

## **Managing the cost of legal assistance in the justice sector:**

### **Regulatory Impact Statement**

---

#### **Agency Disclosure Statement**

This Regulatory Impact Statement has been prepared by the Ministry of Justice. It provides analysis of the options to create a more sustainable approach to the provision of legal aid (and similar court-funded services), and restrain the growth in expenditure that has occurred in recent years.

The analysis identifies the past drivers of legal aid expenditure and their relationship to the demand for legal aid and draws on a review of international approaches to funding legal aid. It covers a wide range of topics, and was fit for purpose in identifying the options to be considered. However, other than at a high level, it was not possible to identify the effect that wider justice sector changes had on increasing legal aid expenditure. Furthermore, due to the number of policy changes from 2006 to 2008, it is difficult to quantify the effect of individual changes, and in some areas the effects are estimated by combining the data that is available with the judgement of experienced Legal Services Agency staff.

In conducting this analysis, we focussed upon the areas most directly driving legal aid expenditure. Small or low-growth areas of legal aid expenditure (such as duty solicitors) were not explored.

We were unable to conduct public consultation on the proposals discussed in this document due to time constraints for the programme of work and the 'Budget Sensitive' nature of the options identified. Proposals relating to the 'lawyer for the child' will be consulted on at a later date, following further development.

The proposed changes will affect the eligibility for and repayment of legal aid, and hence affect the amount of Government subsidy payable to some individuals seeking legal assistance. Most of the proposed legislative changes will not affect businesses, although there will be some costs for legal aid providers to collect a \$50 user charge from legally aid clients, and for lawyers for the child to undertake quality assurance activities.

The analysis relating to the lawyer for the child is a part of initial analysis of issues associated with the Family Court. More detailed work on these proposals needs to be conducted. Further work may be required to fully identify issues within the Family Court.

**Sarah Turner**  
**General Manager, Public Law**  
**Ministry of Justice**  
**Date:**

## Summary

---

1. The current growth in legal aid expenditure is not sustainable. Spending rose \$48 million from 2007/08 to 2009/10, and is forecast to rise a further \$51 million by 2014/15.
2. Changes are proposed to address the causes of this growth, whilst remaining true to the fundamental objective of legal aid – to provide low income people with access to legal services.
3. A large number of options are discussed, ranging from those that are most achievable, those that would result in significant change and finally those that are necessary if expenditure is to reduce to the current baseline. The options are in the following areas:
  - reducing the price per legal aid grant (these options do not require legislative change);
  - reducing the number of legal aid grants (these options require amendments to the eligibility criteria in the Legal Services Bill to be enacted in 2011);
  - increasing repayments (most options require amendments to the Legal Services Bill);
  - managing total legal aid expenditure (can largely be done within existing legislation, but one option would require amendment to the Legal Services Bill); and
  - managing the use of lawyer for the child (options would require changes to the Care of Children Act 2004, and one options would also affect the Children, Young Persons and Their Families Act 2004).
4. Most of the options would not affect businesses, although there could be some costs for legal aid providers to collect a user charge from legally aid clients, and for lawyers for the child to undertake quality assurance activities.
5. The options would increase the costs for some private individuals, because they would no longer be eligible for legal aid, or would have to pay an increased contribution towards legal aid or lawyer for the child).
6. The options were identified by reviewing the causes of growth to date, and by examining international approaches to managing legal aid expenditure. It was not possible to conduct consultation on the options, due to the Budget sensitive nature of the work, and the need to urgently address the fiscal pressures created by legal aid.

## Objectives

---

7. Legal aid provides people on low incomes with access to legal services, for criminal, family, civil and Waitangi Tribunal cases. It ensures a balance of power by providing legal representation for people facing criminal charges or allows them to protect their personal rights. Providing legal aid to persons facing criminal charges so they can afford legal representation also lessens the risk of convictions being overturned on appeal.
8. The purpose of this project is to develop a sustainable approach to funding legal aid that protects the objectives of legal aid.
9. Because of the fiscal pressures arising from legal aid expenditure, the changes are urgent. The changes which do not require legislative change could be introduced progressively from July 2011. The other changes could be introduced through an

amendment to the Legal Services Bill (currently in front of the house), taking effect from July 2012.

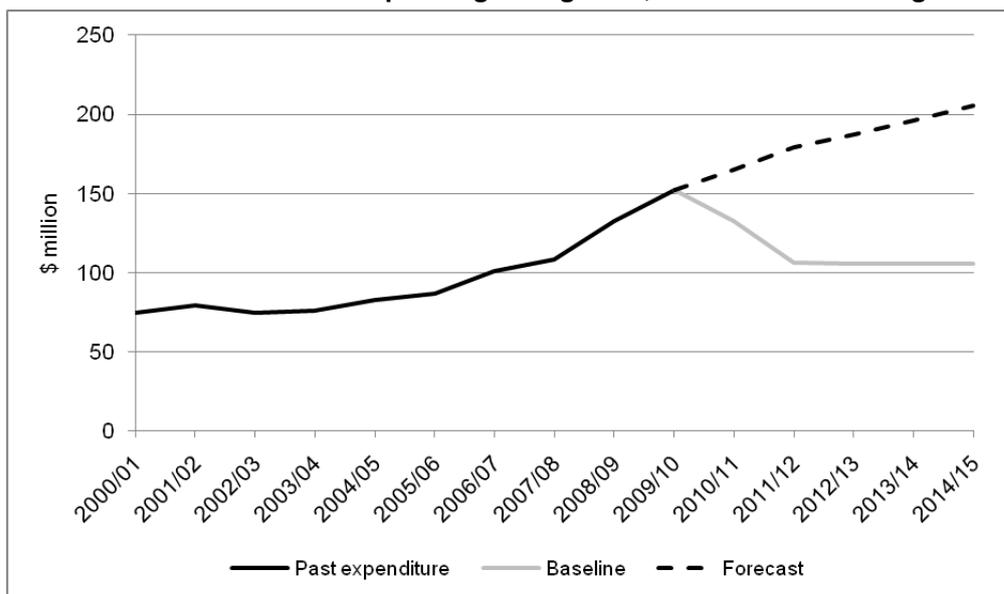
10. The proposals include changes to the lawyer for the child scheme, which provides legal assistance for children in care of children cases, and is funded through the court (rather than through legal aid). Lawyer for the child services need to be addressed both because of fiscal pressures and the importance of maintaining parity between the different forms of government funded legal assistance. These changes represent a first step in further work that is required to review the efficiency of Family Court services.

## Problem definition

---

11. Chart 1 sets out historical and forecast expenditure on legal aid, and the baseline as at Budget 2010. Spending was fairly level until 2004/05, but increased by an average of 13% per year from 2005/06 onwards, peaking at a 23% increase in 2008/09.
12. The gap between forecast expenditure and the Budget 2010 baseline is widening, and a sustainable approach to providing legal aid is required, to provide certainty to legal aid recipients, providers, and the Government. A decision about the future approach is required to align funding and the approved baseline.

**Chart 1: Actual and forecast spending on legal aid, and baseline funding**



13. The lawyer for the child service is funded through the court rather than legal aid (and through the Care of Children Act 2004 rather than the Legal Services Act 2000), but faces similar cost pressures. Expenditure on this service increased from \$15 million in 2006/07 to \$23 million in 2009/10. Given the similar increases to legal aid, this area has also been initially examined for savings.

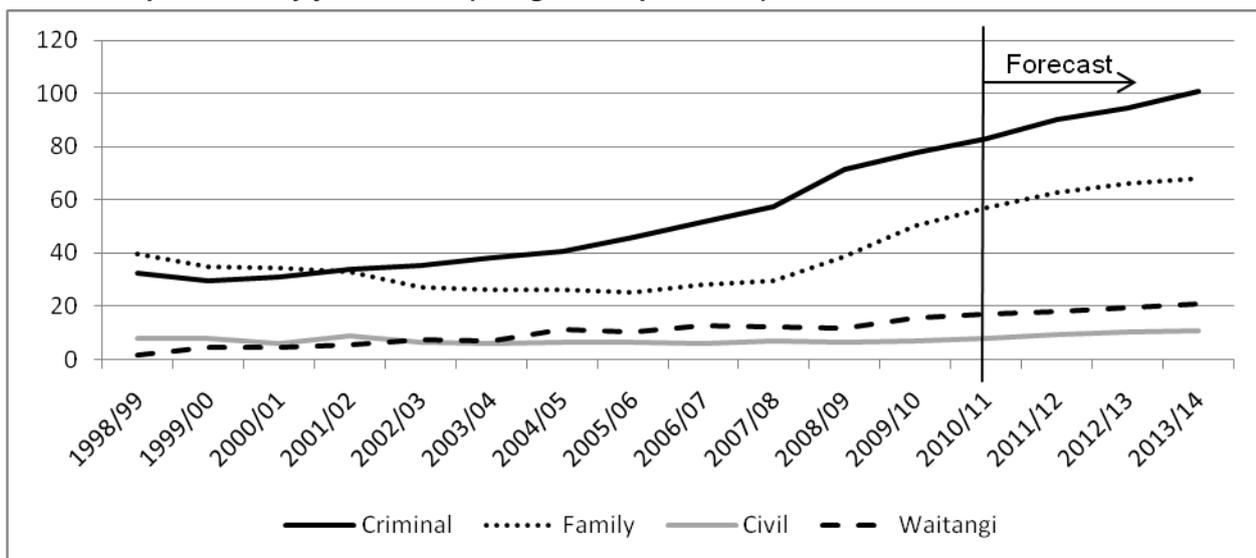
## Status quo

---

14. The funding system for legal aid is highly complex. The complexity is driven by the legislative framework and a history of legal challenges which requires the Legal Services Agency to take account of all possible circumstances before refusing legal aid. Therefore the options to establish a sustainable baseline for legal aid also seek to simplify the rules for accessing legal aid.

15. There are three major drivers of legal aid expenditure: the price per grant; the number of grants; and the repayment of those grants.
- 15.1. The Legal Services Act 2000 determines the number of grants (through the eligibility criteria in the Act) and the repayment of grants (through the associated criteria). The Legal Services Agency (LSA) is responsible for administering this legislation, and in a number of areas has considerable discretion in doing so.
- 15.2. The price per grant is determined by the purchase approach taken by the LSA. Changes to the purchase approach would not have a regulatory impact.
16. Growth in legal aid expenditure varies by jurisdiction. Chart 4 shows that spending on:
- 16.1. Criminal legal aid has increased steadily throughout the period, due to ongoing increases in the cost per grant, bolstered by increases in the number of grants from 2005/06 onwards.
- 16.2. Family legal aid remained fairly level until 2006/07, when both the number and cost per grant began to rise.
- 16.3. Civil legal aid has not changed substantially over the period.
- 16.4. Legal aid for Treaty of Waitangi claims has increased sharply over the period, peaking in 2006/07.

**Chart 2: Expenditure by jurisdiction (\$m, gross expenditure)**



17. The options to establish a sustainable approach to providing legal aid have been developed to align with the legal aid reforms already underway. The reforms include:
- 17.1. moving the functions of the LSA into the Ministry of Justice and establishing a statutory officer to undertake the functions that require independence;
- 17.2. improvements to the administration of the legal aid system, including a streamlined process for assessing eligibility for criminal legal aid;
- 17.3. introducing a new quality assurance and performance management system for providers; and
- 17.4. expanding the Public Defence Service across Auckland, Wellington, Christchurch and Hamilton.

## Regulatory impact analysis

---

18. We investigated options in five areas, structured around the drivers of expenditure:
  - 18.1. the price per legal aid grant;
  - 18.2. the number of legal aid grants;
  - 18.3. the repayment of legal aid;
  - 18.4. setting the overall legal aid baseline; and
  - 18.5. managing lawyer for the child.
19. Several options have been identified to manage expenditure. The options were assessed according to the following criteria:
  - *Cost-efficiency*: The effect of the proposals on government expenditure, and the efficiency effects on legal aid recipients and providers and the administrator of legal aid, and the flow-on effects on the wider justice system.
  - *Impact on legal aid recipients*: Whether people will be able to afford legal representation, and what the consequences are for those losing representation.
  - *Impact on the legal aid market*: The impact on the willingness of lawyers to provide legal aid and hence whether the change is likely to create a gap in provision.
20. The main options considered are summarised below. Some other options were rejected at an early stage because they would not affect the sustainability of legal aid provision. The savings for each option are affected by the other proposals selected (e.g. a reduction in eligibility will reduce the revenue gathered in user charges), so the amount of savings will differ for the final package of options selected.

### ***Reducing the cost per legal aid grant***

21. The cost per grant for legal aid increased by 48% from 1998/99 to 2008/09. The cost per grant is determined by the hourly rate payable, the number of hours of legal advice, and additional expenses. Providers have more flexibility in the number of hours and disbursements they claim, whereas the hourly rate is set by the Government.
22. In the past decade, the only increase in the hourly rate was an increase of 10% in July 2008 (reduced to 8.5% in July 2009). Therefore, the 48% increase was primarily due to increased hours and disbursements per case. Hence, the options developed focus upon restricting the number of hours and disbursements rather than restricting the hourly rate.

### ***Change in approach required to manage costs***

23. In order to better manage the cost per claim, funding rates need to be negotiated in advance, and encompass all three elements driving costs (i.e. the hourly rate, the number of hours, and disbursements). This approach aligns with Cabinet's agreement to trial other models of service provision in response to the Bazley Review (CAB Min (09) 45/6B).
24. Rather than seeking a single purchase approach to address the growth in the price per grant, several approaches are needed to address different types of cases. Most other jurisdictions use a range of purchase approaches. Three models are proposed:

- *Public provision* provides somewhat cheaper (and high quality) legal aid, with lower expenditure growth and efficiency benefits for the court system, as well as mentoring and development which will benefit the legal profession as a whole.<sup>1</sup> It is recommended where there are sufficient volumes of cases to make it cost-effective or where it can provide a service benchmark.
- *Fixed fees* allow a price to be set for each key stage, replacing the fee-for-service calculation based on the number of hours, price per hour and disbursements. This is effective for high-volume activities with a fairly predictable cost. Fixed fees will reduce compliance costs. Legal aid providers commonly assert that 20 – 30% of their time is spent in administrative tasks associated with the legal aid system, primarily relating to claims and invoices for fee-for-service grants. Because fixed fees involve specifying a rate for a stage in the court process, considerably fewer details will be required to support a claim for legal aid.
- *High cost case management* allows negotiation of a price up-front for a case (or for each stage of a case), where it is expected to be high cost. High cost cases are an important driver of expenditure - the most expensive 1% of cases accounted for 26% of expenditure in 2008/09, and their cost grew twice as fast as the average case from 2001/02 to 2008/09.

25. These purchase models can be implemented relatively quickly and focus on the largest expenditure areas. In the medium term, it is intended that the purchase approach will be extended to cover all legal aid expenditure, and that bulk funding will be introduced.

### **Options to reduce the price per grant**

<b>Proposal</b>	<b>Description and timeframe</b>	<b>Rationale and risks</b>	<b>4-year saving (\$m)</b>
<b>Most achievable options</b>			
Public provision: expand current offices	<ul style="list-style-type: none"> <li>• Metropolitan PDS offices to take 50% of cases.</li> <li>• Small trial of public provision for family law cases.</li> <li>• Implementation in 2011/12 and 2012/13.</li> </ul>	<ul style="list-style-type: none"> <li>• PDS offers improved efficiency and quality, as well as constraining future growth.</li> <li>• Most cost-effective and viable in metropolitan centres and at a level where significant private market still operates.</li> </ul>	7.2

<sup>1</sup> Based on evaluations of the New Zealand Public Defence Service. The quality of public provision varies internationally, primarily due to resourcing issues. Public provision within Australia and the United Kingdom is well resourced and provides high quality services, although some models are less cost effective (which is also linked to the structure of the legal aid markets in those areas).

Purchase strategy	<ul style="list-style-type: none"> <li>• Hold price at 2010/11 levels.</li> <li>• Use fixed fees for criminal summary, 'standard' family cases and simpler civil cases (e.g. ACC and employment).</li> <li>• High cost case management for the most expensive criminal cases and all Treaty of Waitangi cases.</li> <li>• Fee for service for residual cases.</li> <li>• Implementation in 2011/12.</li> </ul>	<p><i>Fixed fees</i></p> <ul style="list-style-type: none"> <li>• Removes incentive to increase the number of hours per grant.</li> <li>• New risk is that providers will reduce the amount they do, which can be managed with audit and monitoring.</li> <li>• Careful pricing will be required so that changes in behaviour do not result in unanticipated expenditure.</li> <li>• Reduces administrative costs.</li> </ul> <p><i>High cost case management</i></p> <ul style="list-style-type: none"> <li>• Is administratively complex, but the only approach that appears to be used successfully in other systems.</li> <li>• Could be an area particularly subject to legal challenge, because the greater cost of these cases raises the stakes for the provider.</li> </ul> <p><i>Residual fee for service</i></p> <ul style="list-style-type: none"> <li>• By the end of 2011/12, less than 20% of funding will be through fee for service; but this remainder should not more generous than the new regime.</li> </ul>	23.2
<b>Significant change options</b>			
Expand public provision: new offices in next largest centres	<ul style="list-style-type: none"> <li>• New offices in Tauranga, Napier/Hastings and Dunedin.</li> <li>• Implementation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>• PDS offers improved efficiency and quality, as well as constraining future growth.</li> <li>• Share of market needs to be carefully managed to ensure cost-effectiveness remains.</li> <li>• In smaller centres, risks will have greater impact on private market due to smaller size.</li> </ul>	1.8
Purchase strategy: reduce price by 10%	<ul style="list-style-type: none"> <li>• Same approach as above, but reduce price by 10% from 2010/11 levels.</li> <li>• Implementation in 2011/12</li> </ul>	<ul style="list-style-type: none"> <li>• Main effects as for purchase strategy: hold price constant.</li> <li>• In addition, greater risk of gaps in provision due to lawyers withdrawing from legal aid.</li> </ul>	62.1
<b>Back to baseline options</b>			
Public provision: 65% of cases in metropolitan areas	<ul style="list-style-type: none"> <li>• Expand metropolitan caseload to 65%.</li> </ul>	<ul style="list-style-type: none"> <li>• Main effects as for public provision: expand current offices.</li> <li>• In addition, greater risk of crowding out the private market. This may also affect the cost-effectiveness of the model due to less competition.</li> </ul>	13.1
Purchase strategy: reduce the hourly rate	<ul style="list-style-type: none"> <li>• Reduce the hourly rate paid.</li> <li>• Implementation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>• High probability of provider exit.</li> <li>• Providers consider that remuneration rates are too low (increase from 2008/09 was first increase in over 10 years and there is a large gap between legal aid and private rates).</li> </ul>	51.4
Purchase strategy: reduce price by 20%	<ul style="list-style-type: none"> <li>• Same approach as above, but reduce price by 20% from 2010/11 levels.</li> <li>• Implementation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>• Substantial risk of gaps in provision due to lawyers withdrawing from legal aid.</li> </ul>	98.7

### **Reducing the number of legal aid grants**

26. After the LSA was established in 2000 the number of legal aid grants decreased due to better standardisation of granting practices across the country. However, since 2005/06 the number of criminal legal aid grants has grown by an average of 10% per annum and the number of family legal aid grants has been growing since 2007/08.

27. The number of grants has grown faster than court throughput (for example, in criminal cases growth was 48% compared with 13% in court cases since 2004/05). A proportion of the growth can be attributed to Government policy changes to increase eligibility, particularly within the family jurisdiction. However, this does not fully explain the growth. For instance it would appear that decisions by the Legal Aid Review Panel and pressure from individual lawyers have contributed to increased numbers of grants.
28. To address this growth options were identified to:
- 28.1. reverse changes that appear to have contributed to growth (for instance the change to the family merits test in the Legal Services Amendment Act 2006); and
- 28.2. restrain the areas that contain high growth (for instance discretionary granting and criminal eligibility).
29. As eligibility is currently prescribed by the Legal Services Act 2000 (and is included in the Legal Services Bill), these options required legislation change to be implemented.
30. The options will slightly reduce compliance costs (on legal aid providers and applicants) by removing some of the more complex aspects of legal aid applications. For example, the special circumstances test requires a person to set out their full financial circumstances.
31. One option, to remove reference to household furniture and other goods from the assessment of disposable capital, is specifically aimed at reducing compliance. This requirement leads to confusion on the part of applicants, who may set out all of their possessions in great detail, although they are only assessed for repayment purposes if their second hand value is over \$1,000.

### ***Options to restrict eligibility***

32. Eligibility for legal aid is determined through three tests: whether the proceedings are eligible (e.g. legal aid is not available for marriage dissolutions), the merits of the case, and the means of the applicant. The tests differ across criminal, family, civil and Waitangi Tribunal legal aid.
33. This gives twelve potential tests (three tests in four jurisdictions), and within each test there are several elements. Rather than working through all of these potential options, the options that have the greatest effect on the growth of legal aid expenditure are outlined below.
34. In assessing these options, the underlying concern is to ensure that people on low incomes are able to receive legal advice for court cases with significant consequences, and that the court system can function effectively. Self-represented litigants face personal risks (through inadequate legal advice) and create flow-on costs for the court system (through delays, additional assistance required from court staff and the judiciary, and higher numbers of appeals of decisions).

<b>Proposal</b>	<b>Description and timeframe</b>	<b>Rationale and risks</b>	<b>4-year saving (\$m)</b>
<b><i>Most achievable options</i></b>			
Restrict the special circumstances test for family	<ul style="list-style-type: none"> <li>Restrict grants of legal aid where the applicant is above the financial eligibility thresholds.</li> <li>Return to the previous family merits test, removing consideration of the</li> </ul>	<ul style="list-style-type: none"> <li>Special circumstances grants grew from \$0.2 million in 2006/07 to \$6.4 million in 2009/10.</li> <li>The number of family legal aid cases has grown faster than the number of</li> </ul>	22.0

and civil proceedings and the merits test for family proceedings	<ul style="list-style-type: none"> <li>impact on vulnerable groups.</li> <li>Approximately 2,000 people would be ineligible following change.</li> <li>Women and children would be particularly affected.</li> <li>Domestic violence cases would not be affected.</li> </ul>	<ul style="list-style-type: none"> <li>family court cases. The growth seems to relate to the new merits test and that legal aid is funding more minor matters where children are involved.</li> <li>May marginally increase costs for the court system.</li> </ul>	
Improved eligibility assessment	<ul style="list-style-type: none"> <li>Improve operational efficiency and the accuracy of granting.</li> <li>Some options require legislation.</li> </ul>	<ul style="list-style-type: none"> <li>Will create administrative efficiencies.</li> <li>No significant risks.</li> </ul>	11.7
<b>Significant change options</b>			
Remove indexation of means thresholds	<ul style="list-style-type: none"> <li>Would remove automatic CPI adjustment of means thresholds.</li> <li>Approximately 3,000 people would be ineligible after first adjustment missed, increasing to 11,600 over 5-7 years.</li> </ul>	<ul style="list-style-type: none"> <li>The initial impact would be small but the effect would magnify over time.</li> <li>Would gradually reduce funding.</li> <li>Would affect all income brackets, particularly at the top end.</li> <li>Affects family and civil eligibility.</li> </ul>	8.3
Restrict criminal eligibility	<ul style="list-style-type: none"> <li>Introduce means thresholds for criminal cases (as already apply for family/civil).</li> <li>Would only apply to criminal summary cases.</li> <li>Approximately 2,700 cases would be ineligible for legal aid.</li> </ul>	<ul style="list-style-type: none"> <li>Criminal growth needs to be addressed; a restriction on summary cases is most likely to prove manageable.</li> <li>The judiciary could take the view that the thresholds do not align with the right to a fair trial, and defer cases until a lawyer is assigned or allow appeals of such cases.</li> <li>Could impose delays and additional costs on the court system.</li> <li>Further restrictions may prove necessary in future to fully manage growth in criminal legal aid grants.</li> </ul>	5.9
<b>Back to baseline options</b>			
<i>Restricting eligible proceedings</i>	<ul style="list-style-type: none"> <li>Would remove particular proceedings from being eligible (e.g. ACC, employment, property).</li> <li>Focus on areas with lowest risk.</li> </ul>	<ul style="list-style-type: none"> <li>These options should only be considered if significant savings are required.</li> <li>Would significantly reduce eligibility.</li> </ul>	24.6
<i>Restricting the family/civil means thresholds</i>	<ul style="list-style-type: none"> <li>Would restrict the means thresholds to benefit levels.</li> <li>Approx. 5,000 cases ineligible.</li> </ul>	<ul style="list-style-type: none"> <li>Would disadvantage women, particularly as most options focus on family legal aid.</li> <li>Could be particularly contentious to remove legal aid for proceedings against the Crown (e.g. claims of historic abuse).</li> </ul>	58.1
<i>Removing family eligibility</i>	<ul style="list-style-type: none"> <li>Remove eligibility for all family proceedings.</li> <li>Approx. 28,000 cases ineligible.</li> </ul>	<ul style="list-style-type: none"> <li>Majority of people affected would no longer have access to legal services.</li> <li>Significantly reduce access to justice.</li> <li>Increase self-represented litigants in the court system, resulting in higher cost for the courts.</li> </ul>	252.6
<i>Removing civil eligibility</i>	<ul style="list-style-type: none"> <li>Remove eligibility for all civil proceedings.</li> <li>Approx. 2,500 cases ineligible.</li> </ul>		40.1

### Increasing revenue

35. Depending upon their financial circumstances, some legal aid recipients are required to repay their legal aid. Repayment levels have not increased over the past decade, although expenditure has risen substantially (and the level of debt established has risen). This is in effect a cost to the legal aid system.
36. A key problem is incentives; few sanctions are applied to those who do not repay their legal aid debt. In the case of property-related debt, there is no obligation to repay until a house is

sold. Furthermore, there is no interest applied to debt, so that the longer that repayments are deferred, the lower the real value of the debt becomes.

37. This problem may have been aggravated by the 2006 Amendment Act which extended debt to criminal legal aid, and removed an initial contribution of \$50 in the family and civil jurisdictions. The \$50 contribution generated a small but immediate source of revenue, and encouraged legal aid recipients to consider whether they wished to proceed with litigation. The new debt is harder to collect, because it is from a lower income group, and for larger amounts.
38. The review also identified that the current repayment regime is complex (for both the administrator and for repayers) and that there is a widening gap between the level of debt established and what is likely to be repaid. Further work will be carried out to redesign the repayment regime. This was not a priority for the current review because it is unlikely to generate greater revenue (since legal aid is targeted to people with limited means). However, a redesign could simplify the scheme, make it more transparent, and better link the level of debt established to what might realistically be repaid.

### Options to increase revenue

Proposal	Description and timeframe	Rationale and risks	4-year saving (\$m)
<b>Most achievable options</b>			
User charges	<ul style="list-style-type: none"> <li>Re-introduces user charges in the areas removed in the 2006 Amendment Act (excludes domestic violence and mental health).</li> <li>\$50 for family/civil cases.</li> <li>Requires legislation.</li> <li>Should be reviewed from time to time.</li> </ul>	<ul style="list-style-type: none"> <li>A small charge on all legal aid recipients allows eligibility to be maintained for a wider group.</li> <li>Providers would face a cost in collecting fees from their legal aid clients (although they already collect payments from private clients).</li> <li>\$50 reflects the charge set in 1991.</li> </ul>	2.3
Attachment orders	<ul style="list-style-type: none"> <li>Impose payment orders on income-related debts.</li> <li>In order to protect privacy, attachment orders would only be used when the loan is in default.</li> <li>Could be implemented following the passage of the Courts and Criminal Matters Bill.</li> </ul>	<ul style="list-style-type: none"> <li>This allows existing obligations to be enforced, rather than adding new ones.</li> </ul>	6.6
<b>Significant change options</b>			
User charges	<ul style="list-style-type: none"> <li>\$200 for family/civil cases and \$100 for criminal cases.</li> </ul>	<ul style="list-style-type: none"> <li>As above, however higher user charges may be difficult to collect.</li> </ul>	33.0
Interest charges	<ul style="list-style-type: none"> <li>Improves the incentive to repay legal aid by making the cost more comparable to interest-bearing debts such as mortgages.</li> <li>Requires legislation.</li> <li>Costing based on interest on all debts, set at the rate of the capital charge.</li> </ul>	<ul style="list-style-type: none"> <li>The main risk is that those who genuinely cannot pay will be even less able to pay their debt as it rises due to interest.</li> </ul>	7.4
<b>Back to baseline options</b>			
User charges	<ul style="list-style-type: none"> <li>\$200 for all legal aid cases.</li> </ul>	<ul style="list-style-type: none"> <li>As above, however higher user charges may be difficult to collect.</li> <li>Taking account of likely collection rates, revenue gathered would be lower.</li> </ul>	59.9

### ***Managing overall legal aid expenditure***

39. As well as making policy changes to reduce expenditure, options were developed to determine the longer term basis for funding legal aid.
40. Up to 2008/09, funding for legal aid was demand-driven: the Government set the rules for eligibility and rates of provider remuneration, and funding was provided for every eligible applicant.
41. An alternative approach is to impose a cap. This sets a level within which funding must be managed. Caps are in place for most areas of government funding, and they generally operate by refusing services or queuing clients when funding is exhausted. For example, District Health Boards may reduce elective surgery places to accommodate a surge in patients requiring acute care, and Tertiary Education Institutions can stop accepting enrolments when funding is exhausted.
42. The problem with operating a cap for legal aid expenditure is the difficulty in declining or queuing legal aid applications if funding runs out. A queuing system for legal aid would mean that the cost of legal aid would simply be deferred until outyears, creating significant disruption for individuals and the court system, and shifting rather than addressing the fiscal pressure. In contrast, the proposed approach (ongoing pricing and policy adjustments to respond to pressure) addresses fiscal pressures as they arise.
43. Another approach used overseas is to cap the price of individual cases. Where such caps are introduced, the cost of cases tends to rise towards the top of the cap. This means that in order to achieve cost savings, the cap would need to be set below the current average price of cases, which would lead to significant under-funding of more complex cases, and over-funding of simpler cases.
44. Caps do operate in other countries, although they either operate as a target (which may be temporarily exceeded, leading to further policy changes), or by rescinding eligibility when funding is exhausted (typically for family and civil legal aid).
45. The proposed cap does not have a direct effect on individuals or providers of legal aid.

### ***Setting the baseline***

46. The options above provide control over spending. However, external factors will also affect spending, such as the number of prosecutions, the number of family or civil cases, and the economy (affecting the numbers eligible for legal aid and repayment of legal aid). These independent drivers of demand will continue to place pressure on legal aid spending.
47. In light of the fiscal environment, it is not feasible to automatically increase legal aid as these other factors change. The baseline for legal aid will be held at a fixed nominal amount, and additional investment decisions will be made as part of the regular Budget process (e.g. in response to changes in court throughput or provider supply problems). If a decision is made not to increase legal aid, it is probable that there will need to be further reductions to eligibility or the price paid.
48. The most important effect of a predictable baseline is upon the administration of legal aid. It will require close monitoring of spending and the ability to respond swiftly where unexpected changes in expenditure occur.

### ***Operating within the baseline***

49. A further issue is the ability to precisely manage costs in the short term. It is not possible to accurately predict legal aid expenditure. The only way to manage a short-term rise in expenditure is to refuse new applications for legal aid – in effect, ‘queue’ legal aid recipients. This would impose costs on the court system, and be inequitable for those whose legal aid needs arise later in the financial year.
50. To manage this risk, there will need to be ongoing adjustments to manage spending. The usual fiscal management approach will apply (i.e. adjustments can be made through joint Ministers’ decisions, transfers within the vote, or Cabinet decisions). However, policy settings may need to be adjusted quickly to manage back to within baselines.
51. The main choices for short-term restrictions in response to an overspend would be changes to the price paid for legal aid (managed through the purchase system), or changes to eligibility for legal aid. There is more flexibility to adjust eligibility for legal aid in the family and civil jurisdictions (where the consequences of litigation are less severe), and it is proposed that the eligibility for these jurisdictions be set in regulation in future, to allow for greater flexibility to respond to changes in demand.

### ***Lawyer for the child***

52. The Family Court may appoint a lawyer for the child whenever a dispute involving a child needs to be resolved under the Care of Children Act 2004. Expenditure on the lawyer for the child scheme has increased significantly. In 2009/10, \$23 million was spent on lawyer for the child in care of children cases<sup>2</sup>, up from \$15 million in 2006/07, due to several factors including:
  - 52.1. an increase in the number of Care of Children Act cases and the number of lawyer for the child appointments;
  - 52.2. the Care of Children Act strengthened the requirements concerning children’s participation in proceedings which has expanded the role of lawyer for the child, including ensuring the child’s views are put before the court;
  - 52.3. some judges appear to be appointing lawyers earlier in proceedings;
  - 52.4. broader eligibility for legal aid increased the number of care of children cases and subsequently appointments for lawyer for the child; and
  - 52.5. more cases are being treated as complex, attracting a higher hourly fee.
53. This is a particular area within the Family Court that has experienced recent increases in expenditure. However, there are further areas within the Family Court where savings could be made and further work is required (expenditure on the Family Court and its related services has increased by 33% between 2005/06 and 2008/09).
54. The options for change are designed to reduce costs, increase alignment, and encourage the judiciary to consider the cost of services and the types of cases where a lawyer for the child is appointed.

---

<sup>2</sup> Expenditure in care and protection and other cases totalled \$7.933 million.

Proposal	Description and timeframe	Rationale and risks
Quality assurance for lawyer for the child	<ul style="list-style-type: none"> <li>Extend the quality assurance framework for legal aid providers to lawyer for the child (and youth advocates).</li> <li>Requires legislation.</li> </ul>	<ul style="list-style-type: none"> <li>Would improve the quality of services provided under this scheme.</li> <li>While likely to be opposed by the profession it is unlikely to affect supply given the current supply levels.</li> <li>Will likely increase pressure from lawyers to increase remuneration rates for legal aid.</li> </ul>
Contributions to the costs for lawyer for the child	<ul style="list-style-type: none"> <li>This would require parties to contribute towards the cost of services (like legal aid).</li> <li>Requires legislation.</li> </ul>	<ul style="list-style-type: none"> <li>Given that these services are not means tested it may be reasonable that some parties could contribute.</li> <li>The likely income from this change is unavailable as there is currently no data available.</li> </ul>
Review the criteria for appointing lawyer for the child	<ul style="list-style-type: none"> <li>Review the criteria for when a 'lawyer for the child' is appointed.</li> <li>Requires legislation.</li> </ul>	<ul style="list-style-type: none"> <li>Restricting use to serious or complex cases would reduce expenditure.</li> <li>The size of reduction in costs would be determined by the tightness of criteria and judicial discretion.</li> <li>Likely to be opposed by family justice sector because may be seen as reducing ability of child to express views.</li> </ul>
Integrating with legal aid system	<ul style="list-style-type: none"> <li>Free access would be restricted to cases where parties are legally aided. In all other cases, parties would have to pay the costs</li> <li>Integrating payments for lawyer for the child with legal aid payments.</li> </ul>	<ul style="list-style-type: none"> <li>Could provide an incentive on parties to resolve cases at an earlier stage.</li> <li>Fundamental differences between the two systems – lawyer for the child is not means tested and a third party (a judge) is required to determine when a lawyer for the child is required.</li> <li>May create a perception of undermining the principles of family justice, particularly the welfare and best interests of the child.</li> <li>Would highlight difference in payment rates between lawyer for the child and legal aid.</li> <li>Significant operational costs in changing payment systems.</li> </ul>

## Risks

55. The risks associated with these changes are summarised below:

- 55.1. A change of purchase approach is required, but is likely to be resisted by some parts of the legal profession, particularly those who may feel that it will reduce their incomes or curb the choices they can make when managing cases. This is likely to lead to an increase in the number of legal challenges of legal aid grants, as well as public concern.
- 55.2. Reductions in the price paid to lawyers could create gaps in provision, particularly in the family and civil jurisdictions where there is more choice of private work and in some smaller centres where there are already supply issues.
- 55.3. The introduction of income and asset thresholds for the criminal means test will be in tension with section 24(f) of the New Zealand Bill of Rights Act, providing for the right to an affordable defence. It could also delay some court cases if judges defer proceedings because of inadequate representation.
- 55.4. Restrictions to eligibility will disadvantage people on low incomes, who have few options to find legal services elsewhere. Generally this includes young Māori men in the criminal jurisdiction and women and children in the family jurisdiction.
- 55.5. Withdrawing legal aid for low income groups is likely to lead to additional costs elsewhere in the justice system. In particular, it may increase the number of self-represented litigants, with flow on costs due to delays, additional assistance required from court staff and the judiciary, and higher numbers of appeals of decisions.

## **Consultation**

---

56. Due to the time pressures and Budget sensitive nature of the issues under consideration, it has not been possible to conduct public consultation on the proposals in this Regulatory Impact Statement. However, current changes increase the level of public provision have been widely consulted on with the legal profession. All changes requiring legislation will have public consultation as a part of the select committee process.
57. The following agencies were consulted on the Regulatory Impact Statement: the Department of Corrections, the Department of Labour, the Legal Services Agency, 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. The Department of Prime Minister and Cabinet was informed.

## **Implementation**

---

58. The options that do not require legislative change will be implemented in 2011/12. The legislative changes will be implemented once the necessary amendments are in place (hoped to be in July 2012).
59. The LSA (whose functions will become part of the Ministry of Justice on passage of the Legal Services Bill) has experience in implementing changes to eligibility. They advise that the changes are relatively simple and do not pose substantial implementation risks.
60. The changes will not impose compliance costs on individuals, and in some places the simplification of eligibility rules will reduce compliance. The basic application process will not change, nor will the process for repaying legal aid.
61. There will be a small compliance cost for legal aid providers, arising from the user charge for family and civil cases. However, these providers already collect payments from their clients who do not receive legal aid, and hence will have invoicing and payment systems in place. Lawyers providing lawyer for the child services will face some additional compliance costs for the new quality assurance system.
62. The changes will alter existing legislative provisions, and will not increase (or decrease) the overall level of regulation, although some provisions will be simplified, reducing the complexity of the administrative processes involved.

## **Monitoring, evaluation and review**

---

63. 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. As well as internal reporting mechanisms, and monthly reports of expenditure to the Minister of Justice, the main public report is the Annual Report.
64. A separate process for reviewing the effects of the changes is not necessary, because the maintenance of a sustainable approach to funding legal aid will require ongoing review of expenditure and the drivers of expenditure (including its effects on different groups). In particular, the Ministry will need to be immediately aware of any variations from the approved baselines, and the reasons for those