



Complaint regarding the Legal Services Regulations 2011 (SR 2011/144)

Report of the Regulations Review Committee

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Complaint regarding the Legal Services Regulations 2011 (SR 2011/144)

Recommendations

The Regulations Review Committee recommends that the House take note of this report.

We recommend that the Government review the lack of provision in the Legal Services Act 2011 for merits review by a provider of a decision to decline out-of-time payment following a grant of legal aid as envisaged by Standing Order 315(2)(d).

Introduction

In November 2011, we received a complaint from Cooper Legal about the Legal Services Regulations 2011. The complaint related to the time-frame set by regulation for making claims for payment for legal aid services.

Parliament's Standing Orders allow a person or organisation aggrieved at the operation of a regulation to make a complaint to the Regulations Review Committee. The committee may consider the complaint, and draw the regulation to the special attention of the House on one or more of the grounds specified in Standing Orders.

At our meeting of 5 April 2012, we heard evidence from the complainant and from the Ministry of Justice. The ministry subsequently provided further written evidence in response to matters raised at the meeting.

The complaint

Grounds of complaint

The complainant bases its complaint on four grounds set out in the Standing Orders of the House of Representatives 2011. The first two grounds were

- SO 315(2)(a): Regulation 19 of the Legal Services Regulations is not in accordance with the general objects and intentions of the Legal Services Act.
- SO 315(2)(b): Regulation 19 of the Legal Services Regulations trespassed unduly on personal rights and liberties.
- SO 315(2)(c): Regulation 19 of the Legal Services Regulations appears to make some unusual or unexpected use of the powers conferred by the Legal Services Act; or
- SO 315(2)(f): Regulation 19 of the Legal Services Regulations is a matter more appropriate for parliamentary enactment.

Relevant legislation

The Legal Services Act 2011 came into force on 1 July 2011. Its purpose is to promote access to justice by establishing a system that provides legal assistance to people of insufficient means, and to deliver the necessary services in the most effective and efficient manner.¹

Section 98 of the Legal Services Act states that the time-frame for claiming payments for legal aid services is that set by regulations unless the Secretary specifies some other time-frame. Section 114(w) of the Act states that regulations may be made prescribing a time-frame.

Section 99 of the Legal Services Act sets out the process for claims for payment for legal aid services. It requires the Secretary for Justice to refer a claim for payment from a provider to the Legal Services Commissioner. Under section 99(4), the Commissioner may decline some or all of a claim on a number of specified grounds, including that of the claim not being made in accordance with the time-frame referred to in section 98.

The Legal Services Regulations also came into force on 1 July 2011. Regulation 19 sets the time-frame in which to make a claim for payment for legal aid services at three months after the day on which the services were provided.

Complainant's evidence

The complainant is a law firm in Wellington with over 600 legally aided clients involved in civil litigation regarding longstanding historic abuse.

The complainant gave evidence that the new time-frame prescribed by regulation 19 had imposed a heavy administrative burden. The complainant said it was now required to submit a separate claim for payment for each one of its legally aided clients every time any work was done on his or her case. The complainant said the requirement applied irrespective of whether the work done was substantial or very minor: this was placing a large burden on the complainant's resources.

The complainant said that a further effect of the requirement to make a claim within three months was that there was now a large backlog of such claims before the ministry. The backlog resulted in long delays in processing claims, which the complainant said was making it difficult to manage its business effectively and for clients to follow the progress of their claims.

We were told that the apparent lack of discretion or flexibility regarding the three-month time-frame was also of concern for the complainant. We were told of instances where delays in delivering posted claims, or delays in making a grant of legal aid, created a risk of the ministry declining a claim for payment as exceeding the statutory time-frame.

We asked the complainant whether it would agree that the ministry had a right to impose a time-frame for submitting claims for payment for legal aid services, provided it was reasonable and appropriate to the ministry's ability to process such claims. The

¹ Section 3, Legal Services Act 2011.

complainant agreed, but said flexibility or discretion regarding the time-frame would still be needed to ensure fairness. The complainant also suggested that the ministry should also be subject to some obligations regarding its processing of claims. At present all the obligations fall on providers and none on the ministry in relation to its processing of claims for payment.

Ministry of Justice response

The ministry said that there had not been any time limit for filing claims for payment under the previous legislation. The ministry said this resulted in claims for payment being made years after the services were provided, making it difficult for the ministry to process them. The ministry also said that the lack of a time limit for making claims for payment also made it difficult to administer legal aid funding.

We asked about the delays in processing claims, and were advised that the ministry consider this to be a transitional issue. The introduction of the time-frame had caused a large backlog of claims to accumulate, and the ministry admitted it had received more claims than it had expected. The ministry said some claims were many years old and time-consuming to deal with. However, the ministry said changes to fees for criminal aid claims had sped up their processing, freeing up resources which were now being used to address the backlog.

We asked the ministry if claims were taking longer to process since the new time-frame was introduced. The ministry said that the time taken to process civil claims had increased, but it attributed this to the complexity of civil matters and the extra time needed to process very old claims for payment.

The ministry pointed out that there is a discretion regarding the time-frame under regulation 19. The Legal Services Commissioner has the discretion to accept and approve a late claim for payment. The commissioner can also reduce a payment, or reject a claim for payment altogether. The grounds on which the commissioner would exercise this discretion were those set out in section 99(4) of the Legal Services Act. The ministry acknowledged that, in practice, the commissioner's discretion was delegated to ministry staff to exercise on the basis of internal guidelines.

We heard that the ministry is reviewing the time-frame set in regulation 19. It is considering changing it from three months to six months, with provision for the ministry to make a formal request for a claim for payment to be lodged within three months in particular circumstances. We note that this amendment was made recently, and the applicable time-frame for claims for payment will be six months, effective from 2 July.

The committee's consideration

SO 315(2)(a): Regulation 19 of the Legal Services Regulations is not accordance with the general objects and intentions of the statute under which it is made

The complainant claims that the time-frame imposed by regulation 19 of the Legal Services Regulations is not consistent with the delivery of legal aid services in the most effective and efficient manner. The complainant argues that the administrative burden on providers imposed by the new requirement, the backlog of claims awaiting processing, and the delays

in processing claims by the ministry were evidence that the time-frame was not consistent with delivering legal aid services effectively or efficiently.

The ministry claims that a time limit for making claims for legal aid payments was necessary because the lack of a time-frame under previous legislation had caused problems in administering legal aid. The ministry says that the backlog of claims and any delays in processing claims were merely transitional issues.

We consider that this ground of complaint has been made out. A reasonable time-frame is not inconsistent with the purpose of the Legal Services Act—to deliver legal aid services in the most effective and efficient manner. However, the current three month time-frame is not reasonable.

SO 315(2)(b): Regulation 19 of the Legal Services Regulations trespasses unduly on personal rights and liberties

The complainant claims that the requirement to invoice for each legally aided client every three months is an unnecessary and unjustifiable constraint upon the rights and liberties of the lawyers who work for the complainant. The complainant claimed the volume of work the requirement created for the complainant's lawyers, and the administrative costs and burden of complying with it, were an unreasonable interference with its right to run its business.

We do not consider that this ground of complaint has been made out.

SO 315(2)(c): Regulation 19 of the Legal Services Regulations appears to make some unusual or unexpected use of the powers conferred by the statute under which it was made

The complainant claims that the introduction of a strict three-month time limit for making claims for payment with no discretion for its extension is an unusual or unexpected use of the powers conferred by the Legal Services Act. The complainant claimed the strict enforcement of the time-frame by the ministry and the lack of any apparent discretion to deal with situations where enforcement of the time-frame would lead to unfairness were an unusual or unexpected use of the power to impose a time-frame for making claims under the act.

The ministry claims that the Legal Services Commissioner has discretion in dealing with claims for payment and can accept, approve, reduce or reject claims for late payment case by case. In practice, the ministry said the discretion was exercised by ministry staff in accordance with internal guidelines.

We acknowledge that the commissioner has discretion under section 99 of the Legal Services Act regarding late claims for payment. The evidence put forward by the ministry also supports the claim that its internal guidance provides for this discretion to be exercised to allow payment of a late claim in circumstances where it would be unfair to enforce strict compliance with the time-frame.

We accept that the discretion available to the Legal Services Commissioner is an answer to the complainant's claim on this Standing Order ground. We also note the discretion must be exercised by ministry staff in appropriate circumstances to prevent the operation of the

time-frame in regulation 19 from being an unusual or unexpected use of the power conferred under the Act.

SO 315(2)(f): Regulation 19 of the Legal Services Regulations contains matter more appropriate for parliamentary enactment

The complainant claims, as an alternative to Standing Order ground 315(2)(c), that the introduction of a time-frame for making claims for payment for legal services is a matter more appropriate for parliamentary enactment. The complainant says that as no time-frame existed under the Legal Services Act 2000, the introduction of one in the current act is a significant change and a matter of broad policy and principle which is more appropriate for inclusion in the principal act.

We do not consider that this ground of complaint has been made out.

Other Standing Orders grounds

Although this was not raised with us by the complainant, we consider that regulation 19 raises concerns on another Standing Order ground. SO 315(2)(d) states that one of the grounds on which a regulation can be brought to the special attention of the House is that it unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal.

We asked the ministry whether there was any basis on which a provider could review or appeal a decision by the ministry on a claim for payment. The ministry advised us that there are internal review processes, which involve the provider raising the existence of special circumstances with the ministry, which would then consider the claim for payment in accordance with its internal guidelines. These guidelines were the same as those that guided decisions on the exercise of the commissioner's discretion under section 99 of the Legal Services Act.

In response to our question, the ministry confirmed that no formal mechanism for review was available to providers under the current act. The right of review available to providers under the Legal Services Act 2000 was not carried over into the 2011 Act. Only clients receiving legal aid could now review decisions of the ministry under the present legislation. The ministry advised that the recourse available to a dissatisfied provider is to seek a judicial review of the decision to decline payment of a claim.

We acknowledge that a legal aid provider that is aggrieved by a decision to decline out-of-time payment following a grant of legal aid has remedies that include a complaint to the Legal Services Commissioner, and a right to seek judicial review in the High Court. However, there is no right to formal and independent review of decisions of this nature. An unspecified right of providers to raise concerns about a decision on a claim for payment with the same party that made the decision, to be considered in accordance with the same internal guidelines that applied to the initial decision, does not constitute an independent right of review on the merits. SO 315(2)(d) envisages such a right of review on the merits but the substantive legislation does not appear to empower this.

Recommendation

We recommend that the Government review the lack of provision in the Legal Services Act 2011 for merits review by a provider of a decision to decline out-of-time payment following a grant of legal aid as envisaged by Standing Order 315(2)(d).

Final matters

We have found that the complaint is made out in respect of the ground set out in SO 315(2)(a). Ordinarily, it would follow that we would recommend the disallowance of the regulation on this ground. However, the regulation has been amended so that it complies with the standing order, so we do not draw the attention of the House to it.

We await the Government's response to our recommendation.

Appendix A

Committee members

Charles Chauvel (Chairperson)

Lianne Dalziel

Ian McKelvie

Mike Sabin

Katrina Shanks

Appendix B

Corrected transcript of hearing of evidence 4 April 2012

Members

Charles Chauvel (Chairperson)
Hon Lianne Dalziel
Ian McKelvie
Mike Sabin
Katrina Shanks

Witnesses

Sonja Cooper, Principal, Cooper Legal
Sam Benton, Associate, Cooper Legal
Gerard Clark, Policy Manager, Ministry of Justice
Patrick McCabe, Principal Adviser, Ministry of Justice

FTR 15:40:41

- Chauvel Welcome to this meeting of the Regulations Review Committee of the 50th Parliament. I wonder if the complainants would mind introducing themselves to the committee, and then the committee will do the same.
- Cooper I'm Sonja Cooper. I'm the principal of Cooper Legal. We're obviously a Wellington law firm that does a lot of legal aid work.
- Benton I'm Sam Benton. I'm an associate working with Ms Cooper.
- Chauvel [*Introductions*] I see that we have Mr Clark and Mr McCabe from the Ministry of Justice. Welcome. What we propose to do is invite the complainants to speak to their complaint. We've set aside 20 minutes for that, and then we'll invite the ministry to respond to the points that are made. The floor is yours.
- Benton Thank you very much for hearing us. I'm going to be starting this submission, and Ms Cooper will pick up shortly afterwards. As you'll be aware, the position has changed somewhat since the complaint was first lodged. There has been a proposed amendment to the particular regulation that we're looking at. Do I need to fill you in on exactly what regulation we're looking at? Would that be helpful?
- Chauvel The members have read the papers, so probably the essential thing to do here is to ensure that you're satisfied we are completely up to date with

where your complaint sits, given the correspondence that's passed between the parties, and what you actually want us to do.

Benton

Thank you. The proposed amendments do seek to change the regulation requiring 3-monthly invoicing. It's currently open for discussion, but, as such, there has been no change to the amendment. The proposals that have been made are, in our view, reasonably vague, and we're not entirely happy with the broadness of the discretion that that grants. I think Ms Cooper will address that in a bit more detail later on. Basically, given that the regulations are still in force and will be until any amendment does get passed, we think it is important to bring our concerns to the committee's attention in any event.

I'm not entirely sure if you will be aware, but the Minister of Justice appeared on the *Court Report* television programme on 22 March and made comment about the 3-monthly invoicing requirement. She stated: "Lawyers being expected to bill within 3 months of a matter is frankly ridiculous, and I've told Justice that, so they're changing that." While we are happy that that is the case, that they are looking to change it, as I've said, we are concerned that the proposed amendment does not go far enough to rectify our concerns, so we will cover those in a little more detail.

Our concerns are basically three-pronged. There's the practical effect on lawyers that the 3-monthly invoicing has, particularly those with a high volume of legal aid cases. There's the effect on Legal Aid Services itself. Both those two concerns are reasonably well covered in the complaint that we have made, although we will speak to them as well. The third concern that we have we haven't really addressed in writing, and that's the actual effect on the legally aided clients themselves. In terms of that, just to briefly cover that off, if we're talking about having to invoice every 3 months, the previous position was that invoicing would generally be done once a certain step was finished. In some of our cases, which is probably all I can speak to personally, that could take a year or two before you'd actually do an invoice, just because we're involved in very longstanding historical abuse civil litigation, which is, unfortunately, a very slow process. So now we are required to invoice within 3 months of any work being undertaken, whether or not it's a single telephone in from a client or even a letter from Legal Aid or anything like that. We have to do an invoice. Invoicing can take sometimes around half an hour to do a single invoice. So if you're having to do a half an hour invoice four times a year, that's 2 hours of work that a legally aided client will have to pay for, although in terms of the fixed-fee regime, obviously that work will have to be paid for by the legally aided lawyer themselves, which is another issue. Civil legal aid, which is what we deal with, we're not subject to a fixed-fee arrangement at present, so the costs go straight to the client, which is, in our view, not acceptable, basically.

- McKelvie I want to ask a question about this. Are you telling us that if you don't get whatever activity's occurred in the 3 months leading up to the billing into that bill, you don't get it—is that what you're saying?
- Benton That's correct, yes. It won't be paid.
- Cooper So we can give you an example. We had an invoice yesterday where Legal Aid incorrectly stated that they had received it 2 days late. They actually hadn't, because we'd emailed it to them on the correct day. They said they were backing out the time for those 2 days, and they're not going to pay for it. That's happening as a matter of routine.
- Shanks You said that you can bill up to once every 1 or 2 years. Is that normal practice for lawyers, is it?
- Cooper For our work, our work is quite unique—it has been quite unique because it's been running a very slow track through the courts. When one has a maximum of one case per every 8 or 9 years being heard by the courts, it's a slow track. For us to do a stage of work, it could be 1 or 2 years, for example, to do pleadings and then to do affidavits. Our work would be unique in that regard.
- Shanks So what percentage of your work would you bill only once every 1 or 2 years?
- Cooper Most of it. Typically, yes.
- Shanks So you're a year or two behind in your billing?
- Cooper Well, no, because we billed within a stage of work. Our work has always been to complete a stage of work. Until the last year or so, we've had six or seven particular steps of work, and once we have completed that step of work, we've billed it.
- Shanks You've obviously got an electronic billing system, haven't you? An integrated system into your time sheets and everything?
- Cooper We run an Excel process.
- Shanks You run an Excel spreadsheet for your billing?
- Cooper We have to.
- Benton We've investigated Junior Partner several times and other electronic billing facilities, but they don't fit with our requirements.
- Cooper Our work, because our work's got unique legal aid invoicing regimes.
- Benton This has all been agreed and discussed with Legal Aid over a number of years, the actual way that we do this and the steps of funding. It's reasonably unique.

- McKelvie Are you kind of unique to the point that there are very few other companies in New Zealand that would be operating in the same manner that you are? Is that what you mean by unique?
- Cooper No, I think all lawyers would be affected by, that there would be some points where—in fact, I was just talking with another lawyer today—there would be a number of files where, honestly, there had probably been a phone call or a letter, so we've got two units that have to be billed. That is because it falls within the 3-monthly invoicing regime. So that would be affecting all lawyers, I think. Probably criminal lawyers, it's going to be much faster, but all of us who do civil/family, there can be large gaps when you're not doing much active on a file—for example, if you're waiting for a court hearing, or if nothing active is happening on a file for a particular point because, say, for example, you've just finished a tranche of work. But as I say, if the client calls in or if you get a letter, or if Legal Aid sends you a letter and that falls within that 3-monthly invoicing regime, if you don't bill it, you don't get paid it.
- Benton Just to clarify, I suppose, our concerns fit quite clearly under the question of whether or not the legal services are being delivered in the most effective and efficient manner, which is section 3, Subpart B of the Legal Services Act 2011.
- Another effect of the 3-monthly billing requirement is the effect on Legal Aid and the delays that this causes, both in terms of individual clients knowing what's going on in a file, what funding is available, and what funding you will get in the future, and in terms of bills being paid by Legal Aid. We have actually—am I able to pass out a document? Is that all right? I'm passing out a letter that we wrote to the general manager of legal aid services, Mr Stuart White. It was copied to the Minister. There is an attachment to both those letters that I have not supplied, for privacy issues. Basically, we're listing there the delays in terms of our firm that we are experiencing at the moment. So you'll see, if you look at my most recent letter, the 19 March one, I describe a number of outstanding amendments to grant. Amendments to grant is the process by which we seek further funding for legally aided clients. You'll see there are about 180 clients in default there, some with many more than one single amendment to grant.
- Possibly more concerning is the second table that I refer to, which lists approximately 970 outstanding invoices, dating back over 2 years, for the sum of about \$888,000 owing to Cooper Legal. I note that we can't seek interest on that amount under the statute. That sum is possibly not entirely accurate. There are some elements of those invoices that are in contention, but we are still talking over half a million dollars in debt to this firm, and mounting, unfortunately, due to delays at Legal Aid.
- Chauvel How does the 3-month requirement around billing relate to the \$800,000 shortfall?

- Cooper In essence, because they're not able to keep up with our work, because we're now having to submit 600 invoices every 3 months, they just fall further and further behind. So in terms of debtors, that falls further and further behind. That's our experience, that Legal Aid are simply unable to deal with the extra work that this has generated at its end.
- Chauvel So having imposed a 3-month requirement, they haven't got the administrative capacity to satisfy it?
- Cooper They can't manage it. They haven't got the staff or the bodies to actually deal with it. We've been repeatedly told, because we've obviously raised this on numerous occasions, that there is a fixed lid on staff, and that nobody actually took into account the extra staffing resources that would be required at Legal Aid to actually manage this increased volume. If you think from our perspective now, our small firm alone is generating actually for Legal Aid something like 1,800 invoices every 3 months because we also do what we call global bills—we do invoices that we now also have to do every 3 months—for work that gets spread between our entire client base. That's an example. We've been sending in our regular 3-monthly bills since August last year. Legal Aid has not yet paid one. They're already 7 months in default. Those two bills get spread between one client group of about 400 and the other client group of about 200. That's already, as I say, about 1,800 payments that they're in default on. That's not including the individual bills; that's just the global bills.
- Shanks When did this regulation come into force, sorry?
- Benton 1 July, I believe, 2011.
- Shanks 2011. This bill, the arrears goes back to 2009, that you're owed?
- Benton The majority of the invoices, I think, go back to early 2010, but there are one or two that go back to late 2009, yes.
- Shanks Do Legal Aid recommend any type of interface or billing system for people, companies like yourselves doing legal aid, to make it easier?
- Cooper There are a number of electronic programmes. I think, as I say, the problem for us is that we're unique in that sense. But that's not going to resolve their issue, which is actually handling the input of work that we're inputting to them. We've actually hired extra staff to manage the extra workload that this has created. We've actually had to hire on an extra staff member so that we can actually, you know, fulfil our statutory obligations. But what we're saying is that at the Legal Aid end, there are no extra staff and they actually can't handle it. And there is a cumulative effect because they're just getting further and further behind. We are getting less and less payments. We're now having to do hundreds of little bills. They can handle a few of them, but it's the kind of bigger, more difficult bills that just sit, and sit, and sit. As I say, the global bills—not one yet has been paid.

The other aspect of that, which we were going to raise as well, is that we've got a number of files where because of this 3-monthly invoicing regime that's in force, where Legal Aid in one case has taken 2½ years to grant aid, in another case has taken about a year and a half to grant aid, and in another case of ours has taken 6 months to grant aid, and then says to us: "We're not going to pay you for the work that's been done outside the 3-monthly invoicing period." We can't actually invoice it until we get a grant of aid. So from our perspective, there are actually disincentives from a legal aid perspective to get on and do its work, because they can then say: "We're not going to pay you because you're outside of the billing regime."

Chauvel The only possible relevance—I'm sorry, because I'm interrupting a question from another member—that can have for the Standing Order grounds that we are responsible for is whether or not the 3-month requirement was, essentially, a rational one, in respect of what you tell us about the processing capability of Legal Services/the Ministry.

Sabin I just wonder when you say you're in a unique position, are there other firms, to your knowledge, that are experiencing—? Because I assume that you're not the sole reason for the backlog at Legal Aid Services.

Cooper No. In fact, it's interesting you ask that, because there's been an email from the Wellington branch of the New Zealand Law Society that's been published the last 3 weeks. I actually took a copy of it. This is our e-brief. This has been published in the last 2 or 3 weeks, saying: "Are you experiencing delays in legal aid payments?", and the Wellington branch of the New Zealand Law Society saying: "A number of practitioners have sent us evidence of delays in legal aid payments. If you also are experiencing problems, please immediately contact the branch.", and they're asking us for quite a lot of information. So I've spoken to the branch manager of the Wellington branch. Anecdotally, she is saying that there are lots of complaints. Apparently, it's confined to Wellington, which, of course, affects us, but Wellington's a large area. I think Wellington Legal Aid goes as far north as Hawke's Bay and covers down a reasonable amount of the South Island as well, I understand. Certainly, we're not unique. If the Wellington branch of the New Zealand Law Society is asking people to send in evidence of delays in debts, we're not unique. I understand that, yeah, it's a real problem, not just for us. We probably are a microcosm—because of the large volume of clients we have, the large number of clients—of all legal aid problems, and so we can talk to that because we probably experience it all. Most law firms have probably got 40 or 50 files, maybe. We've obviously got 600 or 700. We probably experience all of the problems.

Sabin Just trying to get my head around how the 3-month billing period has changed what would have otherwise been your normal course of business and billing. How would you have normally presented invoices in a way that wouldn't create this backlog?

- Cooper What do you mean?
- Sabin You're saying that because you're having to submit every 3 months, these series of invoices for payments—is that correct?
- Cooper Yes.
- Sabin What is it that you would have otherwise done that would have prevented this? Because, obviously, you're saying you only invoice once every 2 years or something, ordinarily.
- Benton It depended on what stage the case was at, but if we had, say, a 2-year period where nothing happened on a particular file and we got a few phone calls earlier on in that period, we wouldn't bother invoicing them 3 months to the day; we would wait until the end of the step. It's basically the number of invoices and frequency.
- Sabin So has it created additional invoices than otherwise you would have had to generate?
- Cooper Absolutely.
- Benton That's correct.
- Sabin And a lot of that is to do with the protracted nature of the cases?
- Cooper Yes. That's right—ours have been very protracted. We're on a kind of different path now, but I think for us, our concerns are, as I say, that we've kind of matched our practice to handle it, but Legal Aid hasn't. Also, a big point is that nobody has factored in the cost of that process for the clients either, because they are actually having to pick up the extra cost of having to do a 3-monthly invoice for what might be a letter or a phone call. That's not fair. We, typically, and I think most lawyers typically, bill within a particular stage of work. All lawyers, whether you're in the Family Court or civil, you do particular tranches of work. If you're in a civil case, your first tranche of work will be to, usually, interview the client, take those initial instructions, and then decide where to, so you bill at that point. That, actually, will be usually quickly. The next point, of course, might be if you're in a civil case to then draft pleadings and file those in a court. That's the next tranche of work. In our area, that can actually be quite a lengthy process because of what we have to collect in to do that. Each area of law will have steps that Legal Aid know. Typically, lawyers have invoiced when they've finished a stage of work, and that makes sense.
- Chauvel Cutting to the chase on this, because I think we understand or can have a picture of the problems that the 3-month rule, if I can put it that way, has posed for you. What do you say about the Ministry's response that it's going to be done away with, so it's not going to be an issue going forward, because obviously that's going to be very relevant?

- Cooper Well, that's not quite what they're saying. I mean, what they're saying is—
- Chauvel Sorry, I'm paraphrasing. On what the Ministry says about the future, what's your position?
- Cooper I guess our position is that it must be clear that the 3-monthly invoicing regime should go. I think we're concerned that this proposed amendment leaves all the discretion, again, with the Ministry to decide: "OK, for this particular firm it's got to be 3-monthly invoicing." And we could see us being stuck with it. When this first came in, we actually approached Legal Aid and said: "Can we look at something special for us because, one, we're going to have difficulty handling it, and, two, you are not going to handle it. You already can't handle our work." They basically just said no, out of hand. I think our concern is that leaving too much discretion with Legal Aid to decide what regime fits for what is not acceptable. It's not an acceptable regime for practitioners. There needs to be certainty around who gets what in terms of invoicing regime. I think our preference is that the 3-monthly goes, and obviously the Minister thinks it's ridiculous. As I say, for lawyers who do the sort of work we do, so civil, family, mental health, or whatever, most of the work is in steps. We think that that sensibly fits, that that's the point at which you invoice within 3 months of completing a step of work. Not just blanketly every 3 months.
- Chauvel We've interrupted your flow, I imagine, several times. Are there any other key points that you think we need to hear from you on before we invite the ministry's response?
- Cooper I think one thing perhaps I need to emphasise is having a 3-monthly invoicing regime or whatever— One thing that needs to be clarified is that at any point it shouldn't start running until there is a grant of aid. The point that I just made before about in some cases we've actually waited 2½ years to get a grant of aid, you can't impose an invoicing regime that kicks in immediately the client instructs the law firm when there's no grant of aid. In our cases, in particular, because ours have been through LAT, and then the High Court, and then back to Legal Aid, we've had a lot of problems with Legal Aid. You cannot impose any sort of invoicing regime that kicks in immediately a lawyer is instructed but there's no grant of aid. It must start to run from when there is a grant of aid.
- Chauvel What about where the grant of aid can't be processed because the authorities don't have the information that they need from the applicant or perhaps where the solicitor doesn't even have it from the client?
- Cooper Again, though, why should the lawyer be penalised? I don't know if you've seen a legal aid form lately, but they're incredibly complex. They require a lot of information. Most of our clients struggle with literacy, and they've got alcohol and drug abuse problems, literacy problems, mentally ill. To complete a legal aid form, it's hard enough, I think, for a lawyer, let alone a client, to complete. There is a lot of background information that needs to

be provided with that, particularly those who've got some form of property, or if you've got debts, you've got to provide evidence of your debts. That's actually a lot of information for somebody who is really struggling with their life to pull together. Often, too, we might wait for 3 months before Legal Aid comes back to us and says: "This form's incomplete because you haven't provided that information." Why should we be penalised? Because then we've got to scurry around and get in a whole lot more information. The example we had, a case here of refusal of legal aid, went to LARP—the Legal Aid Review Panel—then went to the High Court. We abandoned the appeal on the basis that legal aid was going to be granted. It then took another 7 months for a grant to be made. Now, there was no reason why it took another 7 months, and with us constantly chasing up. In the meantime, the 3-monthly invoicing regime has kicked in. We're waiting for the: "Well, we're not going to pay you for all that work between July 2011 and when we actually gave you the grant in March or something 2012."

Chauvel So you would say in that sort of situation the 3-month requirement cuts across the statutory obligations?

Cooper Yeah, we noted that. I mean, one of the things it's about—

Chauvel I think we're understanding the context. Would you agree that there's a right to impose some form of limit, provided that it has a rational connection to the processing capacity of the granting body?

Cooper I suppose so, as long as, one, I think at the moment there's absolutely no discretion. Well, there appears to be no discretion. We've, for example, sent in invoices well within time, but for whatever reason—New Zealand Post has taken a week to deliver from our office on The Terrace to their office just up the road—and if we're 1 or 2 days late, they deduct out that time. I'd hate to think what the position is for lawyers who don't even live in Wellington. I mean, as I say, if New Zealand Post can take a week to deliver our mail, apparently, to Legal Aid, then I don't know what other lawyers are having to do. That actually cuts the 3-monthly invoicing regime even further, because, in fact, you've got to get it to Legal Aid within the time. What we've done mostly now is we actually get them hand-delivered, and we make them stamp it just so we've got proof that it's been delivered. So there are all those kind of quirky things too. If it's a day late because the post is late, you don't get paid for that day. That's creating unfairness and anomalies.

I think at the moment there is no flexibility, there is no discretion, and that's unfair, that can create unfairness. That needs to be rectified. I think our big issue is at the moment every obligation is on a provider. There is no reverse obligation on the Ministry. In our case, we wait 4, 5, 6, 7, or 12 months for an invoice to be even acknowledged, let alone paid. Then there's all the accumulation of amendments to grant not being processed and reconsiderations not being done. Within a 3-monthly invoicing regime, if that's all behind, we never know where we stand in terms of funding. We

don't know whether we should have submitted another amendment to grant, because we've submitted our 3-monthly invoice but Legal Aid hasn't looked at it yet. We've got examples of files here. I got two decisions today on a file, one invoice in November I submitted and another one in March, and we got two decisions on that file today. You're reading them and you're saying: "What? What does this mean? It doesn't even make sense.", because one letter deals strictly with the November invoice, and the other letter then deals with the March invoice. We never know where we stand. They've got no obligations. We've got all of them. There's no discretion, apparently. I understand the rationale of it; it just is not working.

Shanks I think we understand your frustration. I think we've got that pretty clear down this end of the table. You're in agreement that you would be happy with some type of process if you could relate to it. On the other side of that, if there was a lifting of the game in terms of Legal Services, then you'd be a pretty happy camper.

Cooper Well, also, as I say, discretion when it's late, for whatever reason. I think that needs to be taken into account too. Yeah, I would be a happy camper.

Shanks OK. That's great.

Chauvel OK, I think we get it. What I propose to do is invite the Ministry to respond to the complaint, and then if new matters are raised in their reply, I propose to ask you to deal with those right at the end. So if you wouldn't mind yielding the table to the Ministry, we'll hear their response.

If you wouldn't mind formally introducing yourselves. We are transcribing the hearing, so it's good to have these things on the record.

Clark Thank you, Mr Chairperson. I'm Gerard Clark. I'm the manager of access to justice and family law policy in the Ministry of Justice.

McCabe And I'm Patrick McCabe. I'm a principal policy adviser at the Ministry of Justice.

Chauvel Mr Clark and Mr McCabe, welcome. Essentially, the floor is yours to respond as you see fit. We've read the material, but if you want to make any additional points or deal with the way in which the members asked questions of the complainant, then you're welcome to do that.

Clark Thank you, Mr Chairperson. What I'll propose to do is talk a little bit about the background to why the regulation exists at the moment. Then I'd like to go into some detail about the changes we're proposing to make to the regulation in the future, and the situation has slightly changed since the letter we sent you, so there'll be some new information there. Then I can address some of the issues raised by the complainants. Then, if you'd like at that point, I can go through the four grounds of complaint, but you may not feel that's necessary.

As noted by the complainant, prior to the Legal Services Act 2011 there wasn't a statutory time frame for providing invoices, at all. The provision for that time frame, and that regulation setting the time frame at 3 months, was set to address a number of quite significant concerns about the operation of the legal aid scheme generally. These concerns arose because it was common for the agency to be receiving invoices for work undertaken a long time after the work was done. In at least one case this was over 10 years after the work was done. In many cases it was around the 5- or 6-year mark. And, quite concerningly as well, sometimes we would be invoiced for payment at the same time as the application for a grant of legal aid was referred to us. So these late invoices made it very difficult, first of all, for us to assess whether the work that was done was necessary and required, or even whether the work actually was done. It made it very difficult for us to meet our obligations under the Public Finance Act for accrual accounting, because it was impossible to know what to accrue. It also made it very difficult to estimate the resource requirements to deal with invoices, so we never had a clue when in the year various things would come up. They'd come up at a time—so, for instance, sometimes there would be a spike near Christmas; sometimes at other times there'd be a big spike. That would lead to delays in providing those payments. And importantly also for some legal aid clients, the delays in invoicing meant that they were unable to know how much the debt that might be applicable to their legal aid case could be, so they could be left in limbo for quite some time about what they might end up having to repay, which was very uncomfortable for them.

The then Legal Services Agency did explore non-legislative options for this. They looked at having—in fact, they trialled having a contract that required invoicing within 2 months, but that was unsuccessful and wasn't able to be enforced. So the provision was included in the bill that led to the current Act. During the select committee stage of the bill, four submitters commented on the issue of time frames for provider invoices. The New Zealand Law Society, in particular, raised the issue about whether this should be set in legislation and regulation or whether it should be done through contracts, but there were also some submissions about the length of time that would be appropriate for a time frame to be set in regulations. These ranged from 90 days by, for instance, the Criminal Bar Association to 6 months by the New Zealand Law Society and its family law section. Having seen those submissions, the select committee agreed to report the bill without any changes to those relevant provisions on provider invoicing—so that was clause 98 and part of clause 114 of the bill, which is the regulation-making power. Then, in determining the time frame to be used in regulation, we did consult with representatives of the legal profession, including, and in particular, the New Zealand Law Society.

So that's the background to the regulation as it stands. As we wrote to you in our letter on 23 March, consideration is being given in any case to amending this regulation. What we discussed with you in that letter was having a very flexible system where different time frames could be established for different situations. Having looked at that a little bit more

and having had some feedback, that doesn't appear to be workable and possibly would be ultra vires. What the current proposal is is to shift to a requirement for 6-month invoicing but to include a provision that if there's a formal request from the Ministry of Justice for an invoice within 3 months, then that needs to be provided if the payment is to be made in a particular circumstance. This seems to us to balance better with the fact that most providers do comply with reasonable time frames and are able to do so. It also gives us some flexibility to deal with the small number of providers that are unable, for whatever reason, to comply with those provisions or are unwilling to.

Chauvel What about the situation where there is compliance but there isn't timely processing on the Ministry's behalf? Is that a real situation that we should be concerned about?

Clark We see it as a transitional issue, really, for two reasons. There is some increase in the time it's taking to make provider payments. However, it's transitional partly because the reason of bringing in the 3-month invoicing requirement or any set time frame is to ensure that we have a much better idea of when we are likely to be billed for various things, so we can manage our resources better. The other reason there's a bit of a blip at the moment is because we did get an enormous backlog of some very old invoices that came through—probably more than we were expecting.

Chauvel But at the time that the legislation was passed, it was known that the Legal Services Agency functions would move into the Ministry, so presumably this was taken into account in setting the 3-month time frame?

Clark That's absolutely right.

Chauvel —and yet the transition, as you say, causes a problem.

Clark No, not the transition of the Agency to the Ministry but the transition to a 3-month invoicing requirement. So it's a short-term issue that we got an enormous backlog of invoices when that provision came in. That was spread over some time, because for some of the invoices that were incurred prior to 1 July last year we allowed an extra amount of time until the end of the year to provide those. But, notwithstanding that, we got many invoices going back many years from a lot of providers. A lot of those are a lot harder to deal with than invoices that are contemporaneous, where we can actually look at what's happening, so that is taking some time to deal with. The other factor that will mean that we become faster at processing those invoices is that we're introducing fixed fees in the criminal—fixed fees in the criminal jurisdiction have been introduced. That's reducing the amount of work for us, as well, around invoicing. So we're able to use the same resources to remove the backlog, and that's starting to occur at the moment.

- Shanks Now, I would imagine that would be because you didn't know what you didn't have—is that right?
- Clark That's my—we did expect some increase.
- Shanks You had no visuals at all on what was accrued, what you hadn't received, what was sitting in everybody's files, and so they had this one shot to get it in before that 3-month period, then it was gone. So it would've been a huge influx, I would imagine, of really old cases.
- Clark There was a large influx, yes.
- Shanks So I assume, though, you've got systems in place that now— Well, as we heard, you know, some haven't been paid for a period of time but will now be in catch-up and nearly caught up.
- Clark Well, it's certainly our intention to catch up. It is a difficult resourcing issue still. We're getting through the backlog and then we're adjusting to how much that workload adjusts with fixed fees, as well. But it appears to be going down, and we anticipate improving the situation. It is at the moment a bit worse than it was prior to the 3-month invoicing requirement coming into force, but the situation then was unsatisfactory, and we'd like to move into a better situation.
- Sabin How do you find dealing with invoices that might be for matters like a single letter or, you know, just the sheer volume of invoice processing for things that basically amount to very small costs?
- Clark My understanding is that that's not a significant issue with most providers—that in the majority of cases a lot of the work is completed within a 3- or a 6-month period, and so we're not getting that bulk of very minor, small issues. Having said that, when the invoice comes in, we still need to identify that, say, a phone call occurred on a certain date and assess that, so in one sense the work isn't different either in terms of invoicing or in terms of processing that invoice. That still needs to be processed as an item, and so it's merely a matter of when it's bulked up.
- Sabin So have you seen an increase in the numbers of invoices you're processing since this 3-month rule has come into play?
- Clark Yes, but I'm not certain how much of that is because there was a large backlog of old cases and how much—and whether there's just more coming in. I'm not sure I understand the question.
- Sabin Well, I'm just wondering if this new system, with a requirement for 3-monthly invoicing, has dramatically increased literally the number of invoices you're having to process, because clearly there's a substantial backlog. So I guess what I'm trying to get a handle around is is this backlog just part of the normal course of business, or has there been an increase in it as a result of this 3-monthly requirement?

- Clark I would have to go and find that out. I know that a lot of it is simply as a result of a lot of old invoices coming in. I'm not certain if we're in a position yet to assess whether day to day there are more invoices coming in, but I could check that out, potentially.
- Chauvel You'd be welcome to do that, unless your colleagues can assist you. No. All right. Well, I think the relevance of it for us is, again, around the—I'll paraphrase the Standing Orders—the reasonableness or the nexus between the choice of the 3-month requirement and the effect on it, and then the way in which you've had to process things and the position that leaves you in under the Act in terms of your duties. But, anyway, —I think it would be helpful if you were able to give us that information.
- McCabe I think it's important to note, as has been said in our first submission to the committee, that the Ministry did advise Legal Aid providers that until 31 December 2011 it would not enforce the 3-month requirement for cases where the application for legal aid was dated before 1 July 2011. So that's an important position. Second is that the Legal Aid Commissioner has a discretion on a case by case basis, and he exercises that on a case by case basis, and he either accepts and approves a late payment or he reduces the approval or he rejects it. So he's doing that on a case by case basis. He has that discretion. Now, the legal aid commissioner is a statutory officer responsible for the administration of legal aid.
- McKelvie On what grounds would you reject it on?
- Clark I guess it would be that it was unreasonable—that it wasn't referred within the time frame. So we are trying to avoid the situation where people are simply just not billing for quite a long time. Also, if the work wasn't work we consider should've been paid for—
- McKelvie That's partly answered the question.
- Clark —and it might've been that if it was within the time frame, we could have had a discussion about that, but that's no longer possible.
- McCabe Section 99(4) of the Legal Services Act 2011 sets out the statutory grounds for the commissioner to exercise his discretion to decline some or all of the claim “on any 1 or more of the following grounds:”, and it sets out the grounds.
- Chauvel And is that a power that's delegated in practice to claims processing officers?
- Clark Yes, it is.
- McCabe But within a hierarchy of approvals, so that—depending on the experience and the rank of the grants officer.

- Chauvel It's not as if the commissioner's sitting there as a sort of Court of Appeal dealing with exceptional cases; it's a power that is being dealt with every day by staff, effectively.
- Clark That's right.
- Chauvel As you say, within a managerial structure.
- McCabe Some of those people exercising the exceptional cases have been involved in the administration of legal aid under its various statutes for more than 20 years.
- Chauvel Anyway, please continue.
- Clark That's essentially, I think, covered off all the issues we want to, other than to just inform you that we are looking at the regulatory change coming in in June that we're talking about for the regulations. So we're consulting on that currently.
- Chauvel So when would the regulation be made? It would come into effect on 1 July, presumably, or—
- Clark I guess if we take into account the 28-day rule. Our intention is to do it as soon as possible, and we'd hope it would be in force by 1 July. We were consulting on the previous proposal, but we have had to now consult again on this latter one, so we're just working out the time frames, given that consultation.
- Chauvel So I think you told us that initially you thought a flexible requirement applying different time frames for different situations might work, but there are problems with that, so what's the nub of the current proposal that you're consulting on to replace the present requirement?
- Clark It would essentially say that—other than for fixed fees, anyway—the invoice should be provided within 6 months of the work being carried out, rather than the current 3 months. It would additionally provide for the Ministry to make a formal request for an invoice if it felt that it needed an invoice for a particular issue, and if that wasn't paid within 3 months, then we'd be able to decline the payment.
- Chauvel All right. Any other questions for the Ministry? Thank you very much for your response. Just a question to the complainant as to whether there are any issues arising out of that that you want to take the time to address. If there are, what I'll do is ask you just to come up to the table again.
- Cooper Yeah, I don't want to say much. I suppose just a couple of points. Being lawyers, we know about the importance of keeping a reply short. I suppose one thing we just noticed in terms of the backlog issue, these regs have been in force since 1 July, so they've already been in force for 9 months now, and from our perspective we're not seeing any improvement. In fact,

we're only seeing the situation getting worse, and I think the New Zealand Law Society anecdotal evidence suggests that's the case, as well.

I think the other issue—and perhaps you can ask for more information. But while there appears to be a discretion—well, there is a discretion—within the Act and within the regs, we've never seen it exercised. We don't know how it's exercised. And from our perspective it appears to be very inflexible—i.e., as I gave the example of an invoice where they said we'd got it in late; in fact, we hadn't because we'd emailed it. But their own systems hadn't even picked up that they'd got it on time, and they were ready to deduct out—in fact, they'd told us that they were going to be deducting out—the time. There was no discussion about that, no attempt to exercise any discretion, and, as I say, they were wrong in any event. I had to go back and say: “Here's the email I sent to you, sending it on the correct day.” I think, as I say, we don't see the exercise of that discretion.

Chauvel So, just to round out that experience, was the matter corrected once you'd had that discussion?

Cooper Yeah, and an apology made. But the thing is the fact that the system was a failure anyway and I had to spend 20 minutes of my time going back through my files to find that I had actually emailed it—because I knew I had—and find the email and then forward that to the grants people to say: “Here's my email. It was sent to you on the correct day. Why isn't this in your system?”. There's no explanation as to why it's not in the system. There's an acknowledgment, yes, and an apology, but that was more of my legal time that I shouldn't have needed to spend rectifying an error in their office. You know, this was a reasonably large invoice, but, still, imagine if it had been an invoice for two units that I'd had to do that on.

Dalziel But I think your point that you're making is that no one ever said to you, you know: “There is a discretion here if you give us a good reason.”

Cooper No, no. Well, and, in fact, that's a really good example—I think you missed it. We said we had some cases where, in fact, we've waited 2½ years for a grant of aid or 5 months for a grant of aid. Even there we're being asked to break down our work. Now, that's Legal Aid's fault or issue, that we haven't had a grant of aid—or just the system, like, as I say, one case has gone through refusal of legal aid to the High Court and then we waited patiently for Legal Aid to make a grant for 6 months while we were repeatedly saying: “Can you make a grant of aid? Can you make a grant of aid?”. Now, again, we don't know what's going to happen. We have no doubt that we'll just be told to break down the invoice, as we have on every other occasion, to show what works within the 3-month invoicing period and what's not, and we'll probably get a decision saying: “We're only paying you for the last 3 months.” So we don't see any exercise of that discretion, ever.

- Chauvel Do you have any views that you want us to hear about the potential changes—
- Cooper To 6 months?
- Chauvel —that the Ministry—
- Cooper We could probably handle that.
- Chauvel —told us about?
- Cooper Again, I think the challenge will be for the Ministry. That’s probably better for them, as well, actually. That’s probably more realistic. As I say, we’ve already put in place our resources to handle the 3-monthly invoicing regime. That’s, as I say, probably better for them—more realistic—and I think most practitioners should be able to manage a 6-monthly invoicing regime. Again, it worries me that they say they’re going to give themselves power to say in particular cases that they require an invoice within 3 months, and I can just see them saying to my firm, with 600-odd legally aided clients: “Provide all your invoices within the 3 months.” Because of the way that the contracts are set up, we’ve got no power. As I say, all of the obligations in this new legislation are on providers. There are virtually no obligations on Justice. So if we’re going to have obligations, there has to be room for discretion, and also too there has to be—or, otherwise, there have to be reciprocal obligations on Justice, because, as I say, we just— from our perspective the situation’s untenable. When there are months of delays in dealing with anything—amendments to grant, reconsiderations, invoices, applications for legal aid—which just accumulate and accumulate and accumulate, any regime’s got its problems unless there is a reciprocal obligation or timeliness within Justice, and that’s our concern—is that there isn’t.
- Chauvel All right. Any further questions from members? In that case, thank you for your attendance. What we’ll do now is close the public session and consider what we’re going to do with the complaint.

conclusion of evidence