IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA32/2023
[2025] NZCA 63

BETWEEN	LEGAL SERVICES COMMISSIONER Appellant
AND	MAUHA HUATAHI FAWCETT Respondent
	THE LAW ASSOCIATION OF NEW ZEALAND INCORPORATED Intervener
	NEW ZEALAND BAR ASSOCIATION | NGĀ AHORANGI MOTUHAKE O TE TURE INCORPORATED Intervener
	DEFENCE LAWYERS ASSOCIATION NEW ZEALAND INCORPORATED Intervener

Hearing:	7 May 2024
Court:	French, Courtney and Katz JJ
Counsel:	L M Hansen and D A Stephens for Appellant K H Cook for Respondent E P Priest and T Hu for The Law Association of New Zealand Incorporated F E Geiringer for New Zealand Bar Association | Ngā Ahorangi Motuhake o Te Ture Incorporated R M Lithgow KC and S W O Campbell for Defence Lawyers Association New Zealand Incorporated
Judgment:	21 March 2025 at 10.00 am

JUDGMENT OF THE COURT

A **The appeal is allowed in part.**

B **We answer the questions of law as follows:**

(1) **Was the High Court wrong to hold 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"?**

The High Court did not err in finding that the administration of Mr Fawcett's legal aid grant by the preparation of amendment to grant applications and associated correspondence with the Commissioner may amount to the provision of a legal aid service. The High Court did err, however, in finding that the time spent by Mr Fawcett's legal aid provider in relation to invoicing may amount to the provision of a legal aid service.

(2) **Was the High Court wrong to make a declaration?**

No.

C **We set aside the Commissioner's decision and direct her to reconsider Mr Fawcett's application for legal aid funding for the preparation of amendment to grant applications and associated correspondence, in light of this judgment.**

D **Leave is reserved to file memoranda on costs, not exceeding three pages in length. Any memorandum on behalf of the respondent is to be filed within five working days of delivery of this judgment. Any memorandum on behalf of the appellant is to be filed within a further five working days. A decision will then be made on the papers. If no memoranda are filed, costs are to lie where they fall.**

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] The respondent, Mauha Fawcett, was charged with murder. His defence was funded by a grant of legal aid, under the Criminal High Cost Cases legal aid regime (High Cost regime). Various applications were made for amendments to the legal aid grant, which sought additional funding for various aspects of Mr Fawcett's defence.

[2] The High Court found that, in the particular circumstances of Mr Fawcett's case, the "significant, complex and time-consuming" work undertaken by his legal team in preparing applications for amendments to grant (as well as "work related to invoicing that goes beyond form filling") may fall within the definition of "legal aid service" in the Legal Services Act 2011 (Act).[1] Work that falls within that definition is eligible for legal aid funding.

[3] The appellant, the Legal Services Commissioner (the Commissioner) now appeals that decision. The appeal is opposed by Mr Fawcett. The Law Association,[2] the New Zealand Bar Association | Ngā Ahorangi Motuhake o te Ture Incorporated (NZBA), and Te Matakahi | Defence Lawyers Association New Zealand (DLANZ) were each granted intervener status and made submissions opposing the appeal.

Background

[4] Mr Fawcett was convicted in 2014 of murdering a young Christchurch woman, Mellory Manning. The police investigation of Ms Manning's death was one of the largest ever undertaken by the Canterbury Criminal Investigation Branch.

[5] Mr Fawcett's murder conviction was largely based on inculpatory statements or confessions he had made to the police. However, following his conviction, Mr Fawcett was diagnosed with foetal alcohol spectrum disorder (FASD). This Court subsequently allowed Mr Fawcett's conviction appeal, by consent. Specifically, as the Crown conceded, there were concerns as to the reliability of Mr Fawcett's confessions, given his FASD diagnosis.[3]

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1 *Fawcett v Legal Services Commissioner* [2022] NZHC 3366 [judgment under appeal] at [81].
2 Formerly, the Auckland District Law Society.
3 *Fawcett v R* [2017] NZCA 597 at [22]–[24], citing *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.

[6] Prior to Mr Fawcett's retrial, his defence team challenged the admissibility of the statements he had made to the police, on reliability grounds. Dunningham J found that his statements were inadmissible.[4] As there was insufficient other evidence to sustain the murder charge, it was subsequently dismissed. This brought the substantive criminal proceedings to an end.[5]

[7] The retrial proceeding raised a number of difficult and complex issues. During 2019 alone, Mr Fawcett applied through counsel for at least 10 amendments to his grant of legal aid. Under the High Cost regime, Mr Fawcett was required to provide detailed supporting information and justifications for the proposed expenditure, including such things as explaining the nature of the Crown case; the nature of the proposed defence; the relevance of the proposed evidence (or task) to the defence; why the evidence (or task) was necessary; and how the evidence would contribute to the defence case. The Commissioner often sought further information. At times it was necessary for Mr Stevenson, counsel for Mr Fawcett, to liaise with third parties (including experts) to obtain the required information.

[8] The amount of time it was taking Mr Stevenson to manage the legal aid grant was detracting from his substantive legal work on the file. Accordingly, an application was made for an amendment to grant to provide 90 hours of funding for junior counsel for "legal aid management" (the legal aid management application). Funding was sought:

> To manage the legal aid file, including preparing invoices, amendment to grants, and liaising with experts and legal aid[.]

[9] The Commissioner declined the legal aid management application on the basis that the work involved was solely "administrative" in nature. The Commissioner's view was that preparing amendment to grant applications and associated invoicing did not constitute legal advice or representation and therefore did not fall within the definition of "legal aid services" in s 4 of the Act. Such work was accordingly not eligible for legal aid funding.

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4 *R v Fawcett* [2021] NZHC 2406.
5 *R v Fawcett* [2021] NZHC 2969.

[10] The Commissioner's decision was upheld on review by the Legal Aid Tribunal.[6] On appeal to the High Court, however, Churchman J found that the Commissioner had made an error of law, and made a declaration in the following terms:

> [81] … 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.

[11] The Judge declined, however, to determine whether the 90 hours sought by Mr Fawcett all fell within the definition of a legal services. Rather, this issue was remitted back to the Commissioner to reconsider in light of the High Court decision.[7]

The questions of law on appeal

[12] The approved questions of law on appeal are whether the High Court:

> (a) was wrong to hold that "legal aid administration", and specifically the time spent by a provider interacting with the Commissioner submitting applications for amendments to grant and submitting invoices, falls within the definition of "legal aid services" and "legal services" in s 4 of the Act;
>
> (b) … was wrong to grant the declaration at [81] of the judgment.

[13] The first question somewhat misstates the declaration made by the High Court (as set out at [10] above). The Judge did not find that the work referred to falls within the definitions of legal aid services and legal services in s 4 of the Act, but rather that it *may* do so (contrary to the Commissioner's view that such work could never fall within those definitions). The Judge also linked his declaration to the particular circumstances of Mr Fawcett's case, which involved work that was "significant, complex and time-consuming". The parties' submissions engaged with all aspects of the Judge's declaration. We therefore reframe the first question of law as follows, to link it more closely to the declaration actually made by the Judge:

> Was the High Court wrong to hold "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

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6 *Re Fawcett* [2020] NZLAT 10 [Tribunal decision].

7 Judgment under appeal, above n 1, at [82].

> 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"?

[14] The second question, on its face, is apt to mislead. The challenge is not to the substantive merits of the declaration, but rather whether it was appropriate to grant declaratory relief at all. To make that distinction clear, we reframe the second question of law as follows:

> Was the High Court wrong to make a declaration?

The legal aid scheme

Historical development

[15] The provision of legal aid has a long-standing history in the common law world as a means of ensuring access to justice. In England, various forms of free legal representation have existed since the ninth century. The first statutory provision for legal aid, known as *in forma pauperis*, was introduced in 1495.[8]

[16] New Zealand's legal aid system is rooted in this tradition and has gradually evolved, through incremental expansion. Limited criminal legal aid was first introduced in 1912.[9] Subsequently, five post-war statutes have addressed legal aid. The first of these, the Offenders Legal Aid Act 1954, conferred a discretion to grant criminal legal aid on any court.[10] The first civil legal aid scheme was provided for by the Legal Aid Act 1969, to be managed by a Legal Aid Board.[11] It defined the "[n]ature of legal aid" as follows:[12]

> Legal aid shall consist of representation, on the terms provided for by this Act, by a solicitor and so far as necessary by counsel, including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.

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8 Margaret Bazley *Transforming the Legal Aid System: Final Report and Recommendations* (Ministry of Justice, Wellington, November 2009) [Bazley Report] at [11].

9 Justices of the Peace Amendment Act 1912, ss 2 and 3.

10 Offenders Legal Aid Act 1954, s 2.

11 Legal Aid Act 1969. We note that civil legal aid was first legislated for in New Zealand in 1939 under the Legal Aid Act 1939. However, the Act was never implemented due to the outbreak of the Second World War.

12 Legal Aid Act 1969, s 16.

[17] Subsequently, the Legal Services Act 1991 covered both civil and criminal legal aid. The nature of civil legal aid was defined in identical terms to above.[13] That Act did not expressly define criminal legal aid.

[18] The Legal Services Act 2000 (the 2000 Act) defined "legal services" (for the purposes of both criminal and civil legal aid) as follows:[14]

> **legal services**,—
>
> (a) in relation to legal aid, means legal advice and representation; and includes assistance—
>
> (i) with resolving disputes other than by legal proceedings; and
>
> (ii) with taking steps preliminary or incidental to any proceedings; and
>
> (iii) in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings:

That definition has been carried through, in virtually identical terms, to the current Act.

[19] In 2006, amendments to the 2000 Act significantly broadened the eligibility for legal aid. This led to a greater than expected rise in legal aid spending.[15] As a result, the government undertook a fundamental review of the legal aid system, chaired by Dame Margaret Bazley. Her report, "Transforming the Legal Aid System" (Bazley Report), observed that the core function of a legal aid system is providing access to justice.[16] Further, she considered:

> 129. … that the provision of legal aid and associated schemes is undoubtedly a core function of government. State responsibility for the justice system and upholding legal rights and responsibilities imposes an obligation on the State to make justice accessible to all. The legal aid system plays a defining role in upholding the objective of access to justice, and is a core part of an effective justice system. In providing state-funded legal aid, the State upholds the principles of the rule of law and access to justice. This contributes to public confidence in the legitimacy and effectiveness of the justice system.

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13 Legal Services Act 1991, s 20.

14 Legal Services Act 2000, s 4(1), definition of "legal services".

15 *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [7].

16 Bazley Report, above n 8, at [13].

> 130. At the same time, it should be open to the government to determine the level of legal services it can afford to provide its citizens, and establish policies and mechanisms to manage this expenditure. The government has a key stake in devising a legal aid system under which decisions about resources, priorities, and targeting produce the most desirable outcomes in a principled, transparent, and accountable way. Public expenditure principles of equity, efficiency, and effectiveness should guide the nature and extent of the public legal services on offer.

[20] The Bazley Report identified various shortcomings in the legal aid system, including: an overly operational focus; dysfunctional relationships between the Legal Services Agency and its key stakeholders; reluctance by the Legal Services Agency to exercise its discretion; cumbersome administrative procedures; inflexible procurement provisions; variable quality of legal aid services; and over-reliance on complaints as a quality mechanism.[17]

[21] Following the release of the Bazley Report, the 2000 Act was repealed and replaced in 2011 with the current Act which (amongst other things) disestablished the Legal Services Agency and transferred responsibility for the administration of the legal aid scheme to the Ministry of Justice.[18]

Key features of the Act

[22] The purpose of the Act is set out in s 3, which provides that:

> The purpose of this Act is to promote access to justice by establishing a system that—
>
> (a) provides legal services to people of insufficient means; and
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> (b) delivers those services in the most effective and efficient manner.

[23] The Secretary for Justice (the Secretary) and the Commissioner have distinct but interconnected roles under the Act. The Secretary has overall responsibility for developing, implementing and administering legal aid policy and procedures, within the framework of the legislation. The Secretary is required "to establish, maintain and purchase high-quality legal services in accordance with [the] Act".[19] The Secretary may also "assess and determine the need for legal services by people with insufficient means" and "determine the method or methods for the delivery of [those] legal

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17 At [56].
18 Legal Services Act 2011, pt 4 sub-pt 1.
19 Section 68(1).

services".[20] A person must not offer legal aid services unless they have been approved by the Secretary.[21]

[24] The Commissioner is responsible for determining applications for grants of legal aid and assigning a legal aid provider to an aided person.[22] The Commissioner is required to act independently when performing her functions relating to the grant of legal aid.[23] In practice, the Commissioner delegates the responsibility for determining applications for legal aid to grants officers.[24]

[25] The legal aid scheme operates through applications and grants.[25] A legal aid grant is linked to a specific legal aid provider.[26] Part 2, sub-pt 1 of the Act outlines the circumstances under which legal aid may be granted. Legal aid is not available for all types of legal advice or representation but only in respect of certain specified proceedings.[27]

[26] A grant of criminal legal aid is dependent on financial eligibility, the seriousness of the offence and other special factors of the case. Eligibility for civil legal aid is dependent on financial eligibility and other special factors of the case. A legal aid grant may specify the maximum amount of legal aid that is authorised under that grant, which may be expressed as either a dollar amount or a maximum number of hours.[28]

[27] A legal aid grant can be modified through an application for an amendment to grant. Such applications must be made by either the aided person or the provider, in the prescribed manner.[29]

[28] Claims for payment must be submitted by the lead provider to the Secretary in the prescribed format and within certain timeframes.[30] The Secretary then refers the

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20 Section 68(2)(a) and (c).
21 Section 75(a).
22 Section 71(a) and (c).
23 Section 71(2).
24 Pursuant to s 72(1).
25 As outlined in pt 2 sub-pt 2.
26 Section 77(1)(c).
27 Sections 6 and 7.
28 Section 23.
29 Section 28(1).
30 Sections 97 and 98.

claim to the Commissioner for review.[31] The Secretary is obligated to pay the lead provider for every claim approved by the Commissioner.[32]

Policy and procedures — the Legal Aid Services Grants Handbook

[29] On 5 March 2012, following the enactment of the Act, the Secretary introduced a new approach to legal aid funding pursuant to which most legal aid work would be managed on a "fixed fee" basis. In the criminal context, the new policy required that all applications for criminal legal aid received from that date would be managed as a "Fixed Fee, Fixed Fee Plus or High Cost" case. The maximum grant for Fixed Fee cases comprised set dollar amounts for specified activities, together with pre-approved disbursements. For Fixed Fee Plus cases the maximum grant contains a mixture of fixed fees, fees approved on an hourly basis and disbursements requiring prior approval. The maximum grant for a High Cost case is set on an hourly basis.

[30] The version of the policy that applied to Mr Fawcett's case (which was managed under the High Cost regime) is set out in the Legal Aid Services Grants Handbook dated November 2019 (the Handbook). The High Cost regime is designed to manage complex and resource-intensive cases (including homicide, serious fraud and cases involving multiple sexual violation complainants) that cannot be appropriately managed under the standard Fixed Fee or Fixed Fee Plus regimes because the anticipated costs exceed the usual parameters of those regimes.

[31] High Cost cases are managed from the initial grant (which covers 40 hours of preparation time) on the basis of hours requested and approved by experienced grants officers on a staged basis for specific activities or attendances. The provider must submit a plan outlining the expected work and a specific budget is approved based on that plan, which can be adjusted as the case progresses. Further funding is requested in stages, by way of amendment to grant applications. Counsel is required to describe the funding sought for specific activities and attendances and to explain the need for funding for specific expert reports, witnesses, or other disbursements.

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31 Section 99(1).
32 Section 100(1).

[32] The Handbook states that the guiding principle for assessing funding requests is whether the "interests of justice" require the funding to be approved.[33] The Handbook emphasises that it is the role of the Commissioner (not the provider) to assess a reasonable fee for the work to be done, and refers to the following passage from *Legal Services Agency v Haslam*:[34]

> It is no longer a system based on the actual time and fees of counsel. Rather, it is a system where judgement is exercised by the administering body as to the appropriate fee for the work done or to be done. The difficulty arising from practitioners being able to dictate time and fees has been replaced by the difficulty of the [Legal Services Agency] having to make [their] own principled assessment of the appropriate fee for the work to be done.

[33] Hence, the Handbook states, to enable a reasonable fee to be assessed, funding requests must explain why the requested hours or disbursements are necessary. Further, a task breakdown and how the tasks will contribute to the defence case is described as "essential". Two specific examples are given of the type of supporting information required, one relating to expert witnesses and one relating to specialist reports. In both cases, it is noted, the Commissioner is required to assess the relevance and contribution to the defence (in advancing any defence or countering the Crown case) or the relevant witness or report. To assist the Commissioner to do this, the provider is required to provide information on:

i. the nature of the Crown case

ii. the nature of the proposed defence

iii. the relevance of the proposed expert evidence to the defence

iv. why the expert is needed and how they will contribute to the defence case.

Further, for specialist reports: "The application for amendment to grant must demonstrate why the report is needed and how it will contribute to a successful outcome for the customer."

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33 With reference to s 8(1)(c)(iii).

34 *Legal Services Agency v Haslam* (2007) 18 PRNZ 469 (HC) at [13]. We note that this quote predates the establishment of the Commissioner. The administration of legal aid was held by the Legal Services Agency.

Mr Fawcett's amendment to grant applications

[34] Mr Stevenson acted for Mr Fawcett throughout the proceedings, assisted by Mr Cook (who appeared as counsel for Mr Fawcett in this appeal) and Ms Kane.

[35] The Tribunal's decision related to two applications made by Mr Fawcett, through counsel, for amendments to grant. The first, made on 25 October 2019, was for additional time to analyse Mr Fawcett's police interviews that suggested his involvement in the murder (the confessions application). The second, made on 4 December 2019, was the legal aid management application (outlined above at [8]). Although only the legal aid management application is at issue in this appeal, we will also briefly summarise the confessions application, as it provides a helpful illustration of the type and scope of work that was involved in seeking amendments to Mr Fawcett's legal aid grant.

The confessions application

[36] As noted above at [5], the Crown's case against Mr Fawcett was largely reliant on various "confessions" he had made in police interviews. Mr Fawcett maintained that these were false confessions, made in response to police inducements. In the confessions application, Mr Stevenson stated that "[t]he impact of Mr Fawcett's FASD in the context of the case against him cannot be underestimated" and noted that it had underpinned his successful conviction appeal. The Crown did not accept, however, that the confessions were inadmissible. A pre-trial hearing on the issue was therefore necessary. The confessions application sought an amendment to grant of 140 hours for junior counsel to undertake an initial analysis of Mr Fawcett's (extensive) police interviews to further the preparation of his defence.

[37] The confessions application noted that Mr Fawcett's FASD diagnosis also impacted on his ability to instruct counsel. This was supported with reference to extracts from a neuropsychological assessment that had been undertaken. Mr Stevenson explained that the defence team sought to analyse the "facts" that

Mr Fawcett had told police against other sources of evidence available from the disclosure material. Funding was sought:

> … to undertake an analysis of Mr Fawcett's statements to police, to a level consistent with international best practice. The objective of this interview analysis is to investigate the degree of potential contamination and fit, then cross-reference — in a systematic and complete fashion, as far as that is possible — the results of that investigation.

[38] The proposed approach to analysing the statements was explained in detail. For example, it was proposed to break down each police statement, charting each "fact" detail by detail, then to set out for each detail:

- The sources of potential contamination, if any.
- The degree to which that detail can be corroborated by objective evidence.

The application noted that this was a "massive" task due to the sheer number of police interviews Mr Fawcett had given and the number of different versions of events he gave to police. Details were provided in the application of communications with a legal team who had undertaken a similar process in another high-profile murder case. A staged analysis was proposed, and details of the four proposed stages were set out. This was followed with a very detailed (step by step) outline of the work required for stage one, involving an analysis of 13 police interviews Mr Fawcett had given over a 14-month period.

[39] The Commissioner responded on 20 November 2019, seeking further supporting information including, amongst other things:

- An explanation of how counsel's proposal is consistent with "international best practice". Counsel will need to identify the documented international best practice referred to, and explain why the high level of analysis suggested here is necessary to provide the adequate representation necessary for Mr Fawcett in this case.
- An explanation of the extent to which this task has already been addressed in the preparation and presentation of Mr Fawcett's appeal against conviction — given that appeal's reliance of Mr Fawcett's FASD and that condition's effect on the reliability of any comments made in police interview.

[40] Mr Stevenson responded on 27 November 2019, providing the further information sought, in considerable detail. For example, on the issue of the

international best practice relating to false confessions, he noted that there "is a well-established empirical field of research in the academic disciplines of psychology, criminology and sociology on the subjects of police interrogation practices, psychological coercion, and false confessions", and identified a number of leading experts in the field. He explained that the research dated back to 1908, had been subjected to peer review and testing, was based on recognised scientific principles, methods and findings and had been accepted in the context of criminal and civil rights litigation. Mr Stevenson summarised the causes of false confessions identified in the empirical social science research literature and also identified various practical indicators of false confessions, and why they can seem so real. Mr Stevenson quoted a number of leading experts in the field and the information he provided was cross-referenced to numerous academic articles. Mr Stevenson explained why false confessions are notoriously hard to establish and annexed a detailed presentation prepared by the Innocence Project (a United States based non-profit organisation dedicated to exonerating individuals who have been wrongfully convicted of crimes) that set out the international best practice approach for criminal defence lawyers litigating false confessions.

[41] Mr Stevenson then also addressed, at length, why the work in respect of which funding was sought had not previously been undertaken in the context of Mr Fawcett's appeal against conviction. In support of his explanation, Mr Stevenson referred to various documents, including a memorandum filed by the Crown in this Court, and this Court's appeal decision. Mr Stevenson also provided a detailed summary of the expert witness statements that had been prepared for the purposes of the appeal.

[42] Mr Stevenson noted that this Court, in allowing the appeal (which the Crown conceded) had noted that the reliability of the confessions would be an issue at retrial. Mr Fawcett's FASD, memory deficits, tendency to fill memory gaps by confabulation, and high suggestibility were key concerns. Mr Stevenson likened the situation to the *Pora* case, explaining that a cognitively impaired defendant's false confessions required thorough scrutiny. He described 13 police interviews, with transcripts between four and 235 pages each. These had to be cross-referenced with over 10,000 disclosure documents.

[43] Despite Mr Stevenson's extensive advocacy efforts on behalf of Mr Fawcett, the Commissioner only approved 90 of the 140 hours sought for confessions analysis. On review, however, the Tribunal overturned that decision, finding that counsel had justified a grant for the full 140 hours sought.[35]

The legal aid management application

[44] On 4 December 2019, Mr Stevenson submitted the legal aid management application which is at issue in this appeal. It sought the approval of 90 additional hours for junior counsel to manage the legal aid grant. Mr Stevenson noted that the disclosure in the case, and the corresponding preparation required, had been "extraordinary". He again noted that Mr Fawcett's FASD diagnosis affected his ability to instruct counsel, adding a further layer of complexity. Mr Stevenson stated that:

> The legal aid for this case has been an enormous task to manage. I have been a defence lawyer for over 20 years and the work involved with this file to manage the legal aid is unlike any other file I have dealt with in the past…
>
> Due to the complexity and sheer volume of work required to keep up with the legal aid, I have engaged another barrister in my chambers — [Ms] Kane — to assist with this work. I cannot do it — it takes too much time and removes me from trial, appeal and pre-trial preparation. I am writing to seek an amendment to grant for hours to manage the legal aid administration of this file. I understand that it is unusual to seek hours for legal aid work but there are several reasons why this case is extraordinary and justifies a grant being made.

[45] Mr Stevenson referred to two other murder cases managed under the High Cost model where significant legal aid grants had been made for the purposes of legal aid administration. He also noted that in the 2019 year alone, there had been at least 10 amendment to grant requests on behalf of Mr Fawcett, multiple requests from the Commissioner for further information, and at least seven invoices. Each amendment to grant request had been time consuming. As the amounts of funding requested were significant, a greater level of detail than necessary had been required to explain why the funding sought was necessary.

[46] Mr Stevenson noted that in addition to the three approved counsel there were at least nine others involved with the file (including paralegals, investigators, and various experts). As part of the administration of the legal aid grant, it was necessary

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35 Tribunal decision, above n 6, at [59].

for counsel to: engage with the third parties involved to prepare estimates; obtain the correct paperwork and supporting information from them; prepare amendment to grant forms; and draft explanatory letters with sufficient detail for consideration by the relevant grants officer.

[47] Mr Stevenson acknowledged that under the Fixed Fee regime, providers are expected to absorb the cost of legal aid administration within the fixed fee structure. He submitted, however, that Mr Fawcett's case was different, given its complexity and the amount of work required. Mr Stevenson suggested that a review of the volume of material provided by counsel to Legal Aid on the file would give the grants officer some insight into the work that had been involved in managing the legal aid grant. Further, this work had to be undertaken by a lawyer, as a comprehensive working knowledge of the file was necessary. Mr Stevenson conservatively estimated, based on timesheet records, that the time spent developing amendment to grant applications and corresponding cover letters in 2019 alone had been more than 30 hours. Responding to the Commissioner's requests for further information (sometimes involving multiple rounds of correspondence in relation to the same application) had also required more than 30 hours of work. Invoicing had required a further 10 hours.

The Commissioner's decisions

[48] On 8 January 2020, the Commissioner declined the legal aid management application, on the basis that the work involved did not constitute the provision of legal services to Mr Fawcett.

[49] Mr Fawcett (through counsel) sought a reconsideration of that decision. On 21 February 2020, the Commissioner confirmed her original decision, on the basis that:

> [Section] 4 of [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 [a previous case] as being an incorrect interpretation of the Act which, fortuitously, benefitted you.

The Tribunal's decision

[50] Mr Fawcett applied to the Tribunal for a review of the Commissioner's decision. The Tribunal upheld the Commissioner's decision, finding that the Commissioner's decision to "decline funding to manage the paperwork for legal aid [was] neither manifestly unreasonable nor wrong in law".[36]

The High Court decision

[51] Mr Fawcett appealed to the High Court. The sole issue on appeal was whether "legal aid administration" (namely the amendments to grants work and associated invoicing) fell within the definition of "legal services" in the Act.[37] The relevant definitions are as follows:[38]

> **legal aid services** means legal advice and representation (in relation to legal aid) described in paragraph (a) of the definition of legal services
>
> **legal services**,—
>
> (a) in relation to legal aid, means legal advice and representation and … includes assistance—
>
> (i) with resolving disputes other than by legal proceedings; and
>
> (ii) with taking steps that are preliminary to any proceedings; and
>
> (iii) with taking steps that are incidental to any proceedings; and
>
> (iv) in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings …

[52] The Judge found that, on the ordinary and plain meaning of the words used, applications for amendments to grant and submitting invoices are capable of coming within the definition of legal aid services.[39] He stated that:

> [65] … 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.

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36 At [70].
37 Judgment under appeal, above n 1, at [2].
38 Legal Services Act 2011, s 4(1), definition of "legal aid services" and "legal services".
39 Judgment under appeal, above n 1, at [64].

[53] The Judge found that legal aid administration could properly be "described as steps that are either preliminary or incidental to any proceeding" under s 4(1)(a)(ii) and (iii) of the Act.[40] Specifically, the relevant interactions and activities (to the extent they were significant, complex and time consuming) may constitute assistance to take steps that were either preliminary or incidental to the criminal proceedings.[41] In the Judge's view, this interpretation also best reflected the statutory purpose of promoting access to justice by providing legal services to people of insufficient means, and delivering them in the most effective and efficient manner possible.[42] Further this interpretation would best give practical effect to the rights contained in the New Zealand Bill of Rights Act 1990 (NZBORA).[43]

[54] The Judge emphasised that his findings were based on the facts of Mr Fawcett's case, which was not typical of many criminal matters, particularly 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".[44] Here, the work involved could "not realistically be described as just involving 'form filling'".[45] However, in cases where the work concerned "involve[d] nothing more than filling in a simple form or forms" the Judge's view was that the argument that the work fell within the definition of "legal services" would be less compelling.[46] Ultimately, the Judge allowed the appeal and made the declaration quoted at [10] above. The issue of whether the specific hours claimed in the legal aid management application were justified was remitted to the Commissioner to reconsider in light of the High Court decision.[47]

"Legal services" — an inclusive definition

[55] The primary issue on appeal is whether the Judge erred in finding that the work undertaken by Mr Fawcett's legal aid provider in preparing applications for amendments to grant, and work related to invoicing that goes beyond form filling, is capable of falling within s 4(a)(ii) and (iii) of the definition of legal services. It is

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40 At [64].
41 At [81].
42 At [68]; and Legal Services Act 2011, s 3.
43 At [71].
44 At [80].
45 At [80].
46 At [80].
47 At [82].

necessary to first address, however, the Commissioner's submission that the Judge misunderstood the inclusive nature of the definition of legal services and, specifically, the interrelationship between the chapeau in para (a) and sub-paras (i) to (iv) of the definition. We repeat the relevant parts of the definition here, for ease of reference:[48]

> **legal services**,—
>
> (a) in relation to legal aid, means *legal advice and representation* and … includes assistance—
>
> (i) with resolving disputes other than by legal proceedings; and
>
> (ii) with taking steps that are preliminary to any proceedings; and
>
> (iii) with taking steps that are incidental to any proceedings; and
>
> (iv) in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings …

[56] The Judge's view of the interrelationship of the phrase "means legal advice and representation" in the chapeau with sub-paras (i) to (iv) is set out at [52] above. The Judge stated that there is "clearly a difference between advice and representation" and "the provision of services that are directed to securing or administering legal aid".[49] He went on to state, however, that the difference was "irrelevant" because sub-paras (ii) and (iii) expand the definition of legal services to include assistance with taking steps that are either preliminary or incidental to a proceeding.

[57] Ms Hansen, for the Commissioner, submitted that the Judge erred by failing to appreciate that the four categories of assistance set out in sub-paras (i) to (iv) are simply examples or subcategories of "legal advice and representation". They are not something *different* to legal advice and representation. The words "legal advice and representation" in the chapeau are overarching. Legal services in relation to legal aid *means* "legal advice and representation". Hence, Ms Hansen submitted, "assistance" refers to legal advice and representation, and (in respect of para (a)(ii) and (iii)) the relevant assistance must be in relation to a step preliminary to, or incidental to an eligible proceeding.

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48 Legal Services Act 2011, s 4(1), definition of "legal services" (emphasis added).

49 Judgment under appeal, above n 1, at [65].

[58] Mr Cook's submissions (and those of the interveners) did not engage with this issue in any depth. Rather, they proceeded on the basis that the legal aid administration services provided to Mr Fawcett did constitute (at least) representation in or incidental to his criminal proceeding, rather than being something different.

[59] We note that the definition of "legal services" in the Act is an inclusive definition. As Lord Watson explained in *Dilworth v Commissioner of Stamps* the word "includes":[50]

> … is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.

[60] The learned authors of Bennion, Bailey and Norbury on Statutory Interpretation explain further that:[51]

> An inclusive definition modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered. This kind of definition typically takes the form "X includes".
>
> …
>
> What inclusive and exclusive definitions have in common is that they specify matters that are, or are not, to be treated as caught by the defined term but otherwise leave the natural meaning of the term intact.

[61] Hence, an inclusive definition expands the meaning of the defined term so that it captures things that might not otherwise fall under its usual scope.[52] Accordingly, the relevant term or phrase carries its ordinary meaning, supplemented by the special meaning provided by the inclusive definition.[53] Inclusive definitions are commonly used when the central meaning of a term is sufficiently clear, yet uncertainty may exist around the boundaries. The focus on borderline cases is intentional, given that the core concept of the word requires no further clarification.[54]

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50 *Dilworth v Commissioner of Stamps* [1899] AC 99 (PC) at 105–106.

51 Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at [18.3].

52 At [18.3], citing *Revenue and Customs Commissioners v Premier Foods Ltd* [2007] EWHC 3134 (Ch), [2008] STC 176 at [17].

53 Bailey, above n 51, at [18.3], citing *R (Sisangia) v Director of Legal Aid Casework* [2016] EWCA Civ 24, [2016] 1 WLR 1373 at [22]; *Nutter v Accrington Local Board of Health* (1878) 4 QBD 375 at 384; and *Ex p Ferguson* (1871) LR 6 QB 280 at 291.

54 Bailey, above n 51, at [18.3].

[62] We accept the Commissioner's submission that the word "assistance" in the definition must obviously refer to assistance of a legal nature, and Mr Cook did not suggest otherwise. As noted above at [16], the predecessor provisions to the current definition used the somewhat more cumbersome phrase "all such assistance as is usually given by a solicitor or counsel".[55] Similar terminology is used in the United Kingdom and Western Australian legal aid legislation.[56] There is nothing to suggest that when the Act was enacted Parliament intended to expand the meaning of "assistance" beyond this, to encompass types of assistance that are non-legal in nature.

[63] Turning to the relationship between the chapeau of the definition and sub-paras (i) to (iv), we reiterate that not all types of legal advice and representation are eligible for a grant of legal aid. Rather, legal aid may only be granted "in respect of" the proceedings listed in ss 6 and 7 of the Act. Hence, to be eligible for legal aid funding, there must be some connection between an eligible proceeding and the relevant legal advice and representation. Sometimes the connection will be direct and obvious — examples in the criminal context include: explaining the charges and the Crown case; advising on available defences; and representing a defendant in court.

[64] There is room for considerable uncertainty, however, at the boundaries. How close does the nexus have to be between legal advice and representation and an eligible proceeding to qualify for legal aid funding? Sub-paras (i) to (iv) address this uncertainty by expressly including within the definition of legal services four categories of legal activity that are each connected to a proceeding in some way, but where the relevant connection may be relatively weak or indirect. Hence, legal assistance with resolving disputes other than by legal proceedings, with taking steps that are preliminary or incidental to any proceeding, or in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings, may each constitute legal advice and representation that is eligible for legal aid funding.

[65] It appears to us that the Judge's statement that there is "clearly a difference between advice and representation" and "the provision of services that are directed to

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55 Legal Aid Act 1969, s 16.

56 See: the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK), s 42, definition of "representation" and "legal services"; and the Legal Aid Commission Act 1976 (WA), s 4(1), definition of "legal aid".

securing or administering legal aid" was likely poorly expressed, rather than reflecting a fundamental misunderstanding of the inclusive nature of the definition of legal services.[57] It is possible he was referring to "advice and representation" that has a direct nexus to an eligible proceeding, of the type we refer to at [63] above. The Judge recognised, however, that sub-paras (i) to (iv) expand the scope of eligible legal services beyond this, and focussed his analysis on whether legal aid administration could arguably fall within one of those categories. Ultimately, to the extent that the Judge's comment may have been in error, the error does not appear to have impacted his overall analysis or the outcome.

[66] In conclusion, the four examples of legal "assistance" set out in sub-paras (i) to (iv) of the definition of legal services expand the meaning of "legal advice and representation" in respect of an eligible proceeding. Hence, it is not only legal advice and representation that has an immediate and direct nexus to the relevant proceeding that is included within the scope of the definition. Rather, the four categories of legal assistance set out in sub-paras (i) to (iv) also fall within the definition of eligible "legal services". Each of those matters has some connection to an eligible proceeding, but the connection may be relatively weak, or indirect.

Were the amendments to grant work and associated invoicing "preliminary" to Mr Fawcett's proceedings?

[67] The Judge found that the work in issue could potentially fall within both sub-paras (ii) and (iii) of the definition of legal services. We consider para (a)(ii) first.[58] Specifically, did the Judge err in finding that the relevant work was capable of constituting legal assistance "with taking steps that are preliminary to any proceedings"?

[68] Ms Hansen submitted that it is clear from the use of the word "preliminary" that the relevant step must be one that is temporally prior to the commencement of an eligible proceeding. In support of this submission, she referred to the High Court decision of Miller J in *Legal Services Agency v MK*, where his Honour provided the

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57 Judgment under appeal, above n 1, at [65].
58 At [65].

following definition of the word "preliminary" in the definition of legal services in s 4 of the 2000 Act: [59]

> [32] The word "preliminary" in the definition of legal services is used as an adjective. In that sense it means "preceding and leading up to the main subject or business; introductory; preparatory": *Oxford English Dictionary*, Second Ed., 1989 Oxford University Press. This definition tends to confirm that the services for which aid is sought under sub-paragraph (ii) of the definition of legal services must have as their object the commencement or defence of eligible proceedings, that being the object of the grant of legal aid in such a case.

[69] While not conceding this point, Mr Cook accepted that the legal aid administration services at issue in this appeal are "more likely" incidental to Mr Fawcett's proceeding than preliminary to it.

[70] Mr Geiringer submitted that the legal aid administration at issue in this appeal would comfortably meet the requirements of Miller J's definition. Specifically, there was a proceeding, and the work was being done prior to the main hearing of that proceeding and in aid of achieving a successful outcome at that hearing for Mr Fawcett. We do not find that submission persuasive. It treats the "main hearing" of the proceeding as, in effect, a separate proceeding. Hence, if work is done prior to the main hearing, it is preliminary to a proceeding. A hearing, however, is simply a step in a proceeding. It is not a proceeding in itself. Steps that are "preliminary" to a proceeding must refer, as the Commissioner suggests, to steps that occur temporally prior to the commencement of an eligible proceeding but nevertheless have a nexus to the prospective proceeding. This would include, for example, providing a legal opinion on whether a potential claim has sufficient merit to commence a proceeding.

[71] The work at issue in this appeal occurred during the course of Mr Fawcett's criminal proceeding. It was not preliminary to it. It cannot therefore fall within para (a)(ii) of the definition of legal services. The Judge erred in finding otherwise.

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[59] *Legal Services Agency v MK* HC Auckland CIV-2007-404-5943, 29 April 2008.

Are "incidental" steps limited to steps that occur after the conclusion of a substantive proceeding?

[72] We now turn to consider the Judge's finding that the relevant work is capable of falling within para (a)(iii) of the definition of legal services ("taking steps that are incidental to any proceedings").

[73] We first address the Commissioner's submission that para (a)(iii), like para (a)(ii), includes a temporal limitation. Specifically, Ms Hansen submitted that assistance to take steps incidental to any proceedings, correctly interpreted, refers only to steps that occur *after* the conclusion of an eligible proceeding. The examples Ms Hansen gave were applications for the prerogative of mercy and applications for an ex gratia payment arising out of a wrongful conviction. Ms Hansen submitted that such applications are distinct "steps" that are incidental to previous criminal proceedings, and for which legal aid may be granted.

[74] Ms Hansen cited the High Court decision of McKenzie J in *Yash v Legal Services Agency* in support of this argument.[60] The decision in *Yash* concerned whether legal aid funding was available in respect of a petition to the Governor-General to exercise the prerogative of mercy. The appellant had been convicted of murder, but a person living overseas had subsequently claimed responsibility. The Judge noted that there had been previous criminal proceedings in the High Court and this Court. Further, if the petition was successful in obtaining the relief the appellant sought, there would likely be further criminal proceedings in this Court.[61]

[75] Against this background, the issue before the High Court was whether legal assistance in respect of the petition to the Governor-General could properly be regarded as assistance with taking a step that was either preliminary or incidental to the original proceedings or the prospective future proceeding. Counsel for the Legal Services Agency submitted that the petition was not incidental to the original proceedings, as those proceedings had now come to an end. McKenzie J disagreed. He held that legal aid was available for a petition to the Governor General to exercise

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

the prerogative of mercy as a step incidental to the concluded proceedings. He noted that the definition of "incidental" in the Oxford English Dictionary included both "naturally attaching" and "following on as a subordinate circumstance".[62] McKenzie J considered that the petition could properly be regarded as both "naturally attaching" or "following on as a subordinate circumstance" to the original proceeding.[63] Alternatively, the petition could be regarded as a step preliminary to the prospective future proceeding.[64]

[76] We accept Mr Geiringer's submission that the decision in *Yash* does not support the temporal restriction that the Commissioner seeks to place on the word "incidental". On the facts of *Yash*, any petition to the Governor-General could only be made after the original proceedings had been completed. However, there is nothing in the decision that suggests that *only* steps taken after the conclusion of an eligible proceeding could be "incidental" to it. On the contrary, McKenzie J found that a petition to the Governor-General would meet both limbs of the definition of "incidental" in the Oxford English Dictionary — "naturally attaching" and "following on as a subordinate circumstance".[65] Only the second limb includes a temporal limitation.

[77] Nor do other leading dictionary definitions of incidental (set out at [78] below) suggest that the word "incidental" is subject to a temporal limitation. It may refer to subsequent events but will not always do so. We accordingly reject the Commissioner's submission that assistance to take steps incidental to any proceedings, correctly interpreted, refers only to steps that occur *after* the conclusion of a substantive proceeding.

What is the natural and ordinary meaning of "incidental" in the definition of "legal services"?

[78] The meaning of a provision "must be ascertained from its text and in the light of its purpose and context".[66] Our starting point for interpreting para (a)(iii) is to consider the natural and ordinary meaning of the word "incidental". As noted at [75]

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62 At [14].
63 At [14].
64 At [15].
65 At [14].
66 Legislation Act 2019, s 10(1).

above, McKenzie J referred to the Oxford English Dictionary definition of "incidental" in *Yash*. We refer to two further dictionary definitions, which are to similar effect. First, the Collins Dictionary defines "incidental" as:[67]

> 1. happening in connection with or resulting from something more important; casual or fortuitous
>
> 2. … found in connection (with); related (to)
>
> 3. … caused (by)
>
> 4. occasional or minor …

Closer to home, *The New Zealand Oxford Dictionary* defines incidental as:[68]

> … **1** (often foll. by *to*) **a** having a minor role in relation to a more important thing, event, etc. **b** not essential. **2** (foll. by *to*) liable to happen **3** (foll. by *on, upon*) following as a subordinate event …

All three dictionary definitions are consistent with our understanding of the natural and ordinary meaning of the term incidental.

[79] The full context in which the word incidental is used here is:[69]

> **legal services** … means legal advice and representation and … includes assistance … with taking steps that are incidental to any proceedings[.]

[80] Hence, the relevant steps must be "incidental" to an eligible proceeding. As explained above, sub-paras (i) to (iv) are each directed to the required nexus between the relevant assistance and the eligible proceeding. With reference to the Collins Dictionary definition of incidental, the "something more important" is the proceeding. The relevant step must be incidental to that proceeding. It must therefore have some connection to the proceeding, but the step may relate to a matter that is non-essential, secondary, indirect, subordinate, or which "naturally attaches" to the proceeding.

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67 *Collins English Dictionary* (online ed, Harper Collins), definition of "incidental".

68 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 549 (emphasis in original).

69 Legal Services Act 2011, s 4(1), definition of "legal services".

Is the preparation and submission of invoices capable of falling within the definition of legal services?

[81] The legal aid management application sought funding for two categories of work — invoicing and amendments to grant. We will first consider the invoicing work.

[82] The application noted that at least seven invoices had been submitted during the 2019 year. Mr Stevenson stated that it had been a "time-consuming and complicated task" to undertake the invoicing in the case, which had involved invoices in respect of three counsel, the provision of paralegal services, and various disbursements. Based on timesheet records a "conservative" estimate of time spent on invoicing was "almost 10 hours".

[83] The Judge found that where invoicing goes beyond "form filling" it may amount to the provision of a legal aid service, but that:[70]

> 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.

[84] Ms Hansen submitted that the nature of invoicing is form filling, and regardless of the complexity, there is no possibility for invoicing to go beyond form filling. Accordingly completing invoices is incapable of falling within the definition of legal services.

[85] Mr Cook, on the other hand, submitted that invoicing for legal aid work is significantly more complex than one for a private client. The form requires the provider to answer:

> If this is a final invoice, please state work completed and the results of the proceedings. If this is an interim invoice, please state work completed for the part of the proceedings being claimed.

Mr Cook submitted that this is not mere form filling. It requires the provider to justify how they have expended the legal aid funding, which can be time-consuming.

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70 Judgment under appeal, above n 1, at [80].

[86] As Mr Geiringer acknowledged, it is "generally accepted that lawyers should not bill their clients for time spent administering the lawyer's practices". This is reflected in rr 9 and 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which make it clear that a lawyer is only entitled to charge a client for "services" that have been provided to that client by the lawyer. A "service" typically refers to the professional work performed on behalf of the client — such as legal advice, representation (including representing the client's interests to third parties), drafting documents, or appearing in court.

[87] Completing an invoice is not a *service* that a lawyer provides to a client, it is work undertaken primarily for the benefit of the lawyer. Preparing invoices is an administrative task that is tied to the operation and management of the lawyer's practice, not a direct legal service to a client. Such costs are generally absorbed by a firm or sole practitioner as part of the costs of running a practice. By analogy, we note that it would be highly unusual for other service providers, such as medical practitioners or tradespeople, to invoice clients for the time spent by the provider in preparing a bill for the services that have been provided.

[88] We were not referred to any of the actual invoices that were provided to the Commissioner in this case. We accept, however, that the Commissioner's invoicing requirements are likely to be relatively detailed. The provision of detailed invoices is also common in the practice of law in the private sector, however, particularly in the civil context. In our view the fact that invoices might be detailed does not, in itself, transform the nature of the underlying work from administrative work into the provision of legal services.

[89] Here, we note that approximately 10 hours was spent on invoicing over a period of approximately one year, in a highly complex criminal case. This does not seem to be obviously excessive, or out of the normal range of what might be expected. More complex cases (however they are funded) are likely to require more detailed billing, given the greater fees involved.

[90] In conclusion, on the evidence before us we have not been persuaded that the work associated with the preparation and submission of invoices in relation to the legal

costs of defending Mr Fawcett was capable of falling within the definition of legal services. The Judge erred in finding otherwise.

Is the time spent by a provider in relation to amendment to grant applications capable of falling within the definition of legal services?

[91] We now turn to consider whether the Judge erred in finding that the time spent by a provider corresponding or otherwise interacting with the Commissioner in submitting applications for amendments to grant is capable of falling within the definition of legal services.

[92] There are two key reasons why the Commissioner says that such work cannot fall within the definition of services. The first relates to the nature of the work — namely it is "administrative" rather than legal work. The second (related) submission concerns who the relevant communications were directed to — namely the Commissioner, rather than Mr Fawcett.

The nature of the amendments to grant work

[93] We will first consider the nature of the work. A helpful frame of reference is to consider whether the work would have been likely to fall within the definition of legal services if the relevant communications had been directed to Mr Fawcett, rather than the Commissioner.

[94] The Judge found that in a normal, privately funded, lawyer-client relationship, such work would have been chargeable to the client. He stated that:

> [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.

[95] We agree with the Judge's analysis. The work undertaken by Mr Stevenson in relation to the confessions' application, as summarised at [36] to [43] above, provides a helpful illustration. Advising on defence strategy, explaining why certain work is critical to a person's defence and should therefore be funded (with reference to case law, commentary, overseas examples and so on) would clearly fall within the definition of legal services, if the relevant communications were sent to a client. Indeed, such work would not merely be "incidental" to the relevant proceeding, it would fall directly within the scope of "legal advice" in the proceeding (hence falling within para (a) of the definition of legal services). Such work is not administrative in nature. It is not undertaken for the benefit of the practitioner, or to administer their practice, but is essential client-focussed work, necessary for advancing the client's interests in the proceeding.

[96] Indeed, we note that in response to questioning from the Court, Ms Hansen accepted that if the confessions application and associated correspondence had been sent directly to Mr Fawcett, rather than the Commissioner, it would have fallen within the definition of legal services and been eligible for legal aid funding.

[97] On the Commissioner's case, therefore, the critical factor that precludes the amendments to grant work from falling within the definition of "legal services" is not the content of the communications or the level of legal skill and expertise involved in their preparation. Nor is it that the purpose of the communications was to explain the defence strategy and justify the funding sought (as the Commissioner accepts that such a purpose would be unobjectionable if the communications had been directed to Mr Fawcett). Rather, the key differentiating factor relied on by the Commissioner is that the relevant communications were sent to the Commissioner rather than the client.

Can communications to the Commissioner fall within the scope of legal services?

[98] Ms Hansen submitted that legal services should be interpreted as meaning legal advice *to* and representation *of* the aided person by the provider, in eligible proceedings. Communications between the provider and the Commissioner regarding

a legal aid grant (regardless of the level of legal skill or advocacy involved), she submitted, are incapable of falling within this definition because:

(a) The communications cannot constitute legal advice *to* the client, because they are directed to the Commissioner. The Commissioner seeks her own independent legal advice in relation to information provided to her, from solicitors employed by the Ministry of Justice.

(b) The communications do not involve representation *of* the client in an eligible proceeding, which is limited to appearing as an advocate for the client, in a court or tribunal, in respect of an eligible proceeding. Representing a client in a substantive legal process, Ms Hansen submitted, is fundamentally different to the advocacy and other work required to seek funding to undertake that substantive representation work.

[99] Ms Hansen's submissions on this issue proceeded on the basis that "incidental" steps within the meaning of para (a)(iii) are limited to steps that occur *after* the conclusion of the substantive criminal proceedings. We have rejected that submission, however, for the reasons outlined at [72] to [77] above. If we had accepted that argument, however, then the amendments to grant work could not have fallen within para (a)(iii), and it would have been necessary for Mr Fawcett to show that the work fell directly within the chapeau of para (a) — namely that it was legal advice or representation in an eligible proceeding. Given, however, that we have rejected the Commissioner's submission that there is a temporal limitation on the meaning of incidental, the issue we must consider is whether the work involved in preparing amendment to grant applications is capable of falling within para (a)(iii) — assistance with taking a step that is incidental to an eligible proceeding. As set out at [80] above, the relevant step must have some connection to the proceeding, but it may relate to a matter that is non-essential, secondary, indirect, subordinate, or which "naturally attaches" to the proceeding.

[100] Where a proceeding is privately funded, the dynamic between the lawyer and the client involves a relatively straightforward two-way relationship. However, proceedings that involve a funder (whether an insurer, a third-party litigation funder

or a legal aid funder) involve a more complex tripartite relationship between the provider, the client, and the funder. Hence, under the High Cost funding regime that operated in Mr Fawcett's case, the three participants in the relationship were:

(a) The client, who is the ultimate decision-maker on any issues, including defence strategy. In a complex criminal case, however, most clients will likely be largely guided by their provider's advice.

(b) The provider, who is the lead lawyer advising and representing the client in the proceeding. The provider's primary obligation is to their client and, within the constraints of any relevant ethical or legal boundaries, he or she must always protect and promote their client's interests. The provider's ability to do so, however, will be largely dependent on obtaining the necessary funding from the Commissioner.

(c) The Commissioner, whose role is described at [24] above. In the legal aid context, it is the Commissioner rather than the client who must be persuaded to provide the necessary funding to advance the recommended defence strategy.

[101] Each of these participants play a critical role in the progression and ultimate determination of a legally aided criminal proceeding. The tripartite relationship necessitated by the legal aid scheme, however, requires the Commissioner to assume responsibility for what is normally part of the client's role — deciding the scope of the work to be funded, based on information and "advice" received from the provider. The interposition of the Commissioner into this aspect of the normal solicitor-client relationship does not, however, negate the fundamental character of the underlying work. Preparing and presenting arguments to the Commissioner in support of amendment to grant applications in a complex criminal case will require the same legal skill, knowledge, and application of law that would be required to persuade a private client of the appropriate defence strategy, and to fund that strategy. Accordingly, in our view, the amendments to grant work, on the plain meaning of para (a)(iii), is capable of constituting legal assistance with taking a step that is incidental to an eligible proceeding.

[102] The work involved for the confessions application provides a helpful practical illustration. The work was integral to Mr Stevenson's representation of Mr Fawcett in the proceeding and required extensive advocacy on Mr Fawcett's behalf. This advocacy required (and demonstrated) a comprehensive knowledge of the case, the relevant law, and overseas best practice in relation to the analysis of the reliability of confessions. It could not have been undertaken by a non-lawyer. It was not clerical or administrative work. The stakes for Mr Fawcett were high. A failure by Mr Stevenson to secure funding to undertake the necessary confessions analysis would likely have curtailed Mr Fawcett's access to justice. A miscarriage of justice could well have been perpetuated. Engaging with the Commissioner regarding legal aid funding was a necessary step that was incidental to the proceeding. It was undertaken for Mr Fawcett's benefit and was critical to his defence.

[103] We reject the Commissioner's narrow categorisation of representation as being limited to appearing as an advocate for the client in a court or tribunal, in respect of an eligible proceeding. On that interpretation, much of the routine legal work undertaken by lawyers would not be eligible for legal aid funding. This would include, for example, engaging with virtually all third parties including opposing counsel, the Department of Corrections, report writers, experts, family members, interpreters, and even the media. Such work is unlikely to constitute "advice" to a client. Rather it falls within the scope of "representation" of the client. Such interactions are an intrinsic and indispensable aspect of the overall representation of the client in the proceeding.

[104] For completeness, we briefly address at this stage the Commissioner's argument regarding s 28 of the Act. Specifically, Ms Hansen noted that, under s 28(1)(a), an application to amend a legal aid grant may be made by either an aided person or the provider. She submitted that this is a "strong indicator" that such work is not to be regarded as legal services, because a legally aided person cannot provide legal services to themselves.

[105] We find this submission unpersuasive. A legally aided person, if they wish to do so, may undertake numerous activities that fall within the scope of "legal services", including preparing evidence and submissions and appearing in court. That does not mean that such activities, when undertaken by a lawyer rather than the legally aided

person, are not legal services. Further, as Mr Lithgow KC (counsel for DLANZ) observed, it would be virtually inconceivable that a legally aided person could even begin to meaningfully engage with the Commissioner over what funding was required for the advancement of the defence case in a High Cost case, as is apparent from our review of the communications between Mr Stevenson and the Commissioner in this case (as summarised at [37] to [42] above).

[106] Ms Hansen also noted that s 4(2) of the Act excludes, in relation to legally aided Waitangi Tribunal proceedings, the assistance in sub-paras (i), (iii) and (iv) of the definition of legal services. She submitted that it is "inconceivable that the legislature would have intended for providers in all other proceedings to claim administration time but not providers in Waitangi Tribunal claims".

[107] We find this submission unpersuasive. As Mr Geiringer noted, representation before the Waitangi Tribunal is a unique case with a number of special circumstances that require it being given different treatment under this Act. Some of the differentiating features include:

(a) there is a separate funding regime for Māori/Crown negotiations that is controlled by two other Crown agencies – Te Puni Kōkiri and Te Arawhiti;

(b) there has been an entirely separate funding process for expert evidence (and, in particular, expert historical evidence) with such work being funded through the Crown Forestry Rental Trust; and

(c) unlike other grants of legal aid, Waitangi Tribunal grants can be for representative bodies creating a significantly more complex range of matters that could be regarded as preliminary or incidental to those claims.[71]

[71] Legal Services Act 2011, ss 11(1) and 47 of the Act.

Is a broad interpretation of legal services consistent with the statutory purpose?

[108] Where two possible interpretations are reasonably available, the interpretation that best accords with the purpose of the legislation ought to be adopted.[72] For the reasons we have outlined above, it is our view that the work involved in preparing applications for amendments to grant falls within the natural and ordinary meaning of the words of para (a)(iii) (or is capable of doing so). However, even if the Commissioner's narrower interpretation were equally available, we would prefer the wider interpretation, as it best accords with the statutory purpose of the Act, which is promoting access to justice. Legal aid applications, and subsequent amendment to grant applications, are fundamentally linked to a party's ability to participate effectively in legal proceedings. They are an essential step for ensuring fair, equitable, and effective participation in the justice system.

[109] There is nothing in the scheme of the Act to suggest that legal aid providers in High Cost cases are expected to undertake extensive legal work in relation to amendment to grant applications for free, or that legally aided persons are expected to undertake such work themselves. However, if such work is not funded, then either the provider will not be remunerated for legal work they have undertaken, or the conduct of the defence will likely be seriously compromised, compromising access to justice.

Is a broad interpretation of legal services more rights-consistent?

[110] Mr Cook and Mr Lithgow submitted that a further basis for preferring the broader interpretation is that such an interpretation is more consistent with NZBORA (including the right to counsel, the right to present a defence and the right to justice).[73]

[111] We accept that the broad interpretation is more rights-consistent but give limited weight to this submission in the overall interpretation exercise, given that the definition of "legal services" also applies to a wide range of proceedings that do not engage NZBORA rights. A consistent interpretation of the definition of legal services is required across all such proceedings.

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72 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538.

73 Relevantly, the New Zealand Bill of Rights Act 1990, ss 6, 24(c), 25(e) and 27(1).

The relevance of inconsistent practices by the Commissioner

[112] A further matter relied on by counsel, particularly Mr Cook and Mr Lithgow (who provided extensive examples) as supporting a broad interpretation of legal services is that the Commissioner herself appears to have recognised that aspects of legal aid administration are legal services (and therefore eligible for funding under the Act) in a range of different contexts. Counsel drew our attention to the following examples:

(a) The Commissioner funds duty lawyers to provide assistance to defendants to complete legal aid application forms.

(b) Reporting to Legal Aid and submitting invoices under the legal aid fixed fee regimes, across a range of proceedings (both civil and criminal) is recognised as paid work included within the scope of the fixed fee. For example, the Criminal Fixed Fee Schedule as at 2 July 2018 states:

> Reporting to Legal Aid Services 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.

Other fixed fee schedules include aspects of managing legal aid funding, reporting to legal aid and invoicing as tasks deemed to be included in the fixed fee.

(c) Funding has previously been provided for complex legal aid administration services in some high-cost criminal cases.

[113] In relation to the duty solicitor scheme, the Judge found the fact that duty lawyers are funded to assist people to apply for legal aid supports the conclusion that such work is "legal services".[74] Ms Hansen submitted that the Judge erred, as duty solicitors are not funded by a grant of legal aid. Rather the duty solicitor scheme is a specified legal service arising from the Secretary's function under s 68(2)(b) of the

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74 Judgment under appeal, above n 1, at [74].

Act. Accordingly, para (b) of the definition of "legal services" applies, rather than para (a). It provides:

> **legal services**,—
>
> …
>
> (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

[114] Ms Hansen submitted that there is a material distinction between paras (a) and (b) of the definition, as para (b) uses the word "includes" whereas para (a) states that legal services "means" advice and representation, and "includes" the kinds of assistance described in sub-paras (i) to (iv). Hence, she submitted the term "legal services" in the context of para (b) can also bear its "ordinary meaning" and therefore be interpreted to include broader matters that just those referred to in paras (a) and (b). This broader, ordinary meaning of legal services, she submitted, would include assisting defendants with filling out legal aid applications.

[115] We find this argument unpersuasive. It was not supported by any authority that would suggest that the "ordinary meaning" of legal services in connection with a proceeding is broader than the definition in the Act. If assisting defendants to complete legal aid applications is not capable of constituting *assistance* with taking steps that are *incidental* to an eligible proceeding (as the Commissioner submitted) it is difficult to see on what basis such work might nevertheless fall within the "ordinary" meaning of legal services.

[116] Para (b) of the definition of legal services covers funded legal services under the Act "in relation to anything other than legal aid". Most notably, this includes funding for the duty solicitor scheme and Community Law Centres. In our view the correct interpretation of para (b) is that "legal services" is intended to include everything that falls within para (a) of the definition but also, in addition, the provision of legal information and law-related education (which Ms Hansen noted was primarily, but not exclusively, included to cater for Community Law Centres). There is nothing in the scheme of the Act to suggest that para (b) was also intended to bring within the

scope of the definition of "legal services" a range of additional, undefined, services. Hence, duty solicitors can only be funded to assist defendants to complete legal aid applications on the wider interpretation of legal services, as on that definition such work constitutes assistance with a step incidental to an eligible proceeding. This further weighs in favour of the wider interpretation.

[117] In respect of the Fixed Fee schedules, Ms Hansen advised that the inclusion of administrative tasks in those schedules was in error and that the Commissioner intends to remove all references to such work from the Fixed Fee schedules. Similarly, in relation to the funding that has previously been provided for legal aid administration in several High Cost criminal cases, Ms Hansen advised that this was also done in error.

[118] The inclusion of assisting clients with legal aid applications (and indeed invoicing) in the Fixed Fee schedules, and the fact that the Commissioner has previously provided funding for amendments to grant work in some High Cost cases, suggests that the Commissioner herself has previously taken a wider interpretation of the definition of legal services, in some contexts. However, this provides little additional assistance as to the correct interpretation. Rather, little weight can be given to this in the overall interpretation exercise. Such practices may simply reflect that the Commissioner's previous practices were in error (as Ms Hansen submitted to be the case).

Does the amendments to grant work need to be "significant, complex and time-consuming" to constitute legal services?

[119] The Judge's declaration was expressed in the following terms:[75]

> 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.

[120] Ms Hansen submitted that the Judge's qualification that the work must be "significant, complex and time-consuming" was unprincipled, and that such a test

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75 Judgment under appeal, above n 1, at [81] (emphasis added).

would be difficult (if not impossible) for the Commissioner to apply in practice. Amendments to grant applications and associated communications, Ms Hansen submitted, either fall within the definition of legal services or they do not. They cannot sometimes be legal services, and other times not.

[121] We reiterate that this appeal, although it has potentially wide precedential value, relates to the specific circumstances of Mr Fawcett's case. As the Judge pointed out, the amendments to grant work that was undertaken by Mr Fawcett's provider *was* significant, complex and time-consuming. It did not simply involve routine or simple form-filling. Nevertheless, we accept that it is difficult to justify drawing a distinction based on how complex or time-consuming a particular amendment to grant application or associated communication is. Indeed, this will not be known (at other than a general level, based on the complexity of the case) at the time that funding approval is sought for the costs of preparing amendments to grant, as such approval must be sought prospectively, rather than retrospectively.

[122] We are only required to determine whether the Judge was correct to find that the amendments to grant work undertaken (or proposed to be undertaken) in Mr Fawcett's case was capable of falling within the definition of legal services. In our view, that finding was correct, for the reasons we have outlined above. However, the fact that the work was significant, complex and time-consuming is not critical to our analysis. Rather, in our view, the key reasons why the amendments to grant work falls within the scope of para (a)(iii) of the definition of legal services (or is capable of doing so) are that:

(a) the work involved the provision of assistance to the client by the provider, of the type usually provided by a lawyer;

(b) the assistance related to the taking of a step that did not directly progress the substantive proceeding but nevertheless had a sufficient nexus to be incidental to it;

(c) in undertaking the work, the provider was representing the interests of the client (not those of the provider) — explaining the defence strategy

and advocating for the required funding was essential to promoting and protecting the client's interests; and

(d) the work was an essential step for ensuring the client's fair, equitable, and effective participation in the justice system, and therefore promoted access to justice.

[123] We note that completing legal aid applications is already funded work in cases under the Fixed Fee regime (which we understand to be the vast majority of legal aid cases). Amendment to grant applications are only necessary in cases that cannot be managed under the Fixed Fee regime, due to their complexity. The above factors may well apply to all (or most) such applications and associated communications, but that will be a matter for the Commissioner to assess. We further note that, as with any legal aid funding application, it will always be for the Commissioner to assess what is a reasonable fee for the work involved.

Conclusion

[124] In conclusion, the Judge was correct to hold that the administration of the legal aid grant by the preparation of the application for an amended grant, and correspondence with the Commissioner in respect of same, may amount to the provision of a legal aid service. We note, however, that we would not include a requirement that the relevant work be significant, complex, and time-consuming in order to fall within the definition of legal services.

Was the High Court wrong to make a declaration?

[125] The second question on appeal is:

> Was the High Court wrong to make a declaration?

[126] The Judge made the declaration set out at [119] above. He declined, however, to order that the Commissioner approve the number of hours that had been sought in the legal aid management application. Rather, he remitted that issue back to the Commissioner for reconsideration, in light of the High Court judgment.[76]

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[76] Judgment under appeal, above n 1, at [82].

[127] Section 59 of the Act provides an appeal on a question of law should be dealt with in the High Court in accordance with the rules of the High Court. Rule 20.19(1) and (3) of the High Court Rules 2016 provides that:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> …
>
> (3) The court may give the decision-maker any direction it thinks fit relating to—
>
> (a) rehearing any proceedings directed to be reheard; or
>
> (b) considering or determining any matter directed to be considered or determined.

[128] Ms Hansen submitted that when an appeal under s 59 of the Act is successful the usual outcome is for the High Court to:[77]

> (a) set aside the decision of the Tribunal and/or direct the Commissioner to reconsider the application; or
>
> (b) to allow the appeal and grant the application.

Ms Hansen further submitted that while the range of powers in r 20.19(1)(c) may strictly be regarded as coextensive with judicial review,[78] and therefore potentially

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[77] Citing three recent successful appeals: *BD (India) v Legal Aid Tribunal* [2018] NZHC 2542; *Preston v Legal Services Commissioner* [2021] NZHC 2593; and *Griggs v Legal Services Commissioner* [2022] NZHC 3001.

[78] Citing *Wyeth (New Zealand) Ltd v Ancare New Zealand Ltd* HC Wellington CIV 2006-485-2596, 18 June 2007 at [69], held under the prior equivalent rule: Judicature Act 1908, sch 2 r 718A(1).

include the power to make a declaration, declarations are highly unusual in the context of an appeal of this nature.

[129] Mr Cook submitted that the declaration served a purpose and was warranted, given that the issue raised by the appeal was an important issue of statutory interpretation in respect of which both the Commissioner and the Tribunal had erred. The declaration provided helpful guidance as to the correct interpretation of the definition of legal services, for future cases.

[130] We assume the reason that the Judge made a declaration is that this was the form of relief sought by Mr Fawcett in his statement of claim (albeit in slightly different terms). It is not clear if the Commissioner raised any issue at the High Court hearing as to the appropriateness of declaratory relief.

[131] We accept that granting a declaration was unusual. The normal course would have been for the Judge to make the decision that "should have been made" by the Tribunal (as per r 20.19(1)). That decision would have been to set aside the Commissioner's decision to decline the legal aid management application, and to remit the application back to the Commissioner for reconsideration in light of the High Court judgment (specifically, the High Court's interpretation of the definition of legal services).

[132] We are not persuaded, however, that making a declaration was an error of law. The key issue before the Court was one of statutory interpretation. Although the specific appeal related solely to Mr Fawcett, the interpretation issue was one of wider public interest and significance. The aim of the declaration, presumably, was to provide authoritative guidance for the Commissioner and legal aid service providers as to the correct interpretation of the definition of legal services. In any event, the issue as to the correct form of relief in the High Court has been superseded by this appeal.

Costs

[133] Mr Fawcett is the successful party in the appeal. Although we have found that the Judge erred in finding that invoicing work may fall within the definition of legal

aid services, that was a relatively minor issue in the overall context of the appeal. On the key issues, Mr Fawcett was successful.

[134] Ordinarily, as the successful party in civil proceedings, Mr Fawcett would be entitled to an award of costs. However, neither party sought costs at the conclusion of the hearing. The assumption appeared to be that, because Mr Fawcett was legally aided, an award of costs was either unavailable or inappropriate. However, an award of costs can be made in favour of Mr Fawcett as a legally aided person.[79] In some cases such an award has been recognised as necessary or appropriate to reflect that the legal aid recipient has incurred a debt to the Commissioner, part or all of which is liable to repayment.[80] Here, we assume that costs may not have been sought on the basis that any award of costs is likely to be circular. We will reserve leave to file memoranda on costs issues, however, in the event that our assumption is incorrect.

Result

[135] The appeal is allowed in part.

[136] We answer the questions of law as follows:

(1) Was the High Court wrong to hold 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?

The High Court did not err in finding that the administration of the legal aid grant by the preparation of the application for an amended grant, and correspondence with the Commissioner in respect of same may amount to the provision of a legal aid service. The High Court erred in

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79 *Curtis v Commonwealth* [2019] NZCA 126 at [15].
80 Legal Services Act 2011, ss 18(2) and 21

finding that invoicing work may fall within the definition of legal aid service.

(2) Was the High Court wrong to grant the declaration at [81] of the judgment?

No, although that declaration has now been superseded by this appeal.

[137] We set aside the Commissioner's decision and direct her to reconsider Mr Fawcett's application for legal aid for the preparation of his applications for amendments to his legal aid grant, and associated communications, in light of this judgment.

[138] Leave is reserved to file memoranda on costs, not exceeding three pages in length. Any memorandum on behalf of the respondent is to be filed within five working days of delivery of this judgment. Any memorandum on behalf of the appellant is to be filed within a further five working days. A decision will then be made on the papers. If no memoranda are filed, costs are to lie where they fall.

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