

# Evaluation of legal aid reforms

## Response to baseline survey results and update on legal aid reforms

### Introduction

Since 2009 the Government has been reforming the legal aid system to improve the quality of service provided to clients, and ensure that the system is financially sustainable so it is available in future for those who need it most.

Most of the reforms to date have focused on improving the ways in which legal aid services are purchased from lawyers, and these reforms will continue in 2012 and 2013.

Further reforms are proposed to focus eligibility for legal aid on the people who need it most, and strengthen incentives for people to resolve more minor personal and civil disputes between themselves rather than through courts.

The Ministry of Justice is also taking steps to better support people to resolve their own disputes, by improving access to information about the law and ensuring that community legal services are aligned to need.

The Ministry of Justice is evaluating the impact of the reforms and their implementation, to determine whether they are achieving their goals and to inform implementation of the reforms. The evaluation so far has included an online survey of 1,000 members of the public aged 18 conducted in June 2011, and an online survey of more than 1,000 legal aid lawyers conducted between 19 October and 7 November 2011.

The surveys are being released now that analysis of all responses is complete. .

Full results of the surveys are available on the Ministry of Justice website ([www.justice.govt.nz](http://www.justice.govt.nz)).

This document provides a summary of the key results and places them in the context of broader legal aid and justice sector reform.

### Legal aid reform in context

#### **Justice sector reform: less crime, earlier resolution, better services**

Over the last three years, considerable effort has been directed at addressing the causes of crime, reducing reoffending, and improving public safety. These reforms, alongside demographic and other trends, are reducing the number of people entering the criminal court system.

Other reforms may also reduce the number of people entering the family and civil court systems. The Family Court Review, for example, is considering ways to encourage separating parents to resolve their disputes early and out of court if possible. This generally leads to better and more durable outcomes for all involved.

The justice sector is also modernising and improving public services so they are more clearly focused on the needs the people who use them. During this year and next, criminal court procedures are being simplified so that court processes are timely and make sense to the people involved.

The collective results of these changes will be: fewer people entering the court system; earlier resolution; and better justice services. Legal aid reforms are part of this broader context.

### **Legal aid reform: reduced demand, better incentives, higher quality**

Legal aid exists to help people who cannot afford legal help, and genuinely need that help in the interests of justice. Those people are often vulnerable, and may be facing imprisonment or be responding to other uses of state power.

Before the reforms got under way, the legal aid system did not always provide New Zealanders with the standard of service they should expect.

It did not always give clients effective help. While the vast majority of legal aid lawyers served their clients well, Dame Margaret Bazley's 2009 review of legal aid found that there was "a small but significant proportion of lawyers providing very poor services."<sup>1</sup>

Spending on legal aid was rising rapidly – from \$111 million in 2006/07 to \$172 million in 2009/10.<sup>2</sup> The key reasons for this growth were: a widening of eligibility in 2006 for legal aid to include less serious family and civil cases; and an increase in fees paid to legal aid lawyers in 2008.

Though comparisons are difficult, there is evidence that New Zealand's legal aid system is relatively expensive by international standards. For example, a recently published international comparison by the UK National Audit Office found that New Zealand's legal aid system was the fifth most expensive of 19 countries considered.<sup>3</sup>

The legal aid system did not always send the right signals. Access to legal aid meant that people involved in family and civil disputes did not always have an incentive to resolve more minor disputes early and out of court, even when this would have led to better outcomes for them others involved (including children).

The reforms introduced since 2009 address these issues. They will ensure consistent quality, rein in costs, target funding to those who need it most, and ensure that legal aid does not incentivise people to prolong or escalate disputes.

## **Summary of key legal aid reforms**

Many reforms to the legal aid system to date have been operational in nature, and have focused on improving quality, reducing administrative costs and improving the way legal aid services are purchased from lawyers. This has included merging the Legal Services Agency into the Ministry of

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<sup>1</sup> Legal Aid Review, Chairperson Dame Margaret Bazley (November 2009) *Transforming the Legal Aid System: final report and recommendations*.

<sup>2</sup> Following initial reforms and changes in administration of legal aid, spending fell to \$169 million in 2010/11.

<sup>3</sup> National Audit Office (February 2012) Briefing for the House of Commons Justice Committee: *Ministry of Justice – Comparing International Justice Systems*.

Justice, changes to the way lawyers are approved for legal aid work and assigned cases, and changes aimed at achieving greater control of the costs of legal aid cases.

As a result, public and media debate has largely focused on these operational reforms which directly affect lawyers' caseloads and fees rather than arguably much more significant reforms which create incentives to resolve more minor disputes early, and target public funding to better meet New Zealanders' legal needs. The key reforms are summarised below.

### **Better legal information and initial advice**

Justice sector agencies are working to improve access to legal information so that people can avoid legal problems or resolve those problems themselves. This has already included the adoption of new national quality standards for community law centres. In the coming year, further options will be developed to better meet New Zealanders' needs for legal information.

Helping people to resolve legal problems early will not only reduce demand on the court system but also lead to better and more durable outcomes for the people involved. This can be likened to building a better fence at the top of the cliff, whereas the current legal aid system is largely focused on ensuring there is an ambulance available at the bottom.

### **Targeting legal aid to those who need it most**

The Legal Assistance (Sustainability) Amendment Bill was introduced to Parliament in 2011. As introduced, the Bill proposed to tighten some legal aid eligibility criteria, which would mean that legal aid is less likely to be provided to people who can afford their own lawyers.

The Bill also proposed to introduce user charges for some family and civil legal aid (but not for cases involving vulnerable people and care and protection of children), and to introduce interest on legal aid debts.

These changes were intended to ensure that public funding is used efficiently by targeting it to where it is needed most. They were also intended to incentivise people to resolve more minor family and civil disputes between themselves rather than through the courts.

The Family Court Review, which is being conducted by the Ministry of Justice, is considering ways to make the court more financially sustainable and better focused on the needs of people who need its services – including incentives to resolve family disputes out of court.

In February 2011, Justice Minister Judith Collins announced that consideration of the Bill will be deferred until after consideration of the Family Court Review, so that decisions about the court and eligibility for legal aid for family disputes can be made together.

Cabinet is expected to consider the review and proposed legal aid amendments later this year.

### **Purchasing higher quality legal aid services**

Many operational changes have been implemented to raise the quality of legal aid services. These include:

- expansion of the Public Defence Service, which independent audits have shown provides high quality, independent, and cost effective services to criminal legal aid clients – the Public Defence Service is only moving into areas where the caseload is sufficient to allow it to successfully

operate alongside a healthy private bar, where it can provide choice and allow benchmarking of quality and cost

- introduction of a new quality framework, under which lawyers have to provide evidence that they have the skills, knowledge and experience necessary to be approved to do legal aid work
- introduction of quality audits and new systems for handling complaints
- assignment of less serious criminal legal aid cases to lawyers on a 'rotational' basis, instead of allowing clients to choose their own lawyers in all cases – this change prevents lawyers from taking on very large numbers of cases without sufficient assurance that they can represent their clients effectively<sup>4</sup>
- new contracts, being offered to legal aid lawyers in April 2012, which set out required standards of service and conduct.

### **Achieving more certainty over the costs of legal aid cases**

Prior to 2011, lawyers were paid on an hourly rate basis for most legal aid work. As explained above, growth in the number of hours charged per case was one factor contributing to the significant overall growth in legal aid costs.

To achieve greater certainty over costs, the Ministry is introducing fixed fees for defined activities in criminal, family and ACC legal aid cases.<sup>5</sup> The fixed fees are being applied to relatively standard and predictable legal aid activities, not to all legal aid work. New systems have also been introduced to manage complex and high cost cases.

The Ministry will also be introducing a new policy on expenses (such as travel, accommodation, and non-lawyer costs) during 2012.

### **Delivering better services**

The Ministry is developing a new electronic operating model for processing legal aid grants and debts, which will be more efficient, simpler and easier to use for legal aid clients, lawyers and legal aid staff.

### **Effect of broader justice sector reforms**

The broader justice sector reforms referred to above are also having significant impacts on legal aid lawyers. Those reforms affect court processes, and in time can also be expected to affect lawyers' workloads as falling crime and earlier resolution of civil and family disputes leads to fewer people entering the court system.

## **Key survey results**

As explained above, the surveys were conducted during 2011 when many of the reforms had been proposed but not yet implemented.

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<sup>4</sup> Clients can still choose their own lawyers for more serious criminal cases and for all family and civil legal aid cases. Courts have found that, while criminal defendants have a right to legal representation, they do not necessarily have a right to choose their own lawyer.

<sup>5</sup> Fixed fees were introduced on 5 March 2012 for criminal legal aid, and will be introduced in July 2012 for family and ACC legal aid.

## Public perceptions survey

The key results of the public perceptions survey were:

- **15% agreed that legal aid operates in a way that represents value for money** – 47% disagreed; the remaining 38% neither agreed or disagreed, or did not know
- **23% agreed that legal aid is provided only to those who really need it** – 48% disagreed; the remaining 29% neither agreed or disagreed, or did not know
- **73% agreed that legal aid services enable access to justice for those who can't afford legal advice and representation** – 10% disagreed; the remaining 17% neither agreed nor disagreed, or did not know.
- **40% agreed that legal aid provides people with high quality legal advice and representation** – 20% disagreed; the remaining 40% neither agreed nor disagreed, or did not know.

## Legal aid lawyers' survey

Key results of the survey of legal aid lawyers included:

- **Changes to the legal aid system:** 72% disagreed with the introduction of fixed fees as a method of paying lawyers for some of their legal aid work, and 54% disagreed with proposals to tighten eligibility for criminal and family legal aid.<sup>6</sup>
- **Intended impacts of changes:** 75% did not agree that measures being taken to control legal aid expenditure would maintain access to justice, 71% did not agree that fixed fees would help achieve earlier resolution of legal aid cases, and 65% did not agree that 'rotational' assignment of less serious criminal legal aid cases would lead to more experienced lawyers doing legal aid work.
- **Implementation of changes:** 71% were dissatisfied overall with the way the changes were being implemented. More specifically, 79% were dissatisfied with a new application and approval process introduced in 2011 which requires lawyers to apply to the Ministry of Justice providing evidence of their experience and competence; and 62% were dissatisfied with the 2010 introduction of 'rotational' assignment for less serious criminal legal aid cases.

## Response to survey results

### Response to public survey results

The public perceptions survey results indicated support for a more efficient, higher value legal aid system in which funding is better targeted to those who need it.

Only relatively small numbers of people in the public survey agreed that legal aid represents value for money and is provided only to those who really need it. Much larger proportions disagreed.

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<sup>6</sup> Just under half disagreed with other changes including: the proposal to introduce user charges for some family and civil legal aid cases; expansion of the Public Defence Service; and a 2011 statutory change under which lawyers who meet quality criteria for approval as a legal aid provider will not necessarily be guaranteed a contract to do legal aid work.

The legal aid reforms directly address these concerns. Two changes referred to above – the introduction of fixed fees, and new systems for managing complex and high cost cases – will provide greater certainty about costs.

The expansion of the Public Defence Service has been found to increase the cost-effectiveness of the legal aid system as well as improving the quality of criminal legal aid defence services.

The proposals in the Legal Assistance (Sustainability) Amendment Bill are also intended to improve the targeting and value of legal aid, as members of the public surveyed appear to support.

## **Response to survey of legal aid lawyers**

Overall, the results of this survey reflected a high level of lawyer disagreement with the reforms, and dissatisfaction with the way they were being implemented.

### **Direct effects of reforms on legal aid lawyers**

Dissatisfaction was significantly more likely among lawyers who:

- worked mainly in criminal legal aid (and therefore had been directly affected by reforms to date affecting caseloads and fees)
- relied on legal aid for the majority of their income
- reported lower workloads since the legal aid changes.

Though there was significant disagreement with proposed changes to eligibility and user charges, the highest levels of disagreement or dissatisfaction appeared to relate to fee changes.

### **Timing of survey**

Disagreement also appeared to be higher for changes that had been proposed at the time of the survey but either not yet introduced or only partially introduced. Fixed fees had been announced but not yet introduced. Proposed stricter eligibility criteria for criminal and family legal aid clients had been announced but, as explained above, will be considered again by Cabinet and Parliament later this year.

There were high levels of dissatisfaction with implementation of the new approvals system. Lawyers commented that the process was time-consuming, though relatively few had in fact submitted their applications at the time of the survey. Some senior lawyers also felt affronted by the requirement to demonstrate their skills, knowledge and experience.

Most legal aid lawyers submitted their applications for approval after the survey had been completed. The Ministry received feedback from some lawyers that the application process was easier and less time-consuming than they had expected. Nonetheless, the Ministry is consulting with representative groups about ways in which it can simplify administrative requirements and provide more flexibility for experienced lawyers while retaining the requirement for lawyers to demonstrate their competence and experience.

### **Reform intentions**

Of the operational reforms so far completed, the initial evidence is that they have achieved their goals. The main purpose of 'rotational' assignment was to achieve a fair distribution of cases among legal aid lawyers. This, in turn, ensures that clients receive a quality service. (Previously, some lawyers had taken on very large numbers of legal aid cases without sufficient assurance that they

would provide a good service to their clients.) The evidence is that this reform has achieved its purpose.

Similarly, the new approvals process has excluded from the legal aid system lawyers who are unable to demonstrate the skills, knowledge and experience needed to provide a good service to their clients.

### **Disagreement with fixed fees**

A great deal of attention has been given to the introduction of fixed fees as a method of paying legal aid lawyers, while comparatively less attention has been given to more significant reforms such as proposed changes to eligibility for legal aid.

The introduction of fixed fees is a change in the way the Ministry pays legal aid lawyers. It does not affect access to a lawyer – anyone who is eligible for legal aid will still have access to a lawyer.

Fixed fees provide greater certainty about legal aid costs for clients, lawyers and the government. This is particularly important for clients who sometimes have to repay part or all of their legal aid costs.

Fixed fees also reduce administration and compliance costs in the legal aid system – for most activities lawyers will simply have to tick boxes on standard invoices confirming that the activity has been completed. Lawyers have previously said that they spent too much time on administration.

The Ministry will monitor the new fee frameworks to determine whether they are achieving their objectives, and will review fee levels late in 2012 for criminal legal aid and in 2013 for family and ACC legal aid.

### **Proposed changes to eligibility**

Lawyers were more likely than members of the public to agree that legal aid is provided only to those who really need it. However, a sizeable proportion of lawyers who responded to the survey did not agree that legal aid is provided only to those who really need it.<sup>7</sup> As noted above, only 23% of public respondents agreed that legal aid is provided only to those who really need it.

Final decisions are yet to be made on eligibility reforms, but as noted above the government has stated its intention to ensure that legal aid is available for those who need it most.

## **Conclusion**

New Zealand's legal aid system is relatively expensive by international standards, and the public survey results indicate that New Zealanders do not believe the system provides good value or is targeted to where it is needed most.

In the past, the system has not always served its clients well. While most legal aid lawyers have provided a high quality service, some have not.

Legal aid reforms are addressing these issues. For lawyers, some of the operational reforms have been challenging, and those challenges will continue as legal aid and broader justice sector reforms continue.

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<sup>7</sup> Specifically, 54% of lawyers agreed that legal aid is provided only to those who need it most, and 34% disagreed.

The Ministry recognises these challenges. There has been extensive input from representative groups over operational changes, and many of their suggestions have been taken on board.

Legal aid reforms are delivering a higher quality, better value service in which public funding is targeted to where it is needed most. The reforms, in turn, are part of a much broader programme that is focused on reducing crime, encouraging earlier resolution of personal and civil disputes, and providing better and more accessible public services.