IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-540
[2022] NZHC 3366

UNDER	the Legal Services Act 2011, s 59
BETWEEN	MAUHA HUATAHI FAWCETT Appellant
AND	LEGAL SERVICES COMMISSIONER Respondent
	NEW ZEALAND BAR ASSOCIATION Intervener
	DEFENCE LAWYERS ASSOCIATION NEW ZEALAND Intervener
	AUCKLAND DISTRICT LAW SOCIETY Intervener

Hearing:	30 November 2022
Counsel:	C W J Stevenson and K Cook for Appellant L M Hansen and D Stevens for Respondent R M Lithgow KC for Defence Lawyers Association New Zealand F Geiringer for New Zealand Bar Association E P Priest for Auckland District Law Society by written submissions only
Judgment:	13 December 2022

JUDGMENT OF CHURCHMAN J

Introduction

[1] Mr Mauha Fawcett appeals a decision of the Legal Aid Tribunal (the Tribunal), in relation to the grant of legal aid that he received for his retrial.[1] He alleges that the Tribunal was wrong in fact and law in finding that the statutory definition of 'legal aid services' does not accommodate the administrative tasks undertaken in managing a grant of legal aid. He seeks:

(a) a declaration that the administration of a legal aid grant by a provider is a legal aid service under s 4 of the Legal Services Act 2011 (the Act); and

(b) an order that the legal aid administration hours sought for that purpose be granted by the Legal Services Commissioner.

[2] The sole issue on appeal is whether legal aid administration falls within the definition of "legal services" in s 4 of the Act. Particularly, whether that definition includes the time spent by a provider interacting with the Commissioner, submitting applications for amendments to grants, and submitting invoices.

[3] The appeal is opposed by the Legal Services Commissioner (the Commissioner), who submits that the Tribunal did not err in fact or in law.

[4] The Auckland District Law Society (ADLS), the New Zealand Bar Association (NZBA), and the Defence Lawyers Association of New Zealand (DLANZ), appear as intervening parties. These parties were granted leave to intervene by Johnston AJ, on the basis that they would be able to assist the Court.[2]

[5] For the reasons identified below, I am of the view that the appeal should be allowed.

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1 *Re Fawcett* [2020] NZLAT 010.
2 *Fawcett v Legal Services Commissioner* [2021] NZHC 1436.

Background

Murder charges

[6] In 2014, Mr Fawcett was charged, convicted, and sentenced for the murder of Christchurch sex worker Mellory Manning, who was found dead in the Avon River in 2008. His conviction was overturned by the Court of Appeal,[3] which said the case had similarities with *Pora v R*.[4]

[7] The Crown conceded two points on appeal. The safety of Mr Fawcett's conviction was called into question following a diagnosis of foetal alcohol spectrum disorder, and the degree to which confessions Mr Fawcett had made to the Police could then be said to be reliable. Secondly, the amicus curiae appointed to assist Mr Fawcett at trial put forward inconsistent defences, against Mr Fawcett's wishes. As a result, Mr Fawcett's conviction was quashed, and a re-trial ordered.

[8] In addressing the conviction appeal, the Court of Appeal did not address the admissibility of the statements Mr Fawcett had made to the Police, saying that was instead an issue for retrial. As a result, that issue came before Dunningham J in 2020 and 2021. She excluded Mr Fawcett's statements to the Police pursuant to s 28 of the Evidence Act 2006, on the ground that they were unreliable.[5]

[9] Subsequently, in November 2021, Dunningham J dismissed the charge of murder against Mr Fawcett pursuant to s 147 of the Criminal Procedure Act 2011.[6] Therefore, the substantive criminal proceedings have come to an end. The dismissal of a charge pursuant to s 147 is deemed to be an acquittal. This matter comes for determination following the disposition of the criminal proceedings.

Legal aid applications

[10] Mr Fawcett's present counsel, Mr Stevenson, acted for him in the Court of Appeal and before Dunningham J. Mr Stevenson was assisted by Mr Cook and

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3 *Fawcett v R* [2017] NZCA 597 at [24].
4 *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.
5 *R v Fawcett* [2021] NZHC 2406.
6 *R v Fawcett* [2021] NZHC 2969.

Ms Kane. Mr Fawcett was legally aided throughout the proceedings. It is common ground between the parties that Mr Fawcett's case was complex and involved intensive legal efforts. There were at least 10 applications by counsel for amendments to the grant of legal aid, and in response, multiple requests by the Commissioner for further information. Mr Fawcett's case is not paradigmatic of applications for grants of legal aid.

[11] On 4 December 2019, Mr Fawcett's counsel made an application for an amendment to the grant of legal aid. This application sought a further 90 hours of legal aid for the purpose of junior counsel administering the legal aid grant. Counsel submitted that the work required for the management of the legal aid grant was of such a magnitude, that it distracted from the provision of services directed to the proceedings. Counsel sought to employ another lawyer for the purpose of managing that work. On 8 January 2020, the Commissioner declined that application, on the basis that time spent on administration of a grant of legal aid did not fall within the provision of legal services to Mr Fawcett.

[12] Counsel then sought a reconsideration of the 8 January 2020 decision, alleging that in the past, time spent administering a grant of legal aid had been treated by the Commissioner as being recoverable. Mr Stevenson in particular alleged that legal aid had been granted to him for administration in previous cases, and that it was appropriate in the present case. He said that this was so because of the significant, complex, and time-consuming nature of the administration necessary to manage Mr Fawcett's legal aid.

[13] On 21 February 2020, the Commissioner confirmed the previous decision of 8 January 2020. In doing so, the Commissioner acknowledged that Mr Stevenson had previously received funding for legal aid administration, but took the view that this had been provided incorrectly. The Commissioner stated:

> [Section] 4 of the Legal Services Act 2011 (the Act) defines the meaning of 'legal aid services' and 'legal services'. For aid to be granted, both require there to be "legal advice and representation". Legal Aid administration does not involve the provision of legal advice and representation. It is purely an administrative task. Accordingly, we will not grant the 90 hours you seek for this task.

> We view the decision in [suppressed] as being an incorrect interpretation of the Act which, fortuitously, benefitted you.

[14] Mr Stevenson then appealed to the Tribunal.

The Tribunal's decision

[15] Before the Tribunal, Mr Stevenson argued that the administration of legal aid amounts to representation of a client and can be seen as preliminary or incidental to the proceedings. The Commissioner reiterated the view that such work is not representation, or work that is preliminary or incidental to the proceedings.

[16] The Tribunal noted that:[7]

> It has been the long-standing practise of the Commissioner under this statute, if not earlier ones, not to grant aid for the paperwork involved in obtaining a grant or subsequently administering it. In the context of pre-grant work (work required to satisfy the Commissioner that a grant should be made), the Tribunal has previously found that there is no policy to fund such work.[8]

[17] The Tribunal then adopted the Commissioner's view, taking the position that administrative work is not representation of the client in the substantive proceeding, or assistance preliminary or incidental to any future or existing proceeding. It stated:[9]

> There is a fundamental difference between the work of advising and advocating for the client in the substantive legal process, including work done before charges are laid or proceedings are issued, and the work required to seek funding for that substantive work.
>
> I also agree with the Commissioner's contention that the complexity of the substantive case and the magnitude of the legal aid administration work are irrelevant. Such work is either "legal aid services" for all cases or it is not.

[18] The Tribunal considered that the fact that such funding has been awarded to Mr Stevenson in the past "tends to show that there is no practise to permit such funding", and that funding "may have been made by sympathetic grant officers".[10] It also noted that the fact that the Commissioner funds administration for duty lawyers

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7 Above n 1, at [62].
8 *Re DJ (Historic Abuse)* [2012] NZLAT 055 at [30].
9 Above n 1, at [63]–[64].
10 At [65].

for certain tasks, does not change whether such activities fall within the statutory definition of "legal services".

[19] The Tribunal ultimately concluded that administration of a grant of legal aid does not fall within the definition of legal services within the Act, and that the Commissioner's decision was not wrong in law.

Positions of the parties

Mr Fawcett

[20] Mr Cook submits that the Tribunal's decision was wrong in law. He says that the proper interpretation of 'legal services' includes legal aid administration, when considering the Act's context, plain meaning, and taking a rights-consistent interpretation.

[21] Mr Cook submits that the Act confirms that the obligations of a provider of legal aid are no different to the obligations on lawyers performing other kinds of practise under the rules and codes of the legal profession. He says the Lawyers Conduct and Client Care Rules 2008 are applicable, and that therefore a provider must comply with those rules. That includes obligations to justify the number of hours, expenditure, and invoices, as well as fully disclosing any dealing with or expenditure of client funds. He says that the duties of defence lawyers are wide and varied, constituting a heavy burden.

[22] Mr Cook says that the plain meaning of 'legal services' which includes 'assistance with taking steps that are preliminary or incidental to any proceeding', encompasses legal aid administration. He says that securing legal aid is a necessary and imperative aspect of a proceeding, in that if a provider does not have the funding, they cannot provide services. He says that the work involved in High Cost Case matters, particularly making applications, submissions on why more funding is needed, and justifying expenditure, is inextricably linked to the provision of legal services, in that it is preliminary or incidental to those services. He says that counsel may be required to prepare an entire synopsis of their defence, simply for the purpose of renumeration. He says:

> …legal aid administration is a pre-requisite for a defendant who has to rely on legal aid. In a case such as this, Dunningham J's ruling that the evidence was inadmissible, and the dismissal of the charge may well never have occurred without the grant extensions. In essence, true justice would not have prevailed had counsel not made such requests. They were, therefore, imperative in Mr Fawcett's access to justice and must be considered as part of the legal service that was provided to him.

[23] Mr Cook submits that the purpose of the Act supports his interpretation of s 4. He says that access to justice is meaningless without providing a defendant with sufficient resources to exercise it. He says that access to justice necessitates access to counsel and where appropriate, expert evidence, which requires funding. He says that the Act is the vehicle through which the fundamental rights of defendants pursuant to the New Zealand Bill of Rights Act 1990 (NZBORA) are given effect. He submits that it is in the interests of justice that there is little hindrance placed on counsel preparing an effective defence, because otherwise there is a serious risk of appeal, which would be more costly in terms of delay and funding. He says further that the exclusion of some legal aid costs means counsel must either work for free, or spend hours that ought to be spent on representation performing administrative tasks. He submits this is not consistent with the purpose of the Act.

[24] Mr Cook submits that the interpretation of s 4 that is most consistent with NZBORA is one that includes funding for legal aid administration. He says that a position by which counsel is forced to work for free or neglect a client's defence is not a rights consistent interpretation. He submits that if Parliament intended this to be the case, they should have expressly said so. He says that NZBORA should be given a generous interpretation, and that a particular policy consideration or concern for fiscal restraint should not impinge on these rights

[25] Mr Cook again refers to the fact that certain aspects of legal aid administration are funded for duty lawyers pursuant to the Duty Lawyer Service Operational Policy August 2019 (the Operational Policy). He says that:

> The responsibilities of duty lawyers are set out on pp 5-6 of the Operational Policy. This explicitly notes that "Duty lawyers" responsibilities include helping defendants complete a legal aid application forms and submit them to a Legal Aid office as soon as possible. Further the Operational Policy confirms that a duty lawyer will be paid for the time it takes to provide these services.

[26] Mr Cook submits that this is inconsistent with the Tribunal's view that "Such work is either "legal aid services" in all cases or it is not". He says that there is no principled justification to discriminate between duty lawyers and ordinary legal aid administration by providers. He says that providers should be paid for the legal work that is necessary to comply with the requirements of the legal aid regime. He submits that the administrative requirements of legal aid have resulted in the exit of practitioners from the legal aid system, thereby compromising the quality of representation provided to legally aided clients. He says that legally aided clients with complex cases are entitled to expect the same quality of legal representation as those who can afford private representation.

The Commissioner

[27] Counsel for the Commissioner, Ms Hansen, submits the Commissioner uses the term 'legal aid administration' (which is not defined by the Act) to describe the time spent by providers interacting with the Commissioner for the purposes of giving effect to and managing the legal aid scheme.

[28] Ms Hansen and the Commissioner accept that the time spent by a provider prior to the preparation and submission of an amendment application may be funded preparation work. However, she says that neither the act of filling out and submitting the amendment applications, or an invoice are legal services. She says these actions and interactions are not legal advice to, or representation of, or assistance provided to, a legally aided person to take steps in respect of a proceeding. Like the Tribunal, she maintains that there is a difference between advice and advocacy, and the work required to seek funding for substantive representation.

[29] Ms Hansen submits that the Commissioner's interpretation is consistent with the Act's legislative history, in that legal aid services have always been anchored in advice and representation in respect of a proceeding. She says that legal aid has only ever applied to matters within a substantive proceeding. She says that the term 'representation' was used in previous legislation, and that 'legal services' as a term should be regarded as identical in meaning.

[30] Ms Hansen submits that legal aid administration cannot be described as steps that are preliminary or incidental to a substantive proceeding. She says the Courts have described the term 'incidental' as meaning 'naturally attaching' or 'following on as a subordinate circumstance' to a proceeding.[11] She says that legal aid administration is not work that naturally attaches to, or which follows as a subordinate consequence of a proceeding. She submits that legal aid administration does not involve actions preceding or preparatory to a proceeding. She says:

> In a general sense, applications for amendments to grant may be preliminary to the delivery of legal services by a provider. Invoicing may be incidental to legal services that have been delivered. But they are not advice and representation in respect of proceedings or assistance with taking steps that are preliminary to, or incidental to the proceedings for which legal aid has been granted.
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> …
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> The Commissioner has already accepted that the preparatory work will be legal services. But the separate and distinct act of applying to the Commissioner for funding is neither advice or representation in respect of the proceeding or a step distinct from and following the proceeding.

[31] Ms Hansen says that s 28 of the Act supports the Commissioner's interpretation, as it provides that an aided person or a provider may make an application for amendments to a grant of legal aid. She submits that this reinforces the fact that making such an application is not legal services. She says that if an application for an amendment is legal services then there would be no provision for a legally-aided person to make it, because a legally-aided person cannot provide legal services to themselves.

[32] Ms Hansen submits that the Commissioner's interpretation is consistent with NZBORA. She says that in Mr Fawcett's case, his right of access to justice was upheld. He was provided with high quality representation, and received 2729 hours of legal aid plus substantial disbursements. On that basis, Ms Hansen says that Mr Fawcett was not denied access to justice by the Commissioner's interpretation, on the contrary, as a result of his counsel's efforts, he was acquitted. Ms Hansen comments that the Commissioner is concerned that this appeal is being used to

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[11] See *Yash v Legal Services Agency* (2006) 18 PRNZ 320 (HC).

collaterally criticise the adequacy of legal aid funding. She says that any issue of funding and eligibility is a matter for Parliament.

[33] Ms Hansen disagrees with Mr Cook's submissions on the Operational Policy. She submits that services provided by duty lawyers do not concern legal aid, and duty lawyer representation is not provided under a grant of legal aid. She says that duty lawyer services are a 'specified legal service' as defined in s 4 of the Act.

ADLS

[34] Counsel for ADLS, Ms Priest, in her written submissions, supports Mr Cook's submissions, and submits that the appeal should be allowed. She says that ordinarily a fixed legal aid fee would be sufficient to cover administration time. However, for complex and High Cost Cases, applications for amendments are necessary to obtain sufficient funding for legal counsel to fulfil their duties to their client and to the Court. This is an issue because the legal aid regime requires providers to apply for legal aid in advance of the work that needs to be undertaken.

[35] Ms Priest reiterates Mr Cook's submission that:

> The refusal to fund work, experts or travel where counsel believe is it essential to the preparation of an effective defence for their client places them in a conflicted position. Reconsideration of the ATG (or working without payment) are the only options available.

[36] Ms Priest submits that s 28 of the Act supports Mr Cook's interpretation. She says the statutory requirements in that provision mean that any work performed to prepare and submit an application for amendment must be incidental to any proceedings, and that it is administrative work that fits within the definition of legal aid services. She further says that the purpose of the Act supports Mr Stevenson's interpretation.

NZBA

[37] Counsel for NZBA, Mr Geiringer supports Mr Cook's submissions, and submits that the appeal should be allowed. He says that the work in question in this appeal is both preliminary and incidental to proceedings, and that it is legal advice and

representation. He says that the purpose of the Act and an analysis of the equivalent circumstances in a privately funded case supports this conclusion, in that:

> 7.1. equivalent work undertaken in a privately funded case would be considered part of the provision of legal services and billed accordingly;
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> 7.2. the purpose of the Act is to establish an effective and efficient legal aid system;
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> 7.3. the background to this case is a legal aid system in crisis;
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> 7.4. the Commission's interpretation of this definition is, in and of itself, a significant factor contributing to that crisis;
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> 7.5. were the Commissioner's interpretation to be upheld it would apply to all legal aid work;
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> 7.6. the Commissioner is taking an inconsistent approach by funding the same work when it is undertaken in different contexts; and
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> 7.7 accordingly, the Commissioner's interpretation undermines the purposes of the Act.

[38] Mr Geiringer submits that the work of devising a litigation strategy, advising on the need for an expert, and the work of providing a client a detailed opinion explaining the need for an expense, would all appear on a lawyer's bill as part of their legal services. However, the equivalent work in a legal aid matter is not included. Mr Geiringer says that the provision of those services to a client is the provision of legal services. He says:

> In order to be able to offer such advice, the lawyer needs to have an understanding of the relevant legal test. They need to have the legal knowledge or experience to know what evidence might be effective to assist the client to meet that legal test (or to undermine an opponent's evidence seeking to meet such a test). They need to have sufficient knowledge of the relevant legal field to understand the scope of expert assistance that is available. And they would need the legal skill of explaining all of this to a lay client in a way that the client can understand. In short, all of this work – not just devising the strategy, but explaining to the client why their money should be spent pursuing it - calls on a lawyer to use their core legal skills.
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> As an aside, such an opinion would appear to involve "giving legal advice to any other person in relation to the direction or management of" a proceeding. As such, it falls within the definition of "reserved areas of work" and therefore "legal work" under the Lawyers and Conveyancers Act 2006.[12]

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12 Section 6.

[39] Mr Geiringer submits that that the appellant's interpretation is available on the terms of s 4 and that a purposive interpretation supports that interpretation. He says that the present issue bears on the protection of fundamental constitutional rights, protected by NZBORA.

[40] In addition to the issue noted above by Mr Cook as to the Operational Policy, Mr Geiringer submits that the inconsistency identified is broader than just that for duty lawyers. He says that guidance produced for civil and family practitioners shows that they are generally told that administrative work is recoverable. He says that there is an inconsistency in the Commissioner's application of its interpretation, and that if that interpretation is to be preferred, then its inconsistent application means that other aspects of the legal aid scheme are unlawful.

[41] Mr Geiringer submits that the question of whether the legal aid system is in crisis is a matter which has been commented upon by both Winkelmann CJ and the President of the New Zealand Law Society.[13] He properly accepts that this is not at issue in the proceeding, and that it is not the role of the Court to redesign the system. However, he says that the Commissioner's interpretation undermines the efficacy of the legal aid system, and the Court is required to consider that impact.

[42] Finally, Mr Geiringer submits that from work undertaken by the ADLS and NZBA, involving the surveying of legal aid providers, the following matters are known:

> 30.1. roughly half of the work of lawyers on legal aid cases is unremunerated;
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> 30.2. the issue of work on applications for amendments to grant on high end cases has been identified as an area of particular concern;
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> 30.3. overall, the requirement for lawyers to complete a large quantity of work that is characterised as administration, and therefore unremunerated, is driving lawyers away from the legal aid system and preventing them from entering the legal aid system; and

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[13] Farah Hancock "Legal aid system 'broken and may collapse' – Chief Justice" (12 October 2021), Radio New Zealand https://www.rnz.co.nz/news/is-this-justice/453369/legal-aid-system-broken-and-may-collapse-chief-justice.

> 30.4. the lack of availability of legal aid providers generally, and experienced practitioners in particular, has contributed to a crisis where the system is not functioning well and is in danger of collapse.

DLANZ

[43] Counsel for DLANZ, Mr Lithgow KC, supports Mr Cook's submissions, and submits that the appeal should be allowed. He says that work associated with securing appropriate legal aid funding is properly regarded as a legal aid service under the Act. He submits that the use of the word 'administrative' minimises the true nature of the work involved and its importance, which requires close application of law and evidence. He says applications for amendment are essentially the provision of a legal opinion to the funding body.

[44] Mr Lithgow agrees that this appeal engages NZBORA. He says that the Act should be given a rights-consistent interpretation, and that the Supreme Court's comments on NZBORA in *Fitzgerald* require this. He submits that had Parliament intended to exclude the work in question from the ambit of funding then it would have done so explicitly.

[45] Mr Lithgow submits that the work in issue falls within the definition in s 4 because:

(a) seeking and securing funding is an integral part of legal advice and representation;

(b) administrative tasks are assistance that a practitioner provides a legally aided person for matters included in the Act; and

(c) the definition of legal services in the Act is non-exhaustive.

[46] He says:

> The process of seeking funding requires the legal aid provider to provide advice to the client about what would be helpful to advance their defence, set about and then represent those interests to the Commissioner. The process of seeking funding (either for the practitioner or for experts or other disbursements) is to advance the case for the legally aided person. It is not work completed for the benefit of the practitioner – but for the benefit of the

> legally aided person. The legislation envisages within its definition that legal service includes advice and representation.

[47] Mr Lithgow submits that the 'fixed fee schedules' include work that is associated with managing funding, reporting to legal aid and invoicing, and that these matters are paid as part of the fixed fee. He says that the Commissioner acknowledges that these matters are paid as part of the fixed fee. Like the issue in relation to the Operational Policy, he says this is inconsistent with the Commissioner's position in this appeal. He notes a number of other legal aid guidelines in which the work in issue in this appeal is included within eligible funding tasks. He says:

> With this litigation underway [it] appears the [Commissioner's] response is to be, when this was pointed out, to remove identified "administrative" tasks from the fixed fee/steps schedule to respond to the argument that these tasks are not "legal aid services".
>
> The argument that LSA is entitled to view differently "administrative tasks" as payable in some areas and not others as a reflection of their ability to make "policy decisions" is not tenable on a clear and proper reading of the Legal Services Act 2011 nor having regard to the proper foundation of the purpose for the provision of legal aid. It also does not accurately reflect what is actually involved in the task of seeking funding for experts and proper preparation time.

Approach to appeal

[48] This appeal is brought pursuant to s 59 of the Act, which may only be on a "question of law". The standard to be applied is whether the LAT and the Commissioner have made an error of law, rather than whether their decisions are correct.[14]

[49] As to what constitutes an error of law, Randerson J has noted:[15]

> It is undesirable to suggest any exhaustive list but a decision may be wrong [in law] if it derives from an incorrect application or interpretation of the statute; or if it is wrong in principle; or if the decision-maker has failed to take into account some relevant matter; or has taken account of an irrelevant matter; or if it depends upon findings which are unsupported by the evidence.

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[14] *R v Legal Services Commissioner* [2019] NZHC 2117; citing *Legal Services Agency v Brown* (2005) 17 PRNZ 523 (HC) at [30].

[15] *Legal Services Agency v Fainu* (2002) 17 PRNZ 433 (HC) at [27].

Analysis

Preliminary matters

[50] I record that at the outset of the hearing there was the consideration of an issue regarding the filing of an affidavit by the Acting Commissioner, Ms Baguley. Mr Stevenson sought to cross-examine Ms Baguley on her evidence. At that time, I granted Ms Hansen leave to withdraw that affidavit, as she had sought to do, and to amend her submissions removing reference to Ms Baguley's evidence. I declined Mr Stevenson's application to cross-examine Ms Baguley, and also his application to adjourn the hearing to require Ms Baguley to attend.

The Act

[51] As noted, the issue on appeal is whether legal aid administration falls within the definition of "legal services" in s 4 of the Act, so as to be the subject of a legal aid grant. The appeal involves a contest between the Commissioner's narrow interpretation of that definition, and the remaining parties' wider interpretation. A consideration of that issue requires an assessment of the purpose of the Act.

[52] The purpose of the Act is to promote access to justice by providing legal services to people of insufficient means, and delivering them in the most effective and efficient manner possible.[16] The meaning of a provision must be ascertained from its text and in the light of its purpose and context.[17] The following definitions are relevant:

> **legal aid services** means legal advice and representation (in relation to legal aid) described in paragraph (a) of the definition of legal services
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> **legal services**,—
>
> (a) in relation to legal aid, means legal advice and representation and, subject to subsection (2), includes assistance—
>
> (i) with resolving disputes other than by legal proceedings; and
>
> (ii) with taking steps that are preliminary to any proceedings; and
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> (iii) with taking steps that are incidental to any proceedings; and

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16 Section 3.
17 Legislation Act 2019, s 10(1).

(iv) in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings:

(b) in relation to anything other than legal aid, includes—

(i) legal advice and representation (including the kinds of assistance described in subparagraphs (i) to (iv) of paragraph (a)); and

(ii) the provision of legal information and law-related education

[53] The exception referred to in s 4(2) relates to legal aid for proceedings before the Waitangi Tribunal, and is not relevant to the present matter.

[54] Legal aid may be granted for either criminal or civil matters, as set out in ss 6 to 13. Applications are required to comply with s 14. There are conditions that apply to a grant of legal aid, as provided by s 18. A person must not provide a legal aid service unless they are an approved provider, and comply with the conditions of approval.[18]

[55] Section 28 provides for when an amendment to a grant of legal aid is sought. Such an application must be made by an aided person or the provider in a manner prescribed by the Commissioner prior to the final disposition. An application for an amendment may be made after the final disposition if the requirements in s 28(2) are met. Final disposition means "the final disposition of the matter to which the application relates, by a court, tribunal, or any other means".[19]

[56] Applications for legal aid, or amendments to a grant of legal aid are to be granted by the Commissioner, who may delegate her powers.[20] The Commissioner has the following functions:[21]

(a) to grant legal aid in accordance with this Act and the regulations

(b) to determine legal aid repayments where legal aid is granted:

(c) to assign a provider of legal aid services or specified legal services to an aided person:

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18 Section 75.
19 Section 28(6).
20 Sections 71 and 72.
21 Section 71(1).

(d) in relation to salaried lawyers,—

(i) to decide the allocation of cases among salaried lawyers:

(ii) to oversee the conduct of legal proceedings conducted by salaried lawyers:

(iii) to manage the performance of salaried lawyers:

(e) to carry out any other function conferred on the Commissioner by the Minister, by the Secretary, or by or under this Act or any other enactment.

[57] In carrying out her functions pursuant to s 71(1)(a) to 71(1)(d), the Commissioner must act independently.

[58] The Secretary of Justice also has functions under the Act. These are:[22]

(a) to 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.

[59] For the purpose of performing their functions, the Secretary may amongst other things, specify legal services to which the legal aid regime applies, determine the methods of delivery for legal services, and determine the allocation of legal services.[23]

Broader considerations

[60] Underlying this appeal is the contention that legally aided lawyers are under-renumerated by the legal aid regime, particularly in relation to complex criminal matters like those of Mr Fawcett. However, that issue is not before the Court, and nor can the matter turn on the views presented by the intervening parties as to whether the legal aid regime is in crisis. If that is so, the remediation of that issue is a matter for Parliament. The matter turns on the Act's definition of 'legal services'. Appeals of this kind may only be on a question of law.

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22 Section 68(1).
23 Section 68(2).

[61] Certain rights analyses can support the statutory interpretation exercise. However, the focus of the present appeal is solely on that exercise. It cannot be a vehicle for the appellant and the intervening parties to argue via a side-wind that the operation of the legal aid regime is inconsistent generally with NZBORA. Such an argument would properly be the subject of judicial review proceedings.

Definition of 'legal services'

[62] I agree with the submission made by Mr Lithgow that the use of the phrase 'legal aid administration' in relation to this appeal is unhelpful without a clear definition of what that includes. Indeed, Mr Cook at the hearing, also adopted that position, preferring to describe the work in question as representative work necessary to advance or ensure that a client's rights are upheld, specifically the right to a fair trial. It appeared to me that at some points counsel were talking past each other, and needed a clear list of matters that were agreed to be 'legal aid administration'.

[63] However, I note Ms Hansen's acceptance that time "spent by the provider prior to preparation and submission of [an] amendment application may be deemed preparation work that is funded under the grant". It appears to me to be difficult to distinguish between time 'spent prior to the preparation and submission' of an application, as described by Ms Hansen, and the making of an application for an amendment to a funding grant. I am not satisfied that it is appropriate to consider these two things to be in reality, entirely separate activities, unless the Commissioner only seeks to exclude eligibility for the filling out of forms. I was not advised that was the case.

[64] Nonetheless, I am ultimately of the view that each of the kinds of work listed above are capable of coming within the definition of legal aid services on its ordinary plain meaning, as submitted by Mr Cook and Mr Geiringer. Legal aid services means legal advice and representation, and includes assistance with the matters listed in paragraphs (i) to (iv). The matters described by Mr Cook and counsel for the intervening parties can, in my view, properly be described as steps that are either preliminary or incidental to any proceeding. I can see nothing in the Act which

positively excludes this interpretation, or that which requires the Commissioner's interpretation to be adopted.

[65] Further, there is clearly a difference between advice and representation, and the provision of services that are directed to securing or administering legal aid. However, that difference is irrelevant, given the question is simply whether the work in question falls within the definition of legal services. That definition includes provision of assistance with taking steps that are either preliminary or incidental to a proceeding. I am of the view that the work in question falls within that definition.

[66] I am also drawn to this conclusion that were Mr Fawcett able to afford private representation, the matters the Commissioner alleges are not legal services would indeed form part of the costs that Mr Fawcett would be required to pay. That, to me, implies that upon an "ordinary meaning" assessment of the term legal services, such work would be included. For all intents and purposes, those matters are indeed incidental to the provision of advice and representation, and are properly described as legal services, or matters that 'naturally attach' to the provision of legal services. I also accept Mr Geiringer's submission that such work falls within the definition of "reserved areas of work" and therefore "legal work" under the Lawyers and Conveyancers Act 2006. Again, this would seem to suggest that the work in question falls within the definition of legal services.

[67] Nor am I of the view that s 28 assists the Commissioner's interpretation. The fact that a legally aided person may themselves make an application for an amendment to their grant of legal aid does not appear to bear upon the issue of whether when a practitioner makes that application, they are providing legal services. A legally aided person cannot provide legal services to themselves with the support of legal aid. A provider is required to be a registered practitioner, and approved by the Secretary. However, the fact that a legally aided person may make an application for an amendment does not change the character of the work involved in that application itself. The evidence also supported the conclusion that, on the facts of this case, there was no way that Mr Fawcett could himself have provided the information sought – given its nature and complexity.

[68] Turning to the purpose of the Act, where two interpretations are reasonably open as to the meaning of a provision, the words of that provision should be given the one that best accords with the purpose of the legislation.[24] As noted, the purpose of the Act is to promote access to justice by establishing a system that provides legal services to people of insufficient means, in the most effective and efficient manner. That is not only in relation to criminal matters, but civil and family matters also. That purpose is also coloured by the functions of the Secretary, who is required to establish, maintain, and purchase high-quality legal services.

[69] The appellant alleges that the purpose supports his interpretation, given the fundamental importance of access to justice, and because the Commissioner's interpretation reduces the quality of representation received by legally-aided clients. In response, the Commissioner submits that Mr Fawcett received 2729 hours of legal aid, and that there is no room for a conclusion that the legal aid he received was inadequate. With respect, it is at this point that the parties have invited the Court to wade into muddy waters beyond the scope of the present appeal. What legal aid Mr Fawcett received, and its adequacy, is not in issue. This is an appeal on a question of law, specifically regarding the definition of legal services. There is no basis for the Court in the context of this appeal to enter into any analysis regarding adequacy, or the overall merits of the legal aid regime.

[70] However, it is also axiomatic that a provision is to be interpreted in light of its purpose, and that a rights-consistent interpretation is to be preferred.[25] I have recently said that access to justice "is a fundamental requirement of any legal system that purports to uphold the rule of law".[26] I note also Winkelman CJ's comment that NZBORA is to be given:[27]

> …an interpretation suitable to give individuals the full measure of the enacted fundamental rights and freedoms,[28] and one which renders the rights practical

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24 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538.
25 New Zealand Bill of Rights Act 1990, s 6.
26 *Griggs v Legal Services Commissioner* [2022] NZHC 3001 at [34].
27 *Fitzgerald v R* [2021] NZSC 131 at [41].
28 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328 per Lord Wilberforce, cited with approval in *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J; and *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268 per Cooke P.

> and effective, comprehensible beyond the ranks of judges and human rights academics.[29]

[71] Accordingly, on the basis that the purpose of the Act is to advance access to justice, and the general requirement to give practical effect to rights contained in NZBORA, I acknowledge that there is support for the interpretation proposed by the appellant in those sources. A rights consistent interpretation is to be preferred.

[72] That is no more than a conclusion that the Act itself is to be interpreted in accordance with law, and in a manner that gives practical effect to fundamental rights. The most rights and purpose consistent interpretation is one in which the work in question in this appeal is considered legal services, for the purpose of allowing providers to provide the highest-quality legal services possible.

Inconsistencies in practice

[73] It is common ground as between the parties that previously, grants have been made for administrative work. That was touched on by the Tribunal in its decision, and also in the correspondence between Mr Stevenson and the Commissioner prior to the decision under appeal. The Commissioner alleges that these grants have been made in error. Mr Stevenson alleges that these grants illustrate that legal aid is available for the work in question. In my view nothing turns on this. I acknowledge that there is a recorded inconsistency in practice by the Commissioner, and that the Commissioner's view throughout these proceedings has been unchanging. That does suggest to me that awards of legal aid for administrative matters in practice have been the exception, not the rule. Nevertheless, my view is that this inconsistency is simply evidence of the fact that the interpretation advanced by Mr Stevenson is available on the terms of the statute, and that the Commissioner's interpretation is necessarily one of practice, rather than law.

[74] As to the arguments made by the parties regarding duty lawyers, the fact that duty lawyers are enabled to support people to apply for legal aid does suggest that such work is legal services. Nor can I see why the fact that a duty lawyer provides a

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[29] *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [25] per Elias CJ and [103] per Tipping J.

'specified legal service' makes any difference to that matter. Specified legal services means legal services specified by the Secretary under s 68(2)(b), and are simply legal services to which sub-part 2 of pt 3 of the Act applies. That sub-part is directed to quality assurance and review of the providers of specified legal services. It appears to have no bearing on whether administrative work can be considered to fall within the definition of legal services. I note also that sub-part applies equally to "every provider of legal aid services".[30] As such, legal aid services are also specified legal services.

[75] I also consider that the fact that duty lawyers are providing legal services "in relation to anything other than legal aid" is irrelevant. The distinction between (a) and (b) of the definition of legal services does not appear to me to exclude the services which Mr Stevenson alleges fall within (a). Those paragraphs effectively are:

(a) 'legal services in relation to legal aid, means legal advice and representation and includes assistance with the matters noted in (i)–(iv)'; and

(b) 'legal services in relation to anything other than legal aid includes legal advice and representation (including the kinds of assistance described in subparagraphs (i) to (iv)), and the provision of legal information and law-related education.

[76] The clearest reading of that distinction appears to me to be that the provision of legal information and law-related education are not matters that a grant of legal aid is available for. Other than that factor, the distinction does not appear to be capable of carrying the meaning alleged by the Commissioner. I am not prepared to adopt the Commissioner's interpretation without a clear indication that it is appropriate. The distinction between (a) and (b) does not provide that indication.

[77] Further, as submitted by Mr Cook, in relation to the criminal fixed fee schedules, it is clearly recorded that:

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30 Section 74(a).

> **Invoicing**
>
> Reporting to Legal Aid and invoicing in line with fees under the applicable schedule are tasks deemed to be included in every fixed fee. Additional payment cannot be claimed for these tasks.

[78] That goes to establishing that such work, being interactions with the Commissioner in the management of a grant of legal aid and submitting invoices, is work that is properly included within the definition of legal services. That is because payment for such work is included within a fixed fee that a provider received in relation to legal aid matters. Providers are already being paid for such work where they are provided with a fixed fee. It is also a factor that is recorded in similar terms in the fixed fee schedules relating to Family Court matters.

[79] I am told that the Commissioner intends to review the schedules and remove administration tasks. However, this inconsistency effectively places the Court in the position where to adopt the Commissioner's interpretation would also require a recognition of the fact that the Commissioner has been applying her interpretation both inconsistently, and unlawfully. I am instead drawn to the view that the appellant's interpretation is correct, and that further clarification is required from the Commissioner as to when administrative matters may be subject to a grant of legal aid as a matter of policy, rather than law.

[80] The conclusions that I have reached in this case are based on the facts of this case. The case was clearly not typical of many criminal matters. That is particularly so in relation to the quantity and quality of information that it was necessary for counsel to provide to the Commissioner in relation to the application for amendment of the grant and billing. That work involved could not realistically be described as just involving "form filling". Obviously, in cases where the work concerned involves nothing more than filling in a simple form or forms, there is a less compelling argument that the work falls within the definition of the provision of providing legal services.

Result

[81] Accordingly, I am of the view that the Commissioner has made an error of law. I make a declaration that in the circumstances of this case, which involved work that

was significant, complex and time-consuming, the administration of the legal aid grant by the preparation of the application for an amended grant, correspondence with the Commissioner in respect of same and the work related to invoicing that goes beyond form filling may amount to the provision of a legal aid service.

[82] I decline to make a declaration that the administration hours sought are all the provision of a legal service. It is for the Commissioner to consider that in light of this judgment. It is appropriate to remit the decision back to the Commissioner to reconsider in light of this judgment. If costs are sought, the parties may file memoranda in the usual way.

Churchman J

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