manner consistent with the Act.

Recommendation

40. Transfer of hours is not consistent with this approach as aid has been pre approved for a specific activity it is not a global grant of aid

Multiple claims and clusters

41. Grants of aid are made for individual claimants as required under legislation. The Ministry is committed to working with providers to streamline processes where possible, including discussion with co-ordinating counsel and considering ways in which cluster groups e.g. Te Rohe Potae can engage with the ministry to develop best practices.

Policy, operational and corporate implications

42. To be discussed in the Waitangi Tribunal Legal Aid Working Group

43. The remaining items on the work programme will be considered at future forums

Recommendations

44. It is recommended that you:

1. **Receive** the contents of this memorandum for discussion

Recipient/s to complete

Comments:

Signature:

Name:

Date: