

## **ARE LAWYERS LOSING OUT?**

### **Are lawyers losing out under the new criminal legal aid regime?**

**The undesirable result of the Act is that it pays lip service to justice, according to Auckland barrister Marie Dyhrberg.**

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The purpose of the Legal Services Act, as stated in section 3(a), is to promote access to justice by providing a legal aid scheme that helps people who have insufficient means to pay for legal services to still have access to them. The first aim of the new legislation was for Legal Services Agency (LSA) staff to be given the authority to determine all legal aid applications and oversee all payments made under those applications.

**The Agency promises future reviews and evaluations to weed out listed providers who do not make the grade.**

It was a real bone of contention for the former members of the Legal Aid Board that, while they were being held accountable by the government for the distribution and use of the funds made available for criminal legal aid, they had little or no control over a significant portion of the legal aid grants that were being made in the first place. Transferring the power to grant criminal legal aid from registrars to the Legal Aid Board required a change in legislation.

In observing the efforts of the former Legal Aid Board to promote and pass the Legal Services Act, often in what appeared to be the teeth of united legal opposition and overwhelming parliamentary indifference, it seems that the two major promises made by the Legal Aid Board were that: the new Act would streamline and standardise the services provided by legal aid; and the total amount spent annually on legal aid could be controlled and reduced.

**Overall there has been a faster response rate to applications for grants of legal aid and applications for extensions.**

All lawyers eligible to represent a legal aid client are now called “listed providers” and have contracts with the LSA. The Agency promises future reviews and evaluations to weed out listed providers who do not make the grade.

Most practitioners, both civil and criminal, have experienced a significant improvement in the level of service provided by legal aid since the LSA and its associated regional offices were set up. Overall there has been a faster response rate to applications for grants of legal

aid and applications for extensions. Payment, particularly for straightforward matters, has been made far more promptly. The expectation is that these reduced turnaround times will be maintained, if not improved, under the new system.

**The tangible consequences of the new Act are heavily discounted hourly rates and numbers of hours allowable, together with an in-built inflexibility to increase remunerated hours for work carried out.**

If we accept what the proponents of the new Act say it will achieve, then it seems we are now entering a bright new world of legal aid, a world of streamlined regional offices where files will be processed without delay according to an established formula that determines who gets legal aid and how much the grant is. Mistakes will not be made. All assigned counsel will be of the highest calibre, reasonably remunerated for the work they do, and all clients will turn up on time, do what they are supposed to do, when and how they are supposed to do it. And the legal aid budget will never blow out again.

**Practitioners simply cannot afford to do a significant amount of legal aid work. The financial loss is too great.**

However, the new system is really about squeezing even further a group of professionals who have taken a chosen career path - the practice of criminal law - and instituting a new system whereby they have no control over their remuneration. The new system is not about encouraging experienced and capable counsel to carry on with this chosen career path. The tangible consequences of the new Act are heavily discounted hourly rates and numbers of hours allowable, together with an in-built inflexibility to increase remunerated hours for work carried out.

Because of the nature of the business of criminal law, practitioners are locked into the fact that their clients cannot afford to pay for representation. The amount of private work available is only a small percentage of all criminal work. Very few practitioners have the skills and temperament capably to do "bulk work", such as back-to-back trials, which could be economic.

**Underpinning the new Act is the same attitude adopted in relation to all beneficiaries in New Zealand.**

Practitioners simply cannot afford to do a significant amount of legal aid work. The financial loss is too great. The rate of remuneration under the new Act has declined so dramatically that senior practitioners are avoiding doing summary work not merely because, as was the case under the old scheme, they are not being paid well, but because it is now hopelessly uneconomic to do this work. They are simply not being paid for the work they do, and they must subsidise that work too heavily.

For minor trials, hourly rates have declined, and other financial incentives have been taken away. For example, under the old system, if counsel settled a case involving serious

indictable matters before trial, there was financial recognition of having avoided the costs of trial and a payment of up to 10 hours could be claimed. That incentive has now been removed, resulting in another financial loss to responsible counsel acting in the best interests of their clients.

In reality, it seems that the new Legal Services Act is really only concerned with structural changes - getting the power to make grants of legal aid away from the Courts, setting up the regional offices and controlling who does legal aid work and for how much. These are all matters that are designed to keep the legal aid grant as a whole under firm control.

Underpinning the new Act is the same attitude adopted in relation to all beneficiaries in New Zealand. We really love the way we present ourselves as caring people who support the less able and less fortunate, but at the same time we begrudge every cent it costs us and we are continually trying to find ways to say those beneficiaries are not deserving and to cut costs.

The new Act has little to do with its stated purpose as set out in section 3(a). It is not about providing legal services at all, it is about saving money.

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