

Regulatory Impact Statement: Improving access to legal assistance for low income New Zealanders

Coversheet

Purpose of Document	
Decision sought:	<i>Budget 2022 funding has been approved to implement changes to key legal aid policy settings. We seek approval to make changes to the Legal Services Act 2011 and the Legal Services Regulations 2011 that are necessary to realise these changes (Option 3b in this document).</i>
Advising agencies:	<i>Ministry of Justice</i>
Proposing Ministers:	<i>Hon Kris Faafoi, Minister of Justice</i>
Date finalised:	<i>10 June 2022</i>
Problem Definition	
<p>Access to justice is worsening in New Zealand for people on low incomes who cannot afford legal assistance. Investment in key mechanisms like legal aid and/or Community Law Centres is required in order to ensure some of the most vulnerable people in society can access the legal assistance they need.</p>	
Executive Summary	
<p>Access to justice is about ensuring people can use the legal system to enforce their rights by means of a fair and open process. People’s needs can range from requiring information to obtaining legal representation and resolution in the courts.</p> <p>Community Law Centres (CLCs) and the legal aid scheme are the key mechanisms the government has for providing free and or/low cost legal assistance to people who cannot afford it.</p> <ul style="list-style-type: none"> • CLCs assist people on low incomes with free legal advice, so that they can access tools to resolve their legal problems or find information about where they might be able to find someone to help them with that problem. • The legal aid scheme helps to ensure that people of insufficient means (i.e. low incomes) can access legal assistance for problems that go to court. However, stakeholders describe a legal aid system which has not kept pace with inflation and does not fulfil its purpose of promoting access to justice by providing legal services to people of insufficient means. <p>We have presented four options in this paper to increase access to legal assistance for people on low incomes: Option 1: is the counterfactual, where we do not make any changes, Option 2: a non-regulatory/legislative option to improve access to legal assistance, and Options 3(a) and 3(b): changing key legal aid settings in the <i>Legal Services Act 2011</i> and <i>Legal Services Regulations 2011</i>.</p>	

Option 3b (the Government's preferred option) will update the legal aid policy settings in the *Legal Services Act 2011* and the *Legal Services Regulations 2011* relating to eligibility, repayment, and charges for accessing legal aid to improve access to legal assistance for low-income New Zealanders. It will enable more people to access the scheme and receive legal advice to resolve their legal problems. It will also make repayments more equitable, by reducing repayment requirements for low-income and vulnerable New Zealanders.

Targeted consultation with government agencies, the judiciary and the legal profession was undertaken during the 2018 Legal Aid Review, and also in 2021. These consultations have informed the development of the options in this paper. However, stakeholders have not been consulted on the specific options themselves because of Budget confidentiality. We believe that the previous engagement through the 2018 Legal Aid Review gives us a good understanding of stakeholder views as the settings have remained the same in the interim.

Some stakeholders (both the legal profession and users of the legal aid scheme) may consider that the changes should go further, and that Option 3b does not provide enough assistance to low-income New Zealanders who struggle to access legal assistance. The Ministry will keep engaging with the legal profession, as well as listening to those who access the service, as these changes are introduced, to see what is working and what could be improved further.

Limitations and Constraints on Analysis

On 11 April 2022, Cabinet agreed funding for the *Strengthening Legal Aid Budget 22 Initiative* (Option 3b in this paper), based on a description and cost profile of the changes (CAB-22-MIN-0129). Therefore, we have prepared the analysis in the context of this funding having been received. However, we have included the analysis done on a second option that we considered could be feasible at the time the substantive analysis on the Budget 22 Initiative was done.

Other constraints on analysis include:

- Limited and unreliable data is collected on legal aid applicants and recipients (as key demographic data is not collected as part of a legal aid application).
- Lack of existing feasible alternatives to legal aid when improving access to legal representation.
- Much of the stakeholder consultation on the key issues with the legal aid system presented in this paper was conducted via the 2018 Legal Aid Review (aside from targeted consultation with the judiciary and the legal profession in 2021, including the Access to Justice survey commissioned by the New Zealand Law Society (NZLS) in 2021).
- Consultation on the 2018 Legal Aid Review was focused on government agencies and the legal profession (and including several other groups such as Māori Warden coordinators and an academic specialising in access to justice). It did not include public engagement (due to timing and scope constraints) so we have relied on communication by stakeholders with the Minister of Justice, and publicly available information on the users of the legal aid system as a proxy for the public's views.

The Ministry is confident in the evidence and assumptions that underpin this analysis. Where available, we have used robust analysis and evidence to support our assumptions. Our key assumption is that reducing barriers to accessing legal assistance is positive,

because it better equips a greater number of low income people with the legal expertise required to get a resolution to their legal problem(s).

Responsible Manager(s) (completed by relevant manager)

Helen McDonald
Manager, Access to Justice
Policy Group
Ministry of Justice
10/06/2022

Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment:

A Quality Assurance Panel from the Ministry of Justice has reviewed the Regulatory Impact Assessment prepared by the Ministry of Justice and considers the information and analysis **partially** meets quality assurance criteria.

As noted in the analysis, evidence of problems with legal aid are well documented and confirmed by a range of stakeholders. The analysis is constrained by the existing legal assistance framework and the funding available to improve the system. The Government's preferred approach is unlikely to fully address the problems identified by stakeholders but will significantly alleviate the current pressures on the legal aid system. The proposed new reporting measures will help inform the next review of legal aid policy settings scheduled for 2024.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

It is important for people to be able to access justice in order to assert their rights

Access to justice is about ensuring people can use the legal system to enforce their rights by means of a fair and open process. Access to justice is a fundamental common law principle found in some of New Zealand's key constitutional instruments, such as the Magna Carta and the *New Zealand Bill of Rights Act 1990*, and forms part of the rule of law. It is a necessary precursor to the legitimacy and effectiveness of the justice system.

Interactions with the justice system often occur at times of personal stress — during a family break up, as a defendant in a claim, following a traumatic injury or the financial failure of a business. Improving access to justice is key to ensuring people can enforce their rights and resolve disputes through a fair and open process.

The many ways people can choose to access advice to resolve their problems is wide. People's need for legal assistance can vary from receiving information and education through to advice and support, out of court resolution, and to obtaining legal representation and resolution in the courts. This paper concentrates on access to legal assistance and representation for people who choose to go to court.

Access to legal assistance and representation is important for people charged with criminal offences. Section 24(f) of the *New Zealand Bill of Rights Act 1990* provides that everyone charged with an offence “shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance”. In the civil and family areas of law, being able to access legal assistance (including legal information and representation) can better equip people to get a resolution to their legal problems.

Evidence shows that people who receive legal advice fare substantially better in terms of resolving their issues than those who try, but fail, to obtain advice.¹ If a person cannot obtain advice or representation for their legal issue, they may have no choice but to leave the problem unresolved, or to self-represent. A recent report by the NZLS suggested that the inability of people to find legal aid representation is evident in the number of people unrepresented in cases. In an interview with one legal practitioner, she mentioned that of the 11 cases she is due to appear in, 8 of those parties have people who are representing themselves.²

Research and anecdotal evidence suggest that many self-represented litigants face problems in court, such as understanding evidential requirements, identifying legally relevant facts and dealing with forms. These struggles may lead self-represented litigants to take more time in court, causing delays in the court system as well as unsatisfactory outcomes for themselves.³

Legal aid is a key component of accessible justice

Legal aid is government funding provided to people on low incomes who need legal help and could not otherwise afford a lawyer. It forms an important part of New Zealand's justice system, helping to ensure that people are not denied access to legal assistance based on their financial means.

The purpose of the legal aid scheme, set out in section 3 of the *Legal Services Act 2011*, is to “promote access to justice by establishing a system that provides legal services to people of insufficient means; and delivers those services in the most effective and efficient manner.”

The legal aid system is set up to balance parties' access to justice against both the Government's duty to use public funds responsibly and the recognition that disputing parties bear some responsibility for resolving their differences.

Decision-making under the legal aid scheme

Legal aid policy settings (as laid out in the *Legal Services Act 2011* and *Legal Services Regulations 2011*) are set by the Secretary for Justice (as an agent of the Minister of Justice and Cabinet), and day to day legal aid granting decisions are made by the Legal Services

1 See: Coumarelos, C., Macourt, D., People, J., McDonald H.M., Wei, Z., Iriana, R., and Ramsey, S. (2012). Legal Australia-Wide Survey: Legal Need in Australia. Law and Justice Foundation of New South Wales. See also: Currie, A. (2009). The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians. Department of Justice, Canada. See also: Pleasence, P., Balmer, N.J., Patel A., Denvir, C. (2010). Civil Justice in England and Wales, 2009: Report of the 2006-2009 English and Welsh Civil and Social Justice Survey. See also: International Bar Association and the World Bank (2019). A Tool for Justice: The Cost Benefit Analysis of Legal Aid.

2 New Zealand Law Society (2021). Access to Justice Survey. Kantar Public. <https://www.lawsociety.org.nz/news/law-society-statements/thousands-suffer-in-justice-squeeze-legal-aid-a-covid-response-crisis/>

3 Kim Williams. (2011) Research Summary 2/1: Litigants in Person - A Literature Review. London: Ministry of Justice.

Commissioner (a Ministry of Justice employee acting in an independent capacity). Separation between the Commissioner and Secretary ensures decisions about granting legal aid are made independently of Government. Independent decision-making is an important feature of the legal aid system, which avoids any conflicts of interest the Government may otherwise have when funding legal aid to people who are involved in litigation with the Crown.

The table below broadly sets out the responsibilities of the Secretary and Commissioner.

Secretary for Justice	Legal Services Commissioner
Establishes, maintains and purchases legal aid at the system level	Acts independently in granting legal aid to individuals
Determines the method for the delivery of legal aid, and the distribution of legal aid resources	Independently assigns cases to legal aid providers
Employs salaried lawyers to provide legal aid (through the Public Defence Service)	Determines operational policy matters, such as the maximum fee payable in each case
Approves, and ensures the quality of, legal aid providers	Certifies providers' invoices for payment by the Secretary from the legal aid appropriation
Enters into contracts with legal aid providers	Collects and writes off legal aid debt

Eligibility for legal aid

Legal aid is available for both civil and criminal proceedings, provided applicants meet certain criteria. To qualify for a grant of legal aid, applicants must meet eligibility criteria set out in the *Legal Services Act 2011* and the *Legal Services Regulations 2011*. Eligibility for legal aid is largely based on an applicant's income and their disposable capital (including any assets they have), offset by the number of dependents they have.

User charge

In a civil matter, once a person finds a lawyer and legal aid has been granted, some are required to pay a \$50 user charge to access the legal aid service. Legal aid recipients, being on low incomes, often cannot afford to pay the charge upfront. The charge is either absorbed by a legal aid recipient's lawyer (resulting in a cost to them to provide legal aid), or the legal aid recipient is put on a payment plan by their lawyer to pay the \$50 off in instalments.

Repayment obligations

The *Legal Services Act 2011* envisages that legal aid will be repaid unless it would cause a person significant hardship to do so. Repayment amounts are calculated for each person based on income thresholds. Prescribed repayment rates are set out in *Legal Services Regulations 2011*; however, the *Legal Services Act 2011* provides for the Legal Services Commissioner to decide whether or not to recover debt or to write off amounts payable. Ministry of Justice data indicates that approximately 70% of legal aid recipients are not required to repay any of their legal aid grants.

Interest on legal aid debt

Six months after a legal aid debt has been finalised,⁴ interest begins to be charged on the debt repayments at a rate of 5% p.a.⁵ Compulsory interest on legal aid debt was introduced by the *Legal Services Amendment Act 2013* and began to be charged in early 2014. The introduction of interest aimed to incentivise people to repay their legal aid debt promptly, particularly where they had large capital assets such as houses.

Legal advice is also provided at a low cost or no cost by community organisations

Legal aid sits alongside Community Law Centres (CLCs), Citizens' Advice Bureaux (CABs) and Youth Law as (nation-wide) providers of free to low-cost legal advice and representation for people within defined (population/income/age) groups.⁶

CABs are independent services, which provide assistance on any subject matter and are available to everyone regardless of financial means. They provide information about the law, provide initial legal advice (in some cases), and refer clients to local community centres or CLCs.

CLCs are independent charities contracted by the Ministry of Justice to provide legal services to low income New Zealanders, under the *Legal Services Act 2011*. They are often the first point of access to the justice system for many low income people whose legal concern is not eligible for legal aid.⁷ Twenty-four CLCs work out of over 140 locations across New Zealand. Around 30,000 – 35,000 people access CLC services a year.⁸

CLCs predominantly work in administrative and civil law focussing on legal advice, information and (occasionally) representation from professional lawyers (for serious cases, and only if CLC resource allows). CLCs also provide law related education in communities and engage with community organisations about topical legal issues which increases the capability of the social sector. Unlike the legal aid scheme, CLCs do not expect any payment or repayment for advice given.

CLCs determine who can access their services in a similar way to legal aid eligibility testing. CLCs employ a simplified legal aid test which considers only income (in relation to the number of dependants) and disregards the applicant's disposable capital (which would be part of the full legal aid financial eligibility test). They provide flexibility in the criteria (i.e. no income test applied) when considering certain populations, for example, youth and those seeking casework regarding Māori land. CLCs prioritise people who have a low income

4 This is also six months after the legal aid case has been finalised and the full amount of the debt is known to the legal aid recipient.

5 The rate aligns to (and moves with) the Government's capital charge rate, which is set by Treasury's public sector discount rate.

6 There are 24 Community Law Centres and 83 Citizens Advice Bureaux throughout New Zealand. Youth Law provides free legal services to anyone under 25 and are part of the nationwide community law centre network.
<https://www.justice.govt.nz/courts/going-to-court/legal-aid/legal-help/free-community-legal-help/>;
<https://youthlaw.co.nz/about-youthlaw/>

7 For example, legal aid does not cover low level criminal offending such as traffic offences or a number of common civil and administrative issues such as family law, employment, immigration, tenancy, and consumer affairs, including debt matters. In addition, a person may not be eligible for legal aid because their income exceeds the current thresholds.

8 The Treasury (2020). Vote Justice: Estimates of Appropriations 202/21:
<https://www.treasury.govt.nz/sites/default/files/2020-05/est20-v7-just.pdf>

and/or a high cost of living, and in cases where there are other valid reasons to assist someone.

The government has invested in CLCs across successive Budget cycles to improve their ability to support New Zealanders' access to justice. Budget 18 and Budget 19 addressed wage and other cost pressures through to the end of the 2022/23 financial year (\$10.9M in total). Budget 20 met personnel cost pressures (\$5.948M over four years) and allowed extension of the successful Auckland pro-bono clearinghouse scheme to the rest of the country and the implementation of a time-saving case management system (\$1.775M over four years). These are funded through to the end of the 2023/24 financial year. Additional funding to respond to anticipated growth in the need for free legal services was also secured through the COVID-19 Response and Recovery Fund (\$3.467M over three years). Budget 22 delivered extra funding for the Community Law network over the next four years. The additional funding is to help address the cost pressures that Community Law Centres have been facing for some time, for example the rising costs of retaining a skilled workforce.

What is the policy problem or opportunity?

Access to legal assistance has worsened in recent years

Over the past four years, issues concerning people on low incomes' ability to access legal representation (including via legal aid) have become increasingly apparent.

These issues have been raised via multiple avenues, including through the Ministry of Justice's 2018 Legal Aid Review, a recent 2021 NZLS survey of the legal profession, and targeted consultations with the judiciary⁹ and the legal profession.

Stakeholders affected by this issue are some of the most vulnerable New Zealanders

People on low incomes who experience legal problems and cannot afford legal assistance constitute a particularly vulnerable part of the population and are the most affected by a lack of access to justice. This is because people and groups experiencing multiple disadvantages (i.e. low incomes, unemployment, disadvantaged housing) have heightened vulnerability to a range of interlinked legal and non-legal problems. For these people, legal problems can compound and remain unresolved as the costs of paying privately for a lawyer can be prohibitive.¹⁰ Further, people with multiple legal problems related to debt, housing, and social services, are more likely to experience social exclusion, and a dependency on social assistance.¹¹

Evidence from the United Kingdom suggests that people who experience more legal problems have less favourable views of the justice system. This may lead people to be less likely to seek Government support in future for other problems (which may or may not be legal in nature).¹²

⁹ Provided by the Chief Justice on behalf of the Heads of Bench.

¹⁰ McDonald, H. and Zhigang Wei. (2013) Concentrating disadvantage: a working paper on heightened vulnerability to multiple legal problems. *Updating Justice*, No.24. Sydney: Law and Justice Foundation of New South Wales.

¹¹ Currie, A. (2009). *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*. Department of Justice, Canada

¹² Pleasence, P., Balmer, N.J., Patel A., Denvir, C. (2010). *Civil Justice in England and Wales, 2009: Report of the 2006-2009 English and Welsh Civil and Social Justice Survey*.

The legal aid system is under strain and is becoming increasingly unfit for purpose

The issues with current legal aid policy settings are well documented, and are worsening

The purpose of the legal aid system is to assist low income New Zealanders who need assistance in resolving their legal issues. The system has not been able to do this as well as intended due to compounding circumstances which brought the system under significant strain. Apart from the global pandemic and its effects on the system which are more recent, other issues have been consistently raised by stakeholders over the past 14 years. We set out these issues below.

A 2018 review of legal aid found that key settings could be updated to provide better access to justice

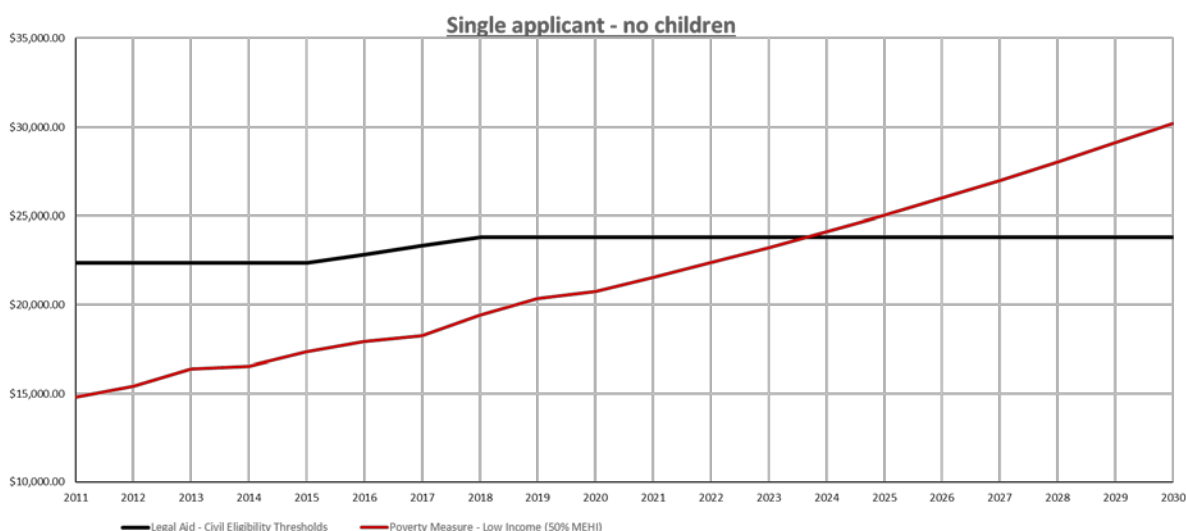
In 2018, the Ministry of Justice conducted a review of the legal aid policy settings as directed by Cabinet. Settings examined included the eligibility thresholds, debt thresholds, interest rates on debt, and provider remuneration. During the Review, the Ministry held targeted consultation with government agencies, the legal profession and several other groups such as Māori Warden coordinators and an academic specialising in access to justice.

The Review found that fewer people are eligible for legal aid today than a decade ago, and a greater number must repay their grant of legal aid. Over time legal aid income thresholds and household incomes have grown apart due to wage growth and inflation, resulting in fewer low-income people eligible for legal aid each year and a greater number incurring a legal aid repayment obligation and debt. Between 2013 and 2018 the number of people eligible for aid decreased by an estimated 22% (around 100,000 people) and is projected to continue decreasing. By 2024 the Ministry projects that a single (unpartnered) applicant in poverty¹³ will no longer qualify for a grant of legal aid (see Figure 1 below).

Figure 1: Legal aid eligibility (single legal aid applicant) and poverty over time¹⁴

13 Single (unpartnered) applicants make up a plurality (40%) of legal aid grants, which explains why we have chosen this group to illustrate. We have used Section 17 of the Child Poverty Act 2018 as a poverty measure “Low income: less than 50% of median equivalised DHI (after deducting housing costs) for financial year”.

14 To interpret the graph, consider the black line - this is the current legal aid income eligibility for single applicants. The red line is the ‘low income’ threshold prescribed in the Child Poverty Reduction Act 2018 (CPRA); 50% of the median equivalised household income (MEHI). A household, in this case a single person, below the line would be considered as low income and a poverty risk under this Act. Currently, a single person meeting this low income definition is eligible for legal aid, but by mid-2023 this projected to no longer be the case. Growth in incomes will cause the poverty measure to exceed legal aid thresholds, indicated by the black and red lines crossing.



The last increase to the eligibility income thresholds was a 6.5% staged increase over 2016-2018. This increase was based on general inflation and did not make up for the full depreciation of the thresholds since they were set in 2008.

Repayment thresholds, unlike eligibility income thresholds, have not changed at all since 2008, meaning that over time, and as the number of eligible people increased (between 2016-18), more of these people have accrued a repayment obligation. Increases to benefit rates have had an unintended effect of accelerating this. As these increases raise a person's gross income while the repayment thresholds remain static, they will receive a higher legal aid repayment requirement sooner.

There can be additional costs to legally aided people which serve as barriers and deterrents to accessing legal aid. Settings like the user charge and repayment obligations (including potential interest on repayments) can act as deterrents for people to apply for legal aid in the first place, even if they may be eligible. The user charge is designed to encourage people to think carefully about whether to engage in litigation, and to contribute towards funding the legal aid scheme. However, the charge is doing little to achieve the first aim, as low-income people do not engage a lawyer unless they are serious about proceeding with litigation. Further, collecting a charge has been criticised as being inconsistent with the purpose of the legal aid scheme as it may deter people of insufficient means from accessing support. When the charge was introduced in 2013, it was not envisaged that legal aid providers would absorb the charge themselves.

Legal aid is one of the few situations where a debt to Government accrues interest. However, it is also one of the last debts to government that is collected, as other repayments are made ahead of it (for example Child Support debts, Ministry of Social Development repayments or court ordered deductions). Consequently, the interest accrues on the legal aid amount while the priority debts are paid. As these priority debts are often slowly repaid the legal aid amount builds up indefinitely. This essentially occurs because the legal aid applicant was already in need of Government assistance and could not afford it.

Strengthening legal aid is part of cross-agency work to reduce debt owed to Government

In 2018 the Child Poverty Unit in DPMC established a cross agency working group (the group) to examine the impact of debts owed to the Government upon vulnerable people. The Ministry has been contributing to this group due to its responsibilities for collecting fines, legal aid and family court debts.

The group aims to better understand how debt to government is generated then administered by different agencies, focusing on the Ministry of Justice, Inland Revenue, and the Ministry of Social Development. This is being delivered by comparing current collection practices and legislation, commissioning research into where and why people owe debt to multiple agencies and developing focus areas for changes from this.

Legal aid has been identified as an area where legislative options may be explored by the Ministry. Particularly, the following 2018 Legal Aid Review recommendations:

- reducing or removing legal aid user charges
- reducing or removing interest on legal aid debt
- increasing legal aid eligibility and repayment thresholds

Legal aid providers are not incentivised to continue providing legal aid

Legal Aid Services are experiencing increasing coverage pressures as providers either exit the scheme entirely or stop providing key aspects of the service, such as Duty Lawyer or Police Detention Legal Assistance. In these particular areas, legal aid is facing challenges on a much more regular basis, having to service rosters on Saturdays and public holidays from a decreasing pool of lawyers wanting to do this work. This then places added pressure on the existing pool and continues to increase the risk in the future of impact to service.

During the 2018 Legal Aid Review the Ministry heard from legal aid providers who told us that providing legal aid was uneconomical for them, and low remuneration rates (relative to private providers) was a common reason for providers to exit the scheme. For example, legal aid providers' hourly rates have not increased since 2008.

Over the last few years, the Ministry has made some operational changes to simplify processes, reduce the administrative burden and make it easier for legal aid providers to engage with the service. These changes in processes have seen improved timeliness of services for providers and legally aided people, however, administrative changes can only go so far to incentivise providers to remain providing legal aid.

A recent NZLS survey reveals many lawyers are dissatisfied with the legal system

Recently, the NZLS commissioned Kantar Public (formerly Colmar Brunton) to undertake a survey of all lawyers to assess the current state of access to justice in Aotearoa New Zealand.¹⁵ The survey, undertaken during September 2021, explores the legal aid system as well as the types of services lawyers are providing for free or at reduced rates.

Many of the findings of the NZLS survey are consistent with the findings of the Ministry of Justice's 2018 Legal Aid Review, particularly around legal aid provider experience and their desire to continue (or not) to take legal aid cases. Half of the lawyers surveyed rate the legal system as poor or very poor at providing access to justice to everyone in New Zealand.

The survey includes interviews with legal professionals, many of whom speak about prospective clients being "just out of the range of being eligible for legal aid" and instead

15 New Zealand Law Society (2021). Access to Justice Survey. Kantar Public. <https://www.lawsociety.org.nz/news/law-society-statements/thousands-suffer-in-justice-squeeze-legal-aid-a-covid-response-crisis/>; 2,989 lawyers (21% of those who received the survey) completed it and six in-depth interviews of lawyers were carried out.

having to self-represent or leave their legal problems unresolved. There is also the “daunting prospect” faced by those who qualify for legal aid of having to repay legal aid debt.

The Chief Justice has expressed serious concerns about legal aid on behalf of the Heads of Bench.

The Chief Justice, Hon Dame Helen Winkelmann, has recently expressed concerns that the legal aid scheme is broken, underfunded, and “unbelievably inadequate” and will “collapse if we don’t do anything about it”.¹⁶

In targeted consultations in 2021, the Chief Justice expressed the Heads of Bench’s concern that New Zealand’s legal aid system is underfunded and that some of the legislative and regulatory settings (for example the legal aid eligibility thresholds) are problematic, creating their own barriers to accessing the courts and legal representation. They consider that these deficiencies are so significant that the system is failing considerably to meet its objectives of facilitating access to justice and upholding the rule of law. A result of this failure is that a sizeable portion of New Zealand’s population is left vulnerable to exploitation and marginalisation. They are concerned that if these concerns are left unaddressed, it will lead to a reduction in social cohesion.¹⁷

While legal aid is available to anyone who meets eligibility criteria, Māori and Pasifika are more likely to feel the impacts of an inaccessible legal aid system

Legal aid is available to all people provided that the proceedings take place in a New Zealand court and some tribunals, and that the type of proceedings are eligible for legal aid (for example, legal aid is not available for Disputes Tribunal proceedings, some immigration matters, and reviews by Work and Income). Therefore, anyone on a low income who needs access to legal advice but cannot afford it is impacted by this problem.

While anyone can experience legal problems, research demonstrates that Māori and Pacific people are more likely to access legal aid services and earn incomes which are within the eligibility criteria for legal aid. While the ethnicity of a legal aid applicant is not required when applying, where it is recorded Ministry data indicates that, disproportionately, 44% and 7% of recipients were of Māori and Pacific ethnicity respectively in 2019/20. In the past ten years approximately 39% of recipients are recorded as Māori ethnicity and 7% as Pacific.

Ministry legal aid grants figures and population data from the 2018 Census show that a significantly larger amount of legal aid grants are made in regions with proportionately higher Māori and Pacific populations (relative to the general population). For example, the Bay of Plenty, Gisborne and Hawkes Bay regions have 17.26% of the general population combined, but 28.9% of the Māori population and 23% of legal aid grants.

Additionally, data from 2021 demonstrates that people of Māori and Pacific Island ethnicity who earn low incomes, earn lower gross incomes on average than the other ethnicities or the national average (\$809 per week and \$732 per week respectively, versus the national average of \$953). As eligibility for legal aid is determined by income this means that a higher proportion of people of these ethnicities will be eligible for legal aid, but also that there are

16 Criminal Bar Association conference, 7 August 2021

17 Letter from the Chief Justice on behalf of the Heads of Bench, to the Deputy Secretary Policy, Ministry of Justice, on 27 October 2021

some who are currently missing out (as they earn above the income thresholds, but are still earning low incomes).

What objectives are sought in relation to the policy problem?

One of the Government's manifesto commitments is to continue to make improvements, so everyone has appropriate access to justice, including through legal aid and CLCs.

In coming up with options to address the issue of diminished access to legal assistance (described above), the following objectives were relevant:

That the options considered provide:

Improved access to legal assistance for low income New Zealanders

This means people on low incomes can access information and legal assistance, and eventually lawyers when their legal problems need to be taken to court.

More equitable provision of legal assistance

This means government assistance can be targeted to people on low incomes who do not have the financial means to pay for that assistance themselves. Any debts that are incurred as a result of government assistance will not be unreasonable.

An appropriate balance between access to justice and responsible government spending

This means recognising that investment in legal assistance must be balanced against the governments other policy objectives.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

We assessed the options against criteria in keeping with the objectives sought in relation to the policy problem (i.e. diminished access to legal assistance for low income New Zealanders). The criteria we used to assess the options were:

Accessibility - The extent to which each option increases the accessibility of legal assistance for people on low incomes who wish to take their issue to court.

Targetability - The extent to which each option is able to be targeted to people on low incomes.

Fairness - The extent to which each option is likely to leave people on low incomes no worse off than they were before seeking assistance (i.e. so people spend less money on paying for legal assistance, and – as a result - do not incur debts they cannot afford to repay).

Feasibility - The extent to which each option can be implemented easily

Affordability - The cost to the Government of implementing the option

What scope will options be considered within?

The scope the options were considered within were:

- Existing mechanisms that can be improved. Considering existing mechanisms recognises that systems exist (e.g., the CLC and legal aid systems) which are designed to provide access to justice, but that need significant investment to be able to keep up with demand for legal services.
- Legislative, regulatory, and operational change. The scope of legislation that was considered was the *Legal Services Act 2011* and *Legal Services Regulations 2011*. We also considered operational changes to the legal services scheme (noting several operational updates have been made in the past few years).

A first principles review of the legal aid scheme was out of scope of this work.

What options are being considered?

Option One – Counterfactual

If no action is taken, by 2024, access to legal assistance will worsen.

As discussed earlier in this document, inflation will continue to erode the effectiveness of legal aid at ensuring low income New Zealanders receive assistance in resolving their legal problems. The legal aid scheme will no longer be a credible way to access justice.

Without investing in updating legal aid settings, access to justice for low-income New Zealanders will worsen *and* the long-term viability of the legal aid scheme will be at risk. The Ministry has projected several scenarios to give a snapshot of how the legal aid system will look in three years' time compared to now. By 2024:

- A single (unpartnered) applicant in poverty will “earn too much” to qualify for a grant of legal aid.
- Increasing amounts of debt will be assigned to applicants with children, notably for all applicants with partners
- A further \$3.5m of interest annually will be charged on New Zealanders in debt, because they could not afford their own lawyer initially and applied for legal aid.

There are few, if any, alternatives to legal aid in the criminal jurisdiction (other than self-representation) for people on low incomes, as these charges are dealt with in court so there are few alternate options for resolution.

In the civil jurisdiction there are alternative options which could help ensure low income New Zealanders receive representation and/or assistance in resolving their legal problems. Option Two discusses these.

Option Two – Non regulatory/legislative option to improve access to legal assistance: further fund Community Law Centres

Alternate options which could help ensure low-income New Zealanders receive representation and/or assistance in resolving their legal problems include:

- improve public understanding of options and costs to resolve legal problems
- improve resources and processes to assist self-representation

- unbundle legal services so lawyers can provide low cost alternatives (e.g., when clients instruct lawyers to assist them only on certain matters rather than the whole issue – such as preparing or writing legal documents, or coaching clients on how to present themselves during court procedures)
- investigate low-cost information and advice options (e.g., LawAccess service in NSW offers a free 24-hour phone advice service)
- work with the private bar to increase availability of pro bono advice
- investigate third party funding of legal services (e.g., litigation funding companies have operated in Australia since the 1990s).
- further invest in existing mechanisms, like CABs and CLCs.

Analysing these options to improve access to justice would require a comprehensive piece of policy work to be done. This is presently outside of what Government has committed to do.

The most feasible alternative non-regulatory/legislative option we considered was to provide further funding to CLCs to respond to the unmet legal needs of the target cohort of low-income New Zealanders who require assistance (there are estimated to be an additional 22,400 low-income people each year who are missing out on legal aid due to the legal aid eligibility threshold depreciation).¹⁸ CLCs are able to provide people on low incomes with legal advice and (in some cases) representation (if CLC resource allows, and for serious cases).¹⁹

Option Three – Change key legal aid settings in the *Legal Services Act 2011* and *Legal Services Regulations 2011*

This option focusses on improving legal aid policy settings identified as needing improvement during the 2018 Legal Aid Review and by stakeholders in the years following. These settings include:

- Eligibility thresholds, which determine who qualifies for a grant of legal aid
- Repayment thresholds, which dictate how much of their legal aid grant people must repay
- Interest charged on legal aid debt (at a rate of 5%)
- The \$50 user charge that legal aid applicants must pay before they can access legal assistance

Another key issue raised by the legal profession is legal aid lawyer (provider) hourly remuneration rates, which have remained static since 2008 and are the key reason why providers stop doing legal aid work.²⁰ Budget 22 funding has provided a 12% increase to hourly rates. Although this change is operational and the responsibility of the Legal Services Commissioner (i.e. no regulatory or legislative change is needed), we have mentioned it here for completeness, before explaining the interlinkages between policy settings in the legal aid system.

18 Roughly estimated using the difference between people eligible for legal aid in 2013 (513,457) and in 2018 (401,240), which comes out to 22,443 people a year over 5 years).

19 Community Law website: <https://communitylaw.org.nz/free-legal-help/eligibility/>

20 New Zealand Law Society (2021). Access to Justice Survey. Kantar Public. <https://www.lawsociety.org.nz/news/law-society-statements/thousands-suffer-in-justice-squeeze-legal-aid-a-covid-response-crisis/>

Eligibility, repayment requirements, and provider remuneration are all interlinked priorities in updating the legal settings. While remuneration is significant for providers, increasing eligibility is equally significant for the people receiving the service, and adjusting repayment requirements provides significant relief from the burden of debts upon vulnerable people.

Changes to each priority have impacts on the others and therefore need to be addressed together in any option. For example, increasing provider remuneration would create increased repayment requirements on legally aided individuals as the cost of service is passed on to the client. Therefore, also lifting the repayment thresholds would mean that legally aided people do not have a higher repayment obligation. In addition, increasing eligibility without increasing provider remuneration could exacerbate issues people have with finding a legal aid provider. Therefore, increasing eligibility as well as an increase to provider remuneration helps to ensure enough providers are incentivised to take the additional cases.

Options 3a and 3b

Within Option 3, there are several ways the settings could be adjusted. The Ministry's preferred option is to adjust the eligibility and repayment thresholds by the full cost of wage inflation since 2008, along with 1.9% wage inflation increases for the next three years, so that the thresholds are adjusted fully for inflation since 2008 as well as ensuring they keep pace with inflation going forward. To give some options to Government at a high, medium and low cost, we presented – respectively – full inflation (\$173m over four years), three-quarter inflation (\$146m over four years), and half inflation (\$105m over four years²¹) adjustment Budget 22 options to Ministers for their consideration.

Both the Ministry's preferred option, and the Government's preferred option are discussed below.

Option 3a (Ministry's preferred option)

- *An 18.5% initial increase to the eligibility thresholds, plus a 1.9% yearly wage growth²² increase for three years*

This option proposes an initial increase of 18.5% to make up for the full cost of wage growth since 2008 (accounting for the increase in 2016-18 – note: a general inflation measure was used to calculate this 6.5% increase (not wage growth), and this has been taken into account in the 18.5% figure proposed), plus a wage growth increase of approximately 1.9% each year. The initial increase represents an investment in the thresholds, bringing them closer in line with the original policy intent, while increasing thresholds in line with wage growth in the years going forward is the method currently adopted by the Ministry of Social Development to make yearly increases to the thresholds for main benefits.²³ Making this adjustment each year will ensure that, from 2021, for at least a period of three years, the thresholds will increase as wages grow meaning more people on low incomes can qualify for legal support.

21 Note: these costs also include a provider remuneration component (which does not require legislative or regulatory change, so has not been included in depth in this paper)

22 Estimated using an average measure of the Labour Cost Index (we used the index at July 2008 and at October 2021, then worked out the average annual increase)

23 This has been the case since 2020. See: <https://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/factsheets/budget/factsheet-benefit-indexation-2019.pdf>

- *A 23% initial increase to the repayment thresholds, plus a 1.9% yearly wage growth²⁴ increase for three years*

This option proposes an initial increase of 23% to the repayment income thresholds, plus an additional wage growth increase of approximately 1.9% each year. This will increase the thresholds by the full extent of wage growth since 2008. An increase going forward will retain the benefit of this increase and prevent depreciation of the thresholds for three years.

Much of the debt owed to Government is borne by people on low incomes. Increasing the repayment thresholds means fewer people need to repay their legal aid debt. If a debt is incurred, their repayment obligation will be a lower amount. This will assist in relieving a debt burden on some legal aid recipients. This proposal to alleviate debt aligns with the Government's priorities around improving wellbeing for families and work underway across Government departments (led by DPMC) looking at alleviating people's debt to Government.

- *Removal of the \$50 user charge.*

Removing the charge will remove an initial barrier to accessing legal aid for all people who qualify for a grant of civil or family legal aid, and will remove an additional cost on legally aided people or legal aid providers who choose to absorb the charge on behalf of clients.

- *Removal of the interest rate on legal aid debt.*

Removing the interest rate means people who are required to repay some, or all, of their debt are not subject to additional charges; thereby relieving a debt burden on some legal aid recipients.

Option 3b (Government's preferred option)

Budget 22 contained an investment of \$148.7m, providing the opportunity to implement an adapted version of the Ministry's preferred option.

The package agreed through Budget 2022, representing the Government's preferred option consists of:

- Increasing the eligibility thresholds by 15 per cent from 1 January 2023, making 93,000 New Zealanders eligible for legal aid in the first year
- Increasing the debt repayment thresholds by 16.5 per cent from 1 January 2023, relieving financial pressures for around 16,000 low-income and vulnerable New Zealanders
- Yearly 1.9 per cent increases to both the eligibility and repayment thresholds for the next three years, so that these settings keep pace with wage inflation
- Removing interest on legal aid repayments
- Removing the \$50 user charge legally aided people must pay to access the service
- Increasing the hourly rate of legal aid providers by 12 per cent from 1 July 2022.

²⁴ Estimated using an average measure of the Labour Cost Index (we used the index at July 2008 and at October 2021, then worked out the average annual increase)

We have provided analysis for Option 3b

Options 3a and 3b are similar in that they improve the same things in the legal aid scheme, but to varying degrees. Outcomes are expected to be similar, but in terms of numbers, key differences include:

- Option 3a would make around 19,100 more people eligible for legal aid in the first year than Option 3b
- Option 3a would give around 7,600 more people a year a lower repayment obligation

As Budget 22 funding has been received for the Government's preferred Option 3b, we have chosen to analyse this option as compared to the counterfactual and Option 2.

How do the options compare to the status quo/counterfactual?

	Option 1 – Counterfactual	Option 2 – Further fund Community Law Centres	Option 3b - Adjust the key legal aid settings
Accessibility	0 Access to the legal aid system continues to worsen. By 2024 a single applicant in poverty will “earn too much” to qualify for a grant of legal aid.	+	++ Helps people on low incomes that need legal assistance with court proceedings. This Option ensures 93,000 more low-income people who cannot afford legal assistance will qualify for legal aid in the first year the initiative is in place.
Targetability	0 Each year going forward, as wage inflation increases, fewer and fewer low-income people will be eligible for legal aid, meaning the legal aid system is becoming targeted only to people with extremely low incomes, rather than “insufficient means”.	+	++ Legal aid is better targeted to people of “insufficient means”.
Fairness	0 More legally aided people each year are having to repay more of their debt due to static repayment thresholds.	+	++ Improves the fairness of the system – brings the settings closer to the original policy intent. Reduced likelihood of incurring debt, and removal of user charge and interest rate on debt may encourage more people to access legal aid.
Feasibility	0	0 What the additional funding will be spent on would need to be discussed with CLCs, and existing contracts may need to be renegotiated. No policy work on this option has been completed.	++ Requires changes to regulations and legislation. Key policy work on this Option has been completed.
Cost	0 No additional cost to the system aside from any cost pressures with existing settings.	- Greater cost to Govt than status quo (low-moderate). Note: there has been significant investment in CLCs in recent Budget cycles.	-- Greater cost to Government than status quo (moderate-high).

Overall assessment	0	+	++
---------------------------	---	---	----

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Key to the table above	
++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
--	much worse than doing nothing/the status quo/counterfactual

Comparing the options

The Government’s preferred option is *Option 3b - change key legal aid settings in the Legal Services Act 2011 and Legal Services Regulations 2011*. This option directly links to our key policy objectives:

- Improved access to legal assistance representation for low income New Zealanders
- More equitable provision of legal assistance

Options 2 and 3b are both better when compared to the counterfactual

As the analysis above shows, each alternative option (Options 2 and 3b) would provide better access to legal assistance in New Zealand, compared to the counterfactual. Given the issues with access to justice described earlier, if no action is taken to address these issues, more and more people on low incomes will continue to miss out on legal assistance each year.

Option 2 only partially meets policy objectives

The Ministry considers that increasing funding to CLCs (Option 2) would partially meet the policy objectives, as supplying increased access to legal advice may give people the tools they need to be able to navigate the system and/or find a lawyer that suits their budget.

CLCs use criteria similar to the legal aid scheme when deciding who to assist. Increased funding for CLCs could focus on increasing the supply of lawyers at CLCs and/or also potentially expanding the thresholds of who CLCs provide services to. Therefore, Option 2 could be proposed as an alternative to one of the components in Option 3b; increasing legal aid eligibility thresholds.

However, the legal aid eligibility thresholds, which dictate who can have free or low cost access to legal assistance, would remain static – creating inconsistency between the CLC

criteria and legal aid eligibility in who is considered “low income” and eligible for subsidised or free assistance.

Option 2 also does not easily extend to issues that would benefit from being resolved by going to court. While legal aid is provided specifically for people going to court who cannot afford a lawyer, CLCs only represent a very small number of people (in serious cases, and only if CLC resource allows), so this Option would only be targeted to specific cases; people on very low incomes who face serious legal problems.²⁵

In addition, other components that have been identified as important to address in order to improve access to legal assistance such as debt and repayment obligations for legal assistance (such as with the legal aid scheme) will not be addressed through Option 2.

Further, the government has invested more recently in CLCs to improve their ability to support New Zealanders’ access to justice. There is a risk of diminishing returns from the additional investment unless CLCs take on more clients who wish to have legal representation or revise their delivery model to identify new services they could provide.

Option 3b best meets the policy objectives and criteria

The Ministry’s view is that it would be a fairer, more feasible, and more targeted investment to improve the legal aid scheme. While continuing to provide additional funding to CLCs may improve their ability to deal with additional (and potentially a wider range of) clients, it will not solve the pressures on, and lack of investment in, the legal aid scheme (and access to legal representation).

Legal aid is a significant factor in maintaining public confidence in the fairness and accessibility of the justice system and promoting the rule of law. Continued erosion of legal aid’s effectiveness at ensuring low income New Zealanders receive assistance in resolving their legal problems gradually increases the risk that these significant public policy objectives will be compromised.

Improving legal aid settings will have the following benefits:

- Increasing the eligibility income thresholds will lead to a greater proportion of people on low incomes qualifying for legal aid. An additional 93,000 people would become eligible in the first year as a result of this proposal, meaning fewer people will have to pay privately for a lawyer, self-represent, or leave their legal problems unresolved.²⁶ In the first year, this will also mean that a single person earning up to \$27,393 would be eligible for legal aid (currently single applicants must earn under \$23,820).

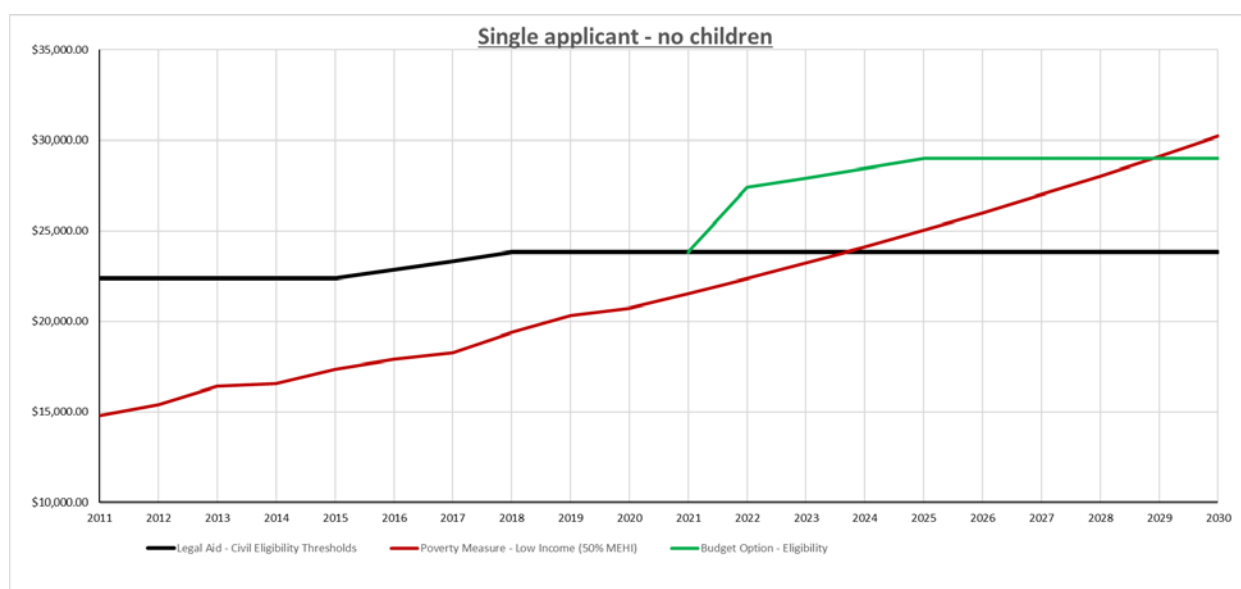
25 For example, for serious issues, such as when a person is experiencing loss of income, loss of housing, harm in the home or community, a serious social justice issue.

26 We have calculated number of additional grants using Ministry of Justice legal aid data and household income data using numbers from the 2018 census. Number of additional grants does not necessarily mean number of additional people who will be assisted, as some people may receive multiple grants of legal aid and would therefore be double-counted in any attempted individual calculations.

- Increasing the repayment income thresholds will mean that each year up to 16,000 people will have a reduced repayment obligation.²⁷
- Removing the user charge will mean that around 7,400 people per year will not have to pay the charge.²⁸
- Removing the interest rate aligns with the cross-Government work led by DPMC to alleviate debt owed to Government.

Figure 2 below illustrates how one component of the changes - the increase in eligibility – is expected to address the issue of the legal aid eligibility threshold depreciation over time. The green line shows the effects of Option 3b eligibility for single legal aid applicants. This Option prevents low income and poverty risk applicants becoming ineligible for aid until at least 2028, maintaining eligibility above the low-income poverty line. As 40% of civil legal aid grants are to single applicants without children this presents a significant increase in support for low income people and reduction in potential poverty exacerbation.

Figure 2: Eligibility and the poverty line over time (single legal aid applicant) with Option 3b's investment



With Option 3b, there is a risk that some stakeholders (both the general public and the legal profession) may consider that the proposed changes to legal aid should go further, and that the initiative does not provide enough assistance to low-income New Zealanders who struggle to access legal assistance. The Ministry plans to address this by continuing to engage with the legal profession and users of the legal aid system as the changes to the legal aid system are introduced, to see what is working and what could be better.

He Ara Waiora analysis

As part of the Budget 2022 initiative process, a Māori wellbeing framework analysis, *He Ara Waiora*, was completed for Option 3. The framework is derived from mātauranga Māori and its principles closely align with the values, beliefs and worlds views of the Pacific

27 Using 2017/18 data. Based on the number of people who would receive a lower repayment amount under the proposed thresholds than the current settings when their grant is finalised. Some people may have multiple legal aid debts so this number could in fact be lower.

28 Number of people was calculated by dividing the total cost collected in F2019/2020 by \$43.48 (cost of user charge).

Community.²⁹ The analysis (outlined below) shows how the proposals to increase access to legal aid might enhance mana and wellbeing for tangata whenua and is also relevant to lifting the intergenerational wellbeing of all New Zealanders.

The analysis reflects that a person's need for legal advice shows that adverse factors are affecting their wellbeing, either through disconnect with family and community (mana tuku iho), their ability to engage in society with freedom from harm or fear (mana tauutuutu) and the lack of resources to resolve these issues effectively (mana whanake) in order to provide opportunities for their aspirations to be realised (mana ā heinga).

Tikanga

The 2018 Legal Aid Review included limited consultation with members of Te Hunga Rōia Māori o Aotearoa, and Māori warden representatives. The proposals in Option 3 are based on the recommendations of the Review and take into account some of the views expressed during those engagements (for example, increasing access to legal aid providers, and removing interest on legal aid debt).

An improvement in access to justice will mean that decisions are made in accordance with the right process. More people will be represented by a lawyer and will be properly heard with their rights protected.

Manaakitanga

He Ara Waiora envisages a state of wellbeing where people are linked through community and their relationships and obligations to others. Under this framework one person's wellbeing is not only theirs, but the community's, just as the community's wellbeing will affect the individual.

This same link between individuals and community is also an essential part of the justice system, which must balance the individual rights and mana with those of the community. Where this balance falters it will create negative impacts on all aspects of wellbeing, affecting quality of life, mental health and financial prosperity.

Providing greater access to justice protects the rights and thus enhances the wellbeing of affected people. Māori and Pacific people comprise a high proportion of those affected by access to justice cost barriers. Providing greater access to justice demonstrates a care about people (manaakitanga), particularly those who may have legitimate claims but struggle to afford the costs of enforcing their rights.

The legal aid service contributes to this wellbeing by helping people to resolve issues affecting them where they may otherwise lack the means to do so. If they are unable to access the service then these issues will continue to be unresolved and possibly worsen, further impacting collective wellbeing. Where the individual and their wider community have a positive experience of the justice system through the assistance they receive, their wellbeing and mana are restored or enhanced; and the legitimacy of and public confidence in the legal aid scheme is also preserved.

29 The Treasury (2018) Pacific Perspectives on the Living Standards Framework and Wellbeing. <https://treasury.govt.nz/publications/dp/dp-18-09>

Within Te Ira Tangata (the human domain of the He Ara Waiora framework) the four aspects of mana important to wellbeing are outlined below:

Mana tuku iho - Mana deriving from a strong sense of identity and belonging.

Greater access to justice supports the individual and thus enhances their belonging in the community. People should feel a sense of belonging or kāinga within their community, but the drivers behind their need for legal assistance may prevent this. Whether this is criminal charges or family and personal disputes, these matters impact social cohesion and people's roles within a community. For example, a criminal conviction may affect a person's employment (and therefore their mana whanake) and social standing, while unresolved family matters will be detrimental to the person and the whanau, particularly children.

Legal aid helps to mitigate these by supporting the individual to resolve the underlying issues where they otherwise could not financially afford to.

Mana tauutuutu - Mana in knowing and fulfilling one's rights and responsibilities to the community and participation and connectedness in the community.

While legal aid supports an individual's wellbeing and connection to the community, it recognises that there is an interdependence between the individual and the community and facilitates this. The legal aid service balances a vulnerable person's need for legal advice and representation with the community's interest in seeing a fair and accessible justice process carried out. Quality legal assistance improves collective security and safety by increasing confidence that a transparent justice process has been delivered, while protecting the individual's rights to security from imbalanced resources throughout the same process.

Many of the people who obtain legal aid are already vulnerable before finding out they need to go to court. Research has shown that young people, disabled people, unemployed people, single parents, or people who live in areas of high-deprivation are more likely to have a greater number of more serious legal problems. Increased access to justice ensures rights and responsibilities are known and can be properly fulfilled, by the individual and community.

Mana ā heinga - Mana in the individual's and the community's capability to decide on their aspirations and realise them in the context of their circumstance.

Greater access to justice via increased eligibility for legal aid helps people on low incomes instruct a lawyer and participate in resolving their legal disputes. This facilitates more just outcomes (as people have access to a legal representative who can navigate the system) and allowing more opportunity for aspirations to be realised.

Mana whanake - Mana in the form of power to grow intergenerational prosperity by reducing debt burdens on families and whānau.

Cost is recognised as a significant barrier to accessing legal services, and an individual's or whanau's mana whanake may be greatly reduced if they must fund this themselves.

The consequences of this cost extend beyond the person taking legal action, as it may consume resources which could otherwise support a person's family or community and may have no long-term benefit if they do not receive a favourable outcome.

Legal aid helps to address this by providing funded legal advice to those who could not otherwise afford it. The income that would have otherwise been used to fund their legal needs can instead be put towards improving their wellbeing in other areas such as food and

rent. The proposed reductions to repayment requirements will also extend these benefits beyond when the person receives legal aid assistance.

The overall support for their wellbeing provided by legal aid will also improve people's long-term prosperity and economic success, while avoiding a significant cost that they may have otherwise occurred.

What are the marginal costs and benefits of the option?

Affected groups <i>(identify)</i>	Comment <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Government	Ongoing cost over 4 years to Government to fund improvements to legal aid settings	-	High
Total monetised costs	\$82.773m over 4 years (this does not include the remuneration increase for providers as that change does not require a regulatory or legislative change)	-	High
Non-monetised costs	-	-	-
Additional benefits of the preferred option compared to taking no action			
Low-income people who: <ul style="list-style-type: none"> • would not be able to pay for a lawyer themselves • wish to resolve their legal problems • have children/ families/ whānau • owe other Government or private debts 	This group will benefit from an increased sense of personal safety and relief from depression and anxiety as a result of being able to resolve their legal problems	An initial 20,500 people per year, rising to 25,072 by 2025, will receive benefits from this initiative. Benefits are estimated at \$20k for personal safety and \$19k for depression & anxiety per year.	Moderate
Government	<p>While improving access to legal aid may have a large upfront cost, providing legal aid to help people to resolve their legal problems sooner has been shown to save Government money in the long-term.</p> <p>A Canadian study estimates the cascading costs of unequal access to justice on public spending in other areas (e.g., employment insurance, social assistance, and health</p>		Low

	care costs) to be approximately 2.35 times more than the annual direct service expenditures on legal aid. ³⁰		
Total monetised benefits	\$726m over 5 years	-	Moderate
Non-monetised benefits	Greater disposable income to meet basic needs	Moderate - 93,000 people will become eligible for legal aid in the first year of the initiative, 16,000 people per year will have a lower repayment obligation.	Low
	<p><i>Supported, timely and effective responses due to improved court efficiency associated with fewer self-represented litigants, and lawyers' ability to effectively navigate the system</i></p> <p>Self-represented litigants can cause delays in the court system as they generally take up more court time due to their limited experience and/or knowledge of the court system or process. In discussing the effects of self-representation on access to justice, the Australian Senate Standing Committee reported the view of judges, judicial registrars and registrars that 81% of self-represented litigants would have benefited from representation.³¹</p> <p>Fewer self-represented litigants also means that more people targeted by this initiative will have equality of arms, an important principle for access to justice. Equality of arms contributes towards reducing scenarios where one party may be able to afford legal</p>	Low - It is hard to quantify how many people with legal problems self-represent and the figure could be as low as 5-10%. ³²	Low

³⁰ See Farrow et al., Everyday Legal Problems and The Cost of Justice in Canada: Overview Report, 2016, <http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.

³¹ Australian Senate Standing Committee (2004). *Inquiry into Legal Aid and Access to Justice*.

³² One study found that 33% of unemployed people handled their legal problem without advice or assistance, and a further 45% of unemployed people sought advice or assistance in resolving their legal problems - in 60% of those cases the advice/assistance was not that of a lawyer or legal adviser ie 60% of people will seek a non-legal solution – see Coumarelos, C., Macourt, D., People, J., McDonald H.M., Wei, Z., Iriana, R., and Ramsey, S. (2012). *Legal Australia-Wide Survey: Legal Need in Australia*. Law and Justice Foundation of New South Wales.

	<p>representation and the other may not, the latter instead electing to represent themselves but unable to present their case effectively.</p>		
	<p><i>Improved confidence in Government: people feel assured that the justice system is inclusive and empowering, protects people's rights, and that assistance is available no matter what a person's means or abilities.</i></p> <p>Low income people consist of some of the most vulnerable people in society. Unable to access legal support, or accessing support but incurring a debt, they will lose confidence in the system, and experience increasing distrust in Government. UK evidence suggests that people who experience more legal problems have less favourable views of the justice system.³³ This may lead people to be less likely to seek Government support in future, for other problems (which may or may not be legal in nature).</p>	<p>Low - Using the evidence available it is not possible to quantify this impact.</p>	<p>Low</p>

³³ Pleasence, P., Balmer, N.J., Patel A., Denvir, C. (2010). Civil Justice in England and Wales, 2009: Report of the 2006-2009 English and Welsh Civil and Social Justice Survey.

Section 3: Delivering an option

How will the new arrangements be implemented?

Option 3 will amend the *Legal Services Act 2011* and *Legal Services Regulations 2011* as part of the existing legal aid scheme. No new services or legislation will need to be created.

Legislative and regulatory changes

The *Legal Services Act 2011* and *Legal Services Regulations 2011* need to be amended before the changes proposed in this initiative can take effect. We expect that the changes will come into effect on 1 January 2023.

The *Legal Services Act 2011* (the Act) provides the enabling provisions for legal aid policy settings, the specifics of which are set out in the *Legal Services Regulations 2011* (the Regulations):

- Changes to the Regulations will be needed to prescribe the new civil eligibility thresholds and repayment thresholds, and to remove the user charge and interest on repayment of legal aid debt.
- Changes to the Act will be required to remove the provisions that mandate prescribing a user charge and interest rate on repayment of legal aid debt. These changes to the Act do not need to occur immediately in order for the changes brought about by the regulatory amendments to take effect.

Changes to ICT systems

Changes to the Ministry's ICT systems will need to be made prior to the legislation and regulations being made. This is because current systems are set up for components this initiative seeks to remove, for example calculating and applying interest on a legal aid debt.

Changes will need to be made to the following systems:

- Legal Services Management System (LSMS) to update the eligibility and repayment threshold, as well as reducing the user charge and interest on legal aid debt to zero. Changes will be made to increase the eligibility and repayment thresholds by 1.9% each year on 1 July 2023, 1 July 2024, and 1 July 2025. These systems (including testing) are expected to be updated by November 2022 in time for the changes to come into effect on 1 January 2023.
- Legal Aid Debt Collection System (CWX) to remove the interest charge on debt and to pre-set letter templates. Testing for this will be completed in quarter two 2022/23 and changes will be in place by November 2022.

Recruiting further staff to meet the new demand

Additional staff will be recruited in Legal Aid Services to meet the increase in demand for legal aid resulting from the changes to the eligibility thresholds. It is estimated that between 4,000 to 5,000 applications per year may arise from these changes, and that an additional 6 FTE will be required to meet the increase in demand. Funding for the additional 6 FTE is included in the Budget 2022 investment.

Recruitment for additional staff is scheduled for August 2022, to ensure that new staff can be brought on board and trained in time for the changes coming into effect.

Communicating changes to stakeholders

As the work to deliver the regulations changes continues, the Ministry will keep stakeholders, including providers and professional bodies, updated.

Work is underway to identify where the current legal aid eligibility and repayment schedules are publicly available, so that these sources can be updated. The Ministry will also be looking to identifying where references to the user charge and interest on legal aid debt are made so that these can be updated as needed.

Legal Aid Services operational policies and manuals for legal aid providers, as well as the legal aid application forms and letters, will be updated prior to these changes being made on 1 January 2023.

How will the new arrangements be monitored, evaluated, and reviewed?

The Ministry is required to report on the number of legal aid grants made each year and the timeliness in which these applications are processed. A minimum of 61,000 grants allocated to private providers is expected annually. The establishment and repayment of legal aid debt is also reported annually through the Ministry's Annual Report.

Data to support this reporting is captured through the Legal Services Management System, which administers all legal aid applications and grants, and a separate debt management system which administers all legal aid repayments. Collectively these systems provide data which will enable the monitoring of:

- Changes in application and grant volumes,
- Establishment of legal aid debts,
- Variations in legal aid repayment requirements, and
- Comparison of the points above before and after any implementation of Budget initiatives.

The Ministry will also be developing new reporting to help monitor the effect the changes have once implemented. This will include:

- Financial monitoring, to ensure expenses are tracking as expected, and
- Monitoring case volumes as well as debt established, to determine whether the changes have delivered the expected increases for accessing the scheme.

Legal aid policy settings are subject to three-yearly review, as determined by Cabinet in 2015. The review conducted in 2018 was the first of these reviews. The 2021 review was cancelled as the problems identified in the 2018 review have persisted and worsened in the absence of settings being changed (which is addressed through the proposals in his paper and Budget 2022 funding). Another review is due in 2024. We expect that this review will be able to examine some of the initial effects of these changes.