



MINISTRY OF  
**JUSTICE**  
*Tāhu o te Ture*

**Legal Aid**

# Quality and value audit report

08 June 2018

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# SECTION 2 | Statutory authority

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## 2.1 | Authorisation

has been selected for an audit of the quality and value of services they provide.

Section 68 (1) of the Legal Services Act 2011 (Act) outlines the functions of the Secretary for Justice (Secretary) to:

- (a) Establish, maintain and purchase high-quality legal services in accordance with this Act;*
- (b) To perform any functions that are conferred or imposed on the Secretary by or under this Act;*
- (c) To perform any other functions relating to legal services that are conferred or imposed on the Secretary by or under any other Act.*

The audit process is governed by sections 91, 92 and 113 of the Act. These provisions outline the powers, functions and duties of the Secretary to conduct audits of approved providers of legal aid services or specified legal services:

- section 91 (1) of the Act enables the Secretary to audit providers at any time<sup>1</sup>;
- section 91 (2) of the Act requires audits to be conducted by an auditor, i.e. a person employed or appointed by the Secretary for the purpose of conducting examinations or audits, or both (section 4); and
- section 113 of the Act makes failure to comply with an audit/auditor an offence where that failure is to such a degree that the auditor is unable to satisfactorily conclude the examination or audit.

The Ministry has developed terms of reference that reflect section 91 of the Act, these were used as a framework for this audit.

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<sup>1</sup> Note: this includes the providers who were previously listed/approved with the Ministry or former Legal Services Agency

# SECTION 3 | Audit ratings

## 3.1 | Rating scale

The assessment scale below summarises:

- the ratings that can be awarded by the auditor for each file audited; and
- the overall rating that can be awarded by the auditor for legal services provided.

The auditor assesses the overall quality of the provider's work from the sample of files. The auditor does not automatically arrive at the rating simply by averaging the scores on the individual files, although in some instances the overall rating is likely to be the equivalent of the average of the scores on those individual files. Auditors use their skill, experience and training to inform the overall rating of the provider from the trends and patterns they see on the individual files. The fundamental nature of auditing is that it is the judgement of an experienced practitioner. The auditing methodology and framework enables peer reviewers to make a judgement on how they think the work of a provider is managed, supervised and ultimately produced as a result of seeing the work in a category of law on the individual files.

Quality Assurance rating scale for each file/overall rating for legal services provided	Ratings awarded
Excellent	1
Very good	2
Acceptable	3
Poor	4
Very poor (Failure)	5
Unable to assess – where relevant documentation is absent, minimal, or so confused that an assessment cannot be made	C/A
Not applicable – cases may have aspects that do not apply, eg no hearing	N/A
<b>Value Assessment</b>	
Exceeds value assessment	Yes / No
Meets value assessment	Yes / No
Does not meet	Yes / No

## 3.2 | Key risk factors

The audit focuses on the adequacy of systems and controls in place to manage the following risks:

- unsatisfactory/inadequate service-delivery systems;
- unsatisfactory/inadequate level of legal services;
- poor value for money for the client, government and taxpayer;
- poor management of legal aid funds;

**2<sup>nd</sup> File**

**Client name and number:**

**14537173**

*Chronology/Summary of file*

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***Working file***

1 January 2008 – 28 page index to the case on appeal.

14 August 2013 – Statement of Claim seeking a declaration that a Court Registrar’s decision denying a request to waive a securing for costs direction is invalid.

13 September 2013 – 21 page High Court bundle of documents index.

24 September 2014 – Index of four case authorities relied upon in the Court of Appeal.

22 May 2014 – Notice of Appeal.

9 June 2014 – Crown Notice to Cross Appeal.

30 April 2014 – Decision in AG v [2014] NZHC Young & Brown JJ – that although the proceeding was not vexatiously instigated, it was vexatiously conducted and imposing limitations on what proceedings Mr can instigate in the future.

23 May 2014 – Application for a filing fee waiver.

10 July 2014 – Case on appeal index.

4 September 2014 – Memorandum setting out what progress is being made, asking for an extension of time to file the case on appeal and asking for the appeal to be set down.

25 September 2014 – Joint memorandum filing an electronic casebook.

23 September 2015 – Submissions in support of the appeal (27 pages).

24 September 2015 – Crown submissions in support of the Cross Appeal.

29 September 2015 – Memorandum of Counsel seeking to recuse a Judge from hearing the appeal in the Court of Appeal.

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1 October 2015 – Crown submissions against the appeal.

2 October 2015 – Crown memorandum submitting that the request for a Judge to recuse himself from hearing the case has no substance.

5 October 2015 – Joint bundle of documents.

6 October 2015 – Decision of the Court refusing to grant a request to recuse a Judge from hearing the appeal.

7 October 2015 – Memorandum of Counsel again pursuing recusal of a Judge from hearing the appeal.

7 October 2015 – Court Minute again refusing the request to recuse a Judge from hearing the appeal.

12 October 2015 – Memorandum of Counsel recording an earlier concession that cases brought by the client prior to 2005 were not included in the material for the hearing.

26 October 2015 – Court Minute.

3 December 2015 – Court Minute.

26 January 2016 – Memorandum of Counsel in response to two Court minutes.

29 January 2016 – Memorandum from the Crown accepting one of the proceedings cannot be properly described as vexatious.

4 March 2016 – Court of Appeal decision refusing the appeal and granting the Cross Appeal. It includes at para [10] the Court’s concern that Counsel had prepared an application (for recusal of a Judge) containing scandalous material.

***LAS documents***

23 May 2014 – Civil Legal Aid application.

7 Grant schedules.

Remittance advice – LAS Amendment to Grant letters.

27 May 2014 – Legal Aid Services’ letter asking who the instructing solicitor is and a 17 June 2014 follow up letter asking for a response to the 27 May 2014 Legal Aid Services’ letter.

10 June 2014 – Declaration by the client’s partner as to her financial position.

***LAS invoices***

- 9 October 2014 – Form 20 \$1,840.00.

- 26 May 2015 – Form 20 \$310.85.

- 26 May 2015 – Form 20 \$304.75 (possibly a corrected invoice).

- 22 October 2015 – Form 20 \$8072.39.

- 28 January 2016 – Form 20 \$914.25.

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*Private invoices (internal records to match Legal Aid invoices)*

26 May 2015 - \$304.75.

21 October 2015 - \$8,072.39.

22 October 2015 – Table of expenses - \$526.77.

28 January 2016 - \$914.25.

26 May 2015 – \$3,108.45.

***LAS payment advice***

15 October 2014.

23 October 2015.

02 February 2016.

***Email file***

20 Emails 02 September 2014 to 29 January 2016 between Counsel and the client (including communications recording submissions are being approved by the client and the client praising the provider) with the Court (such as making arrangements about electronically filing the case on the appeal) and email between Counsel (such as arranging a timetable).

***Various documents***

Filing letters.

Receipts of filing.

Notice of fixtures.

***Legal material***

the Judicature Act 1908.

Relevant High Court Rules.

Brogden v A R.

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***Key observations for file***

The submissions contained some bold statements, such as:-

Para 48 – “...the reasoning of the full bunch is abbreviated out of any sort of recognition that is sadly inadequate ...”.

Para 49 – “No reader of the judgment could understand what abuse of Judges had occurred in proceeding 6822 ...”.

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Para 50 – “[Judges ought not be wilted flowers]”. Para 51 - “The full Court judgment portrays the reverse view, that Judges are wilted flowers and need protection”.

Para 54 – “The full Court ignores freedom of expression”.

Para 61 – “Judges looking after their own patch, or having that appearance must be like Caesar’s wife, above reproach”.

Para 86 – “Their Honour’s judgment is a collateral attack on freedom of speech.”

What were otherwise well reasoned and written submissions were reduced in quality because of what appeared to be overstatement. Given the context of the litigation was a case about whether the client had been properly declared a vexatious litigant and one of the grounds for declaring him a hostile witness was making bold statements against the Court, the submissions created the impression the client was vexatiously making submissions by further attacking the Court. This could have been at the expense of rational submissions like:-

1. The decision was unreasoned –
  - As there was no “balancing” of the right of self-expression (NZBORA) with the conduct even if true;
  - As there was no assessment of the proportionality of the “vexatious litigant remedy” to the alleged conduct if true.
2. No reasonable decision-maker could have made the factual findings made given the litigation successes enjoyed by the client. There could have been a table or win loss percentage type of analysis.

Would the arguments made have been better made if argued more sensitively?

The memorandum seeking to recuse a Judge was even bolder than the substantive decision.

It included a reference to the provider’s own previous historic complaint about the Judge. This was bold in itself to introduce material personal to the Judge and the lawyer – not something in the client’s sphere of knowledge – but paragraph 4 (a reference to the complaint) and 5 (Counsel could elaborate if requested) read like a threat.

The client had previously published a critique of High Court Judges which included derogatory comments about the Judge recusal was sought for. This critique was attached and referred to as if it was representative views or in some way valid. The word “bent” in reference to the Judge was repeated six times in the decision. It ought to have existed only in a direct quote, if at all. The way this material was used was gratuitous and likely to cause unnecessary offence.

All that needed to be said is recusal is sought for the Judge because the client has previously published material that could be categorised as derogatory the special Judge was singled out for special attention.

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Similarly, the 7 October 2015 memorandum asking for the non-recusal to be overturned was perhaps even bolder including a quote about arrogant people make bad Judges. Could not the memorandum have said the recusal decision is unreasoned and reasons are sought so it is reviewable?

The submissions and both memoranda seeking recusal were overly bold, not as convincing as they ought to have been, and derogatory to the Court.

There did not appear to be a client care letter but obviously there were multiple files for the same client.

The file was provided as pdf files in a folio on a data stick. The documents were in no particular order.

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*Overall quality and value rating for file*

The poor quality of the submissions and attack on a judicial officer reduced the rating of the file to poor. The level of expertise in terms of procedural knowledge to identify issues was very good.

Without this high level of expertise aspect the file would have rated very poor.

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# SECTION 5 | Audit criteria

## 5.1 | General criteria

The quality and value of legal aid services provided are audited against the following general criteria:

General criteria	Assessment for each file				
	1	2	3	4	5
<b>1. Quality of advice and representation – has the provider:</b>					
<ul style="list-style-type: none"> <li>exercised independent professional judgement on the client's behalf and given advice that is legally correct and appropriate, including on calling evidence, the use of experts, dispute resolution and options following the outcome of the case?</li> </ul>	2	4	2	2	1
<b>2. Supervision of the case - has the lead provider:</b>					
<ul style="list-style-type: none"> <li>adequately supervised any work undertaken by any others on the matter?</li> </ul>	2	NA	NA	NA	NA
<b>3. Record keeping - has the provider:</b>					
<ul style="list-style-type: none"> <li>kept a written record of important advice given?</li> </ul>	2	2	2	2	2
<ul style="list-style-type: none"> <li>kept a written record of key instructions given?</li> </ul>	2	2	2	2	2
<ul style="list-style-type: none"> <li>kept the file in such a way that any other lawyer could promptly ascertain relevant matters if needed?</li> </ul>	2	3	2	2	2
<ul style="list-style-type: none"> <li>kept on the file all relevant documents, correspondence received and correspondence sent, including legal aid correspondence, court documents, file notes, records of all attendances and any and all correspondence that relates to the legal aid matter?</li> </ul>	2	2	2	2	2
<b>4. Communication with the client - has the provider, in a timely manner:</b>					
<ul style="list-style-type: none"> <li>communicated with the client in a way that was clear, appropriate and tailored to the client's circumstances?</li> </ul>	2	2	3	2	2
<ul style="list-style-type: none"> <li>kept the client informed about the progress of their case, the procedure and substantive issues, including opportunities to resolve matters?</li> </ul>	2	2	3	2	2
<ul style="list-style-type: none"> <li>given appropriate and sufficiently detailed advice and explanations to the client to enable him or her to make informed decisions about the matter?</li> </ul>	2	2	3	2	2
<ul style="list-style-type: none"> <li>advised the client of relevant aspects of the matter, including the material evidence, risks, costs, liability and merits of settlement?</li> </ul>	2	2	3	2	2
<ul style="list-style-type: none"> <li>provided advice to the client in writing where appropriate and practicable (subject to client instructions to the contrary)?</li> </ul>	2	2	3	2	2
<ul style="list-style-type: none"> <li>provided the client with a copy of the relevant agreement, order or judgment upon the conclusion of the matter?</li> </ul>	2	2	3	2	2

## 5.2 | Specific criteria | Family/ Civil /Criminal

The quality and value of legal aid services are audited against the following specific criteria:

	Criteria		Rating for each case reviewed				
			1	2	3	4	5
Case	a. Instructions and preparation	i. Understanding of client	2	2	2	2	2
		ii. Understanding of issues	2	2	1	2	2
		iii. Adequate research	2	2	1	2	1
		iv. Alternative dispute resolution	2	2	2	NA	NA
Client	b. Conduct and advice	i. Advice correct	2	2	3	2	2
		ii. Advice timely	2	2	2	2	2
		iii. Quality of written material	2	4	1	2	2
		iv. Use of resources	2	2	1	2	1
		v. Settlement options	2	2	2	NA	NA
		vi. Level of expertise	2	2	1	2	1
		vii. Supervision	2	NA	NA	NA	NA
	c. Conclusion	i. Advice on judgment	2	2	4	2	3
		ii. Settlement	2	2	4	NA	NA
Court or Tribunal	d. Information, evidence and submissions	i. On fixtures	2	2	4	2	2
		ii. On merits	2	2	3	2	2
		iii. On progress	2	2	3	2	2
		iv. Written record	2	2	2	2	2
		v. Plain English	1	2	2	2	2
		vi. Properly served	1	2	2	2	2
		vii. Obligations met	2	4	2	2	2
Legislative obligations	e. Legal Services Act 2011	i. Notified client of the potential costs of services for the proceedings for which aid is sought	2	2	2	2	2
		ii. Notified Legal Aid - of any change in their address, or any increase in their income or assets (disposable capital)	NA	NA	NA	NA	NA
		iii. Protected Legal Services Commissioner's interests - in relation to charges and proceeds of proceedings	NA	NA	2	NA	NA
		iv. Notified client that a repayment may be required	4	4	2	NA	NA
Professional obligations	f. Lawyers and Conveyancers Act 2006 and obligations under Lawyers and Conveyancers Act (Lawyers; Conduct and Client Care) Rules 2008	i. Conflicts of interest	1	3	1	NA	NA
		ii. Duty as Officers of the Court	1	4	1	2	1
		iii. Reasonable fees	2	2	1	1	1
		iv. Adequate provision of client care material	2	4	2	2	2
		v. Other obligations	2	4	2	2	2
	g. Compliance with Ministry Policies	i. Applications and associated processes	2	4	2	2	2

## 5.3 | Value

<b>Criminal</b> (state yes, no or can't assess)	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
a) Was this a fixed fee case?	N			N	Y
b) If not a fixed fee case, was the time charged reasonable for all providers who worked on the case and verifiable against the time records?	Y			Y	NA
c) Was an amendment to grant sought for additional work (whether fixed fee or not)?	Y			Y	Y
d) Was it reasonable to seek an amendment to grant?	Y			Y	Y
e) Were providers or others who worked on the case paid in a timely manner?	NA			NA	NA
f) Was a cost management tracking system used and was it used appropriately?	N			Y	Y
g) Were any disbursements incurred appropriate and verifiable against the time records?	Y			NA	NA
h) Did the provider use resources effectively, e.g. experts?	NA			NA	Y
i) Was a reasonable approach taken on the case compared to other similar cases?	Y			Y	Y
j) Was there a change in plea?	NA			NA	NA
<b>Overall assessment of value of cases</b>	<i>State the overall rating for the value of the case from a rating of exceeds, meets, does not meet or can't assess, and provide comments on the overall rating</i>				

<b>Family / Civil</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
a) Was the application justified and were there prospects of success (where applicable)? (section 10(4)(d) Legal Services Act 2011)		Y	Y		
b) Was this a fixed fee case?		N	N		
c) Is the fixed fee claimed verifiable to a record of work done?		NA	NA		
d) If not a fixed fee case, was the time charged reasonable for all providers who worked on the case and verifiable against the time records?		Y	Y		
e) Was an amendment to grant sought for additional work (whether fixed fee or not)?		Y	Y		
f) Were providers or others who worked on the case paid in a timely manner?		NA	NA		
g) Was a cost management tracking system used and was it used appropriately?		Y	Y		
h) Was it reasonable to seek an amendment to grant?		Y	Y		
i) Were any disbursements incurred appropriate and verifiable against the time records?		Y	Y		
j) Did the provider use resources effectively, e.g. experts?		NA	NA		
k) Was a reasonable approach taken with the file?		N	Y		
<b>Overall assessment of value of cases</b>	<i>State the overall rating for the value of the case from a rating of exceeds, meets, does not meet or can't assess, and provide comments on the overall rating</i>				

## SECTION 6 | Final assessment

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### 6.1 | Areas of good practice

The following areas of good practice were noted:

The analysis of the law was particularly strong – at or near the top end.

The provider generally communicated well with other Court users.

The impression was the provider established a good rapport with clients and enjoyed the confidence of his clients.

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### 6.2 | Areas for improvement and key recommendations

The following areas for improvement were noted:

#### ***Client correspondence***

There was limited client correspondence on most of the files other than the terms of engagement letter. Many good providers record appearances, processes, outcomes and options in reporting letters to clients. This enables the client to dwell on advice. This helps display the client is making informed choices. Even illiterate clients can find someone to read a letter to him or her. If the client has no address or does not want correspondence this can be recorded in a file note but the client should be given the choice. If correspondence is not sent then file notes become a more important record of progress on the file.

Generally, when there is a known address for a client a final reporting letter is considered good practise - recording the outcome, appeal advice and “bookending” the lawyer client relationship. Many excellent providers record appeal/review advice including timeframes so that even if the decision is not to appeal at least it is an informed one.

#### ***Improved client care terms***

It was not clear if sufficient Legal Aid advice was given. Often providers include the following advice in the client care letter:-

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- Legal Aid is often a loan not a grant – so you can be asked to make repayments, provide security for the debt and / or be subject to user charges. You may also be charged interest on your legal aid debt.
- You will let me know as your Legal Aid provider if your financial circumstances change. You appreciate that I have to pass on information about your change of financial circumstances to Legal Aid;
- You realise I have to protect Legal Aid’s position in relation to any debts that arise to Legal Aid from my provision of legal services to you; and
- That you realise Legal Aid can be withdrawn at any time.

***De-personalising arguments***

In the case the request for recusal included a reference to a claim against a Judge that was personal to the provider and in *M* the Parole submissions included a reference to Counsel agreeing *M* was being arbitrarily detained. Both arguments personalised the submissions. Counsel is very senior and in a position to assess his style and the wider strategic considerations but personalising can weaken the client’s case by making the advocate appearing too partisan – an extremist – or put another way it can distract from a rational/objective argument and erode the Court’s confidence in the advocate. The *M* comment may also have transgressed Rule 13.5.4 of the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008 which provides:-

“A lawyer must not make submissions or express views to a Court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer’s personal opinion on the merits of that evidence or issue.”

This is probably an ethical rule that is breached regularly out of ignorance but it is probably a question of degree. This however was a bad case. The submission made to the Parole Board was a bold statement made by someone whose knowledge in the area is probably second to none but does not justify an advocate making conclusory statements of personal opinion about a material issue in the litigation.

**Were some submissions overly critical**

In *L* criticism was made of Counsel who appeared at sentencing that she had made too great a concession, namely that s104 applied (presumption of a minimum period of imprisonment of 17 years in serious cases of murder) because the victim “vulnerability” criteria was tripped. This was not accepted by the sentencing Judge. As it happened s104 was triggered by other criteria namely the murder occurring in the context of committing another serious offence

(robbery) criterion and callousness/brutality criterion (probably). Counsel's error was therefore an immaterial error. It did not need to be served up with much vigour. The focus of the argument ought to perhaps have been whether it was "manifestly unjust" to impose a minimum 17 year period of imprisonment – a discretion that is more often applied. It did not seem this was argued at either the sentencing or the appeal. A modern trend in appellate advocacy is to be critical of Counsel. Senior Counsel have a role to play in ensuring criticism of Counsel is not overly stated.

In *Siemer* the first memorandum asking the Judge to recuse himself was critical of the Judge and the second memorandum asking the Judge to recuse himself was equally critical of him and his decision not to recuse himself. Recusal is a bold topic and needs to be done well. It is a courageous step but "courage and courtesy should go hand in hand".<sup>2</sup> Possibly the recusal argument needed to be made but it was obvious the way the recusal argument was dealt with caused great offence. Much of the content was over and above what needed to be said, or ought to have been said courteously.

It is questionable whether the recusal memoranda breached Rule 13.2 of the Lawyers and Conveyancers Act (Lawyer Conduct and Client Care) Rules 2008:-

"13.2 A lawyer must not act in a way that undermines the processes of the Court or dignity of the judiciary".

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## 6.3 | Overall rating

Please give an overall rating for this audit and state reason below:

This is a very difficult file to give an overall rating. The provider is a top end provider so the expectations are naturally greater and when not met the disappointment is greater. The core product for this provider is the written submissions. Almost all were very good in parts but in *M* ; *L* and in particular parts were poor. The recusal memoranda in were a deep low point. How much does this detract from what otherwise is generally very good. Balancing the top end legal analysis and issue identification against the repeated defects in the written submissions the audit has to rate only **acceptable** – although this should not mean what happened in the s case was acceptable - that file rated "poor".

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<sup>2</sup> Lord Denning *The Road to Justice* 55/56.