

***Regulatory Impact Statement: Legal aid and Family Court cost pressures (September 2011)***

This is the regulatory impact statement for the Cabinet paper *Addressing funding pressures in legal aid and the Family Court* (September 2011).

This paper should be read in conjunction with that paper, and the accompanying Cabinet papers:

- Cabinet paper: *Changes to the Legal Assistance (Sustainability) Amendment Bill* (July 2012)
- Cabinet paper: *Legal aid reform: retaining eligibility for civil proceedings* (September 2012)

The September 2011 Cabinet paper and regulatory impact statement include proposals to tighten legal aid eligibility for certain family and civil cases. However, in July and September 2012, Cabinet agreed not to proceed with the options in Table 2 (p.3), except for the option "Deny civil/family legal aid if applicant in arrears".

These decisions mean that the types of proceedings eligible for legal aid remain unchanged from those currently in the Legal Services Act 2011.

The Family Court options in Table 3 (p.4) have been superseded by the options in the *Regulatory Impact Statement: Family Court review* (July 2012).

Also, the regulatory impact statement is dated incorrectly; it was signed in September 2011 and accompanied the September 2011 Cabinet paper.

A further regulatory impact statement was not necessary for the 2012 Cabinet papers because the policy issues contained in those papers had already been considered by the regulatory impact statements prepared in 2011, or were covered by the Family Court Review's regulatory impact statement.

# REGULATORY IMPACT STATEMENT:

## LEGAL AID AND FAMILY COURT COST PRESSURES

### Agency Disclosure Statement

This regulatory impact statement has been prepared by the Ministry of Justice.

The analysis has been prepared within a constrained fiscal environment. It assumes that no additional money will be available to address the legal aid and Family Court funding pressures and that services must be reduced, new revenue created or funding transferred from elsewhere in the justice sector, or a combination of all three approaches, in order to address the funding pressures.

In February 2011 Cabinet agreed to a package of legal aid changes. This package included all the realistic savings from how legal aid services are purchased or from the repayments made by legal aid recipients. Further savings are also not possible within criminal and Waitangi Tribunal legal aid. The only area where legal aid savings options have been considered is through reductions to family and civil legal aid eligibility. Alternative options that would fundamentally rethink the operation of the legal aid scheme have not been considered due to time constraints.

Cabinet directed that further savings be considered by reviewing legal aid cost drivers, including those in the Family Court. Savings options have been considered in the Family Court to address some of the remaining legal aid cost pressures, but alternative savings options within the justice sector have not been considered within the scope of this project.

The Family Court savings options that have been identified are relatively discrete and could be implemented without unduly compromising the Family Court Review, which was agreed to by Cabinet subsequent to the February legal aid decisions. Wider options have not been considered to avoid undermining the Review, but will be necessary to consider as a part of the Review.

The accuracy of the financial impacts of the options is limited by the quality of the available data. There are issues with the ways in which legal aid data is recorded due to recent changes in data capture systems. They are a best estimate of the likely savings. Family Court savings are also susceptible to uncertainty in predicting user responses to particular options.

Public consultation on options to alter the legal aid scheme has been unable to occur due to the budget sensitive nature of the options. However, consultation will occur as a part of legislative or regulatory processes required to implement the changes.

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Date:

## STATUS QUO AND PROBLEM DEFINITION

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### STATUS QUO

#### *Legal aid*

1. The appropriation for legal aid services provided by private providers in 2011/12 is \$173.7 million. This appropriation funds legal aid for criminal, Waitangi Tribunal, family and civil proceedings. Baseline funding falls to approximately \$116 million in 2012/13 and to approximately \$102 million in 2013/14 and out-years.
2. In February 2011 Cabinet agreed to a package of changes designed to address the cost drivers of recent growth in legal aid expenditure. The package included tightening legal aid eligibility, a new purchase approach, and increased payment requirements for legal aid recipients. The changes will bring forecast legal aid expenditure closer to baseline funding.

#### *Community law centres*

3. Community law centres currently receive a fixed annual allocation of \$10.970 million. Funding comes from the Lawyers and Conveyancers Special Fund, drawn from interest payment on trust accounts that are too small to cost effectively return to clients. The revenue from the Special Fund is linked to the performance of the housing market and interest rates and has proved highly volatile, leading to a shortfall in revenue. In recent years the government has made up the shortfall, including funding of \$5.970 million for 2011/12. In order to maintain funding for community law centres at the current level, \$13.2 million is required over the four years from 2011/12 to 2014/15.

#### *Family Court*

4. Family Court funding consists of departmental funding to administer the functions of the Court and funding to pay for professional services such as counselling, specialist report writing, and legal services. These services cost \$60.7 million in 2010/11. The cost is forecast to continue increasing and an extra \$13.3 million is required to provide such services over the four years from 2011/12 to 2014/15.

### PROBLEM DEFINITION

5. The demand-driven nature of the legal aid scheme and the Family Court, combined with the need to ensure access to justice for users, means that the Ministry of Justice cannot stop funding them simply because the appropriation has been used up. If the funding pressures are not addressed, the Ministry risks breaching the Public Finance Act 1989 through unappropriated expenditure.
6. A lower baseline means that fewer legal aid services can be purchased from private providers. The fiscal constraints faced by government mean that new funding is not available. To address the full funding pressures, services must be severely reduced, new revenue created, or funding transferred from elsewhere in the justice sector, or a combination of all three approaches. This assessment identifies options to reduce services (and in some cases reprioritise this funding) and increase revenue.
7. To maintain the current scope of the legal aid scheme, and meet the full community law centre and Family Court cost pressures, approximately \$93 million over three years would be required.

## OBJECTIVES

8. This regulatory impact statement assesses options that address the legal aid, community law centre, and Family Court cost pressures. The need to create savings or generate new revenue must be balanced against the following criteria:
- maintaining the integrity of the legal aid scheme by ensuring that it is still available for the people who most need its assistance;
  - having the least possible impact on users of the legal aid scheme and Family Court;
  - being as administratively simple as possible to implement; and
  - not unduly compromising the Family Court Review.

## REGULATORY IMPACT ANALYSIS

9. The purpose of the legal aid scheme is to provide access to justice by providing legal services to people of insufficient means. It contributes to fairer outcomes by ensuring that parties with unequal financial resources have equal access to justice. Consequently, legal aid helps underpin confidence in the justice system. However, access to justice must be balanced against both the government's duty to use public funds responsibly and the recognition that disputing parties bear some responsibility for resolving their differences.
10. In order to create the necessary legal aid savings there are choices between the reductions in eligibility for legal aid and the savings options in the Family Court. Adopting all the legal aid options would keep legal aid expenditure within the baseline, and meet most of the community law centre funding pressures. However, the cuts to family and civil legal aid would be substantial. Reprioritising funding from the Family Court would allow legal aid to be available for more services. Table 1 illustrates what legal aid services are available with a \$100 million baseline for legal aid, and what could be available if funding were reprioritised from elsewhere in the justice sector.

**Table 1: Legal aid services available within different baselines**

<b>Baseline of approximately \$100 million</b>	<b>Baseline with reprioritised funding</b>
<ul style="list-style-type: none"> <li>• Criminal matters (includes duty solicitor and Police Detention Legal Assistance services)</li> <li>• Waitangi Tribunal</li> <li>• Civil matters involving the government</li> <li>• Family matters including:               <ul style="list-style-type: none"> <li>- Domestic violence</li> <li>- Mental health</li> <li>- Care and protection</li> </ul> </li> </ul>	<b><i>Baseline of approximately \$127 million</i></b> <ul style="list-style-type: none"> <li>• Criminal matters (includes duty solicitor and Police Detention Legal Assistance services)</li> <li>• Waitangi Tribunal</li> <li>• Civil matters involving the government</li> <li>• Family matters including:               <ul style="list-style-type: none"> <li>- Domestic violence</li> <li>- Mental health</li> <li>- Care and protection</li> <li>- Care of children</li> </ul> </li> </ul>
	<b><i>Baseline of approximately \$135 million</i></b> <ul style="list-style-type: none"> <li>• The above proceedings and family matters including               <ul style="list-style-type: none"> <li>- Relationship property</li> <li>- Other family matters such as adoption, paternity and maintenance</li> </ul> </li> <li>• Civil matters involving disputes between private parties</li> </ul>

11. Table 2 identifies options that would limit the scope of the legal aid scheme to ensure its financial sustainability. Table 3 identifies options that would create savings to address Family Court and community law centre cost pressures and allow reprioritisation of funding to create a sustainable legal aid baseline. Many of the options are interchangeable and different packages could be selected to address the cost pressures.

Table 2: Legal aid changes

Option	Cost savings achieved? (3 year)	Maintains integrity of legal aid scheme?	Administratively simple to implement?	Impact on people?	Risks
Remove eligibility for relationship property matters.	\$11.5 m	Yes, but reduced	Yes	<ul style="list-style-type: none"> <li>Inequitable division of property, resulting from power imbalances if one party has control of the assets.</li> </ul>	<ul style="list-style-type: none"> <li>People no longer eligible for legal aid will have few alternative options to access legal services.</li> </ul>
Remove eligibility for other lower priority family proceedings.	\$6.9 m	Yes, but reduced	Yes	<ul style="list-style-type: none"> <li>Adoption and paternity proceedings unable to be resolved, negatively affecting children involved.</li> </ul>	<ul style="list-style-type: none"> <li>People affected by the changes may face increased levels of stress or domestic violence due to legal issues not being resolved.</li> </ul>
Remove eligibility for civil proceedings between private parties.	\$7.0 m	Yes, but reduced	Yes	<ul style="list-style-type: none"> <li>People will be unable to pursue and/or defend civil proceedings or appeals to address legal wrongs against them. However, there are some alternatives to access legal assistance.</li> </ul>	<ul style="list-style-type: none"> <li>Will significantly reduce workload for providers, risking increasing provider exit from the legal aid system. Supply issues may arise in areas where eligibility remains.</li> </ul>
Remove eligibility for care of children matters.	\$79.8 m	Yes, but reduced	Yes	<ul style="list-style-type: none"> <li>Custody disputes and parenting issues would remain unresolved negatively affecting children involved.</li> </ul>	<ul style="list-style-type: none"> <li>Increased costs elsewhere in justice system due to increased numbers of self-represented litigants who require additional judicial, professional Family Court services, and administrative support. However, the overall impact could be reduced costs due to lower volumes.</li> </ul>
Restrict legal aid to mediation where both parties are legally aided.		Yes	More complex	<ul style="list-style-type: none"> <li>Maintains some assistance and encourages early resolution of cases.</li> </ul>	<ul style="list-style-type: none"> <li>Increased workloads for community law centres.</li> </ul>
Deny civil/family legal aid if applicant in arrears.	\$3.0 m across the three options	Yes	Slightly complex	<ul style="list-style-type: none"> <li>Legal aid still available as long as repayment obligations are met.</li> </ul>	<ul style="list-style-type: none"> <li>Increased costs for social sector agencies as a result of issues not being resolved.</li> </ul>
Restricting legal aid for variation of parenting orders.		Yes	More complex	<ul style="list-style-type: none"> <li>Ongoing custody disputes and parenting issues may be unresolved negatively affecting children involved.</li> </ul>	



Table 3: Family Court options

Option	Savings (3 year)	Administratively simple to implement?	Impact on court processes, parties and providers?	Risks
Introduce new fees for proceedings in the Family Court.	\$9.9 m	Medium	<ul style="list-style-type: none"> <li>Increased costs for court users.</li> <li>Small reduction in applications may occur due to introduction of fees.</li> </ul>	<ul style="list-style-type: none"> <li>Removing funding for professional services provided through the Family Court will significantly reduce workloads for some providers, potentially undermining their financial viability. This may also impact on programmes provided for other government departments.</li> </ul>
Reduce payment rates for counselling providers.	\$7.6 m	Medium	<ul style="list-style-type: none"> <li>Little impact on recipients of counselling but impact on provider revenue could lead to viability issues as indicated for removing all counselling funding.</li> </ul>	<ul style="list-style-type: none"> <li>Removing counselling programmes would reduce the therapeutic elements of the Family Court leaving the Court with a largely legal approach to resolving problems.</li> </ul>
Stop provision of counselling.	\$33.6 m	Yes	<ul style="list-style-type: none"> <li>Some relationship issues would remain unresolved.</li> </ul>	<ul style="list-style-type: none"> <li>Low-income people will have less access to therapeutic services in resolving their family disputes as they are less likely to be able to afford private counselling.</li> </ul>
Restrict lawyer for the child services.	\$3.0 m	Medium	<ul style="list-style-type: none"> <li>Services would still be provided for the most important cases, but less serious cases would be unlikely to involve a lawyer for the child.</li> </ul>	<ul style="list-style-type: none"> <li>All of the options have some overlap with the Family Court Review. However, they are generally discrete enough to be able to be progressed without compromising the Review.</li> </ul>
Restrict role of counsel to assist in mediation.	\$6.0 m	Medium	<ul style="list-style-type: none"> <li>Limited impact on court efficiency.</li> </ul>	
Stop Parenting Through Separation programme.	\$1.2 m	Yes	<ul style="list-style-type: none"> <li>Programme is generally regarded as successful in assisting parents to understand the impacts of separation on their children. However, its long term benefits are unclear.</li> </ul>	

## **CONSULTATION**

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12. The Legal Assistance (Sustainability) Amendment Bill, currently before the House, will allow the family and civil proceedings eligible for legal aid to be altered by Order in Council. The Bill requires consultation with representatives of groups whom the Minister of Justice considers are likely to be affected by the changes.
13. Discussions with stakeholders have been held during the development of the Family Court Review consultation paper. These have not directly sought feedback on the options relating to the Family Court (this will occur following the release of the public consultation paper). However, this process has provided some insight into the views of those likely to be affected by changes brought about by the options. It is likely that a number of stakeholders would object to some or all of the options proposed in this regulatory impact statement.
14. The Department of Corrections, the Department of Labour, the Ministry of Social Development, the Ministry of Women's Affairs, the New Zealand Police, the State Services Commission, Te Puni Kōkiri, and the Treasury were consulted. The Department of Prime Minister and Cabinet was informed.

## **CONCLUSIONS AND RECOMMENDATIONS**

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15. In order to address the legal aid funding pressures, a significant proportion of family and civil proceedings would need to be removed from eligibility unless existing funding is reprioritised. There are significant risks for legally aided clients in removing proceedings and access to justice would be reduced. Providing access to justice through the legal aid scheme must be balanced against the government's fiscal position. While the scope of the legal aid scheme needs to be limited, any reductions in eligibility must be careful to ensure that the integrity of the scheme is not undermined.
16. Funding must be reprioritised from the Family Court if the integrity of the legal aid scheme is to be maintained. Reprioritisation would have some impact on users of the Family Court. However, a balanced approach to savings between legal aid and the Family Court would ensure that the integrity of both areas is maintained. Reprioritisation of existing Family Court funding (and new funding generated through fees) will also address cost pressures in this area.
17. Community law centre cost pressures would also be able to be addressed with an appropriate package of savings options from both legal aid and the Family Court.

## **IMPLEMENTATION**

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18. If options to remove eligible proceedings are progressed, further legislative change is not required. The Legal Assistance (Sustainability) Amendment Bill places the eligible proceedings for family and civil legal aid in a schedule to the Legal Services Act 2011 which can be amended by Order in Council. Assuming that the Bill is enacted in early 2012, these changes could be implemented from 2012/13.
19. Some of the options require changes to the Legal Services Act 2011, the Care of Children Act 2004, and the Family Proceedings Act 1980. The amendments to the Legal Services Act and some of the amendments to the Care of Children Act could be done by way of a Supplementary Order Paper to the Legal Assistance

(Sustainability) Amendment Bill. A separate Bill would be required to implement the changes to counselling. Orders in Council will also be required to introduce fees in the Family Court.

20. All of the options would require systems changes to implement. However, generally they are quite discrete and can be implemented without fundamental operational changes.
21. The only option which would impose compliance costs is the introduction of fees to the Family Court. However, removal of legal aid and counselling would also increase costs for individuals resolving disputes. Potential implementation issues are also identified in Tables 2 and 3.

## **MONITORING, EVALUATION AND REVIEW**

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22. The Ministry of Justice's Research team is conducting an evaluation of the legal aid reforms that have taken place following the legal aid review. This work will include evaluation of the changes that are to be made to reduce legal aid expenditure.
23. Additionally, the Ministry of Justice will monitor the impacts of the changes as a part of business as usual, including reporting on the number and demographic characteristics of legal aid recipients and expenditure on legal aid.