

# Regulatory Impact Statement: Legal Aid Eligibility

## Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice. Legal aid promotes access to justice by providing legal services to people without the financial means to pay for a lawyer's assistance. The RIS provides an analysis of options to increase the number of people who receive civil and family legal aid by amending eligibility criteria set in regulation.

A RIS is required because implementing an eligibility increase would require amending the Legal Services Regulations 2011.

### *Limits on options analysed*

We acknowledge that there are other options that could improve the public's access to justice. These options include providing additional assistance to people who represent themselves in court, and improving the public's understanding of their options and costs to resolve legal problems. Looking at these wider 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 RIS therefore does not consider these other options.

As discussed at paragraphs 6-7 of the RIS, the Legal Services Amendment Act 2013 removed the previous automatic adjustment of eligibility criteria in line with movement in the Consumer Price Index. This change was intended to ensure decisions about eligibility thresholds could be made alongside other Budget priorities. Amending primary legislation to reverse this decision was not considered.

Criminal legal aid is not considered because the eligibility criteria set in regulation do not apply to criminal legal aid applications.

### *Limitations on the analysis carried out*

It is difficult to quantify the unmet demand for civil and family legal aid (ie, those people who would take a case to court if they were granted legal aid, but have not in the absence of aid). This is because no agency collects, or would easily be able to collect, this data.

The Ministry holds data on the number of legal aid applications and the percentage of which are successful each year.<sup>1</sup> But this information is not considered an effective measure of unmet demand in civil and family legal aid cases because legal aid lawyers self-regulate the application process (ie, lawyers know the eligibility criteria and therefore are only likely to apply for cases that they expect have a good chance of being approved).

This RIS instead focuses on identifying the total number of New Zealanders likely to be made eligible for legal aid if eligibility criteria were adjusted to offset the effects of CPI inflation on eligibility. This estimate relies on household composition and income data from the 2013 Census provided by Statistics New Zealand; it is considered the best data available. The

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<sup>1</sup> Civil and family legal aid application numbers have remained relatively steady since 2008. There have been approximately 25,000 - 30,000 civil and family legal aid applications each year with 85% grant rate.

number of New Zealanders likely to be made eligible is then used to estimate financial implications based on the forecast legal aid expenditure set out in the Justice Sector Legal Aid Forecast.

However, the figures in this RIS are only estimates of the expected number of legal aid grants and resultant cost to Government. The cost of legal aid is demand-driven; it is a direct outcome of the number of cases taken to court, and the cost of conducting these cases. The Ministry must continue to pay for legal aid in eligible cases even if the limit of the Legal Aid appropriation is reached, and additional funds appropriated by Parliament to cover these costs.

This paper references research in comparable jurisdictions such as Australia and the UK which support the problem definition and identify positive flow on effects associated with increased legal aid eligibility. This research has not been replicated in New Zealand. Any potential flow on benefits to the public, the court system or the Government associated with an increase in legal aid eligibility cannot be quantified with currently available data.

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## Context and status quo

1. Legal aid promotes access to justice by providing legal services to people without the financial means to pay for a lawyer's assistance. Legal aid is available for criminal and civil (including family) proceedings. It enables parties with unequal financial resources to have greater access to justice. Access to justice helps ensure equality before the law, contributing to the maintenance of the rule of law and the legitimacy and efficiency of the justice system.
2. Government has a dual responsibility to ensure access to justice and to use public funds responsibly. Public expenditure principles of equity, efficiency, and effectiveness guide the nature and extent of services the legal aid system provides.
3. Given the limited public funds available and the high cost of legal aid (over \$130 million in 2014/15),<sup>2</sup> legal aid cannot be used to ensure that every person has sufficient access to justice. Criteria set out in the Legal Services Act 2011 and subordinate regulations restrict eligibility to those people whose income falls below certain thresholds.

*Civil and family legal aid availability is determined by income eligibility criteria*

4. Eligibility for civil legal aid is determined based on an applicant's income, with eligibility criteria set in the Legal Services Regulations 2011. Eligibility criteria outline the maximum income a person can have and be granted civil legal aid, taking into account whether they have a dependent partner and/or children. The current eligibility criteria are shown in Table 1 below.

**Table 1: Civil eligibility criteria set in regulation**

	Single	One dependent	Two dependents	Three dependents	Four dependents	Five or more dependents <sup>3</sup>
<b>Status quo</b>	\$22,366	\$35,420	\$50,934	\$57,880	\$64,678	\$72,302

5. A person whose income exceeds the eligibility criteria may be granted legal aid only if there are special circumstances relating to the likely cost of proceedings and the applicant's ability to fund them.<sup>4</sup>

*Legal aid reforms set the civil and family legal aid eligibility criteria*

6. Between 2010 and 2013 the Government implemented reforms to control legal aid expenditure, which had grown rapidly between 2006 and 2009. One of these changes was the removal of the automatic adjustment of eligibility criteria in line with movement in the Consumer Price Index. This change was intended to ensure decisions about eligibility thresholds could be made alongside other priorities.

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2 This figure includes only expenditure in the Legal Aid appropriation. Vote: Justice incorporated a further \$26 million in 2014/15 appropriated to fund the Public Defence Service, and \$11 million to fund Community Law Centres.

3 Where an applicant has five or more dependents \$6,689 is added to the income threshold for each additional child.

4 For example, the applicant may have a disability, illness or injury which makes additional demands on their financial resources, or a protection order applicant may be unable to access resources controlled by their partner.

- Cabinet acknowledged that over time this would reduce the real value of the eligibility thresholds, as they would remain static while wages and benefit levels rose. As eligibility levels reduced in real terms, the number of people eligible for civil and family legal aid would also reduce. Cabinet decided, however, that the ability to consider legal aid in a wider Budget context outweighed this concern [CAB Min (11) 3/6].

## Problem definition

*Eligibility has not adjusted as wages rise, meaning fewer people are eligible for legal aid*

- The maximum income a person can have and be eligible for civil legal aid is low; so much so that a person without dependents who is working full time and earning minimum wage is not eligible for legal aid.
- Since 2008 when eligibility criteria were last adjusted, inflation has driven an effective 12 percent reduction in eligibility (calculated to mid-2016).<sup>5</sup> The effective reduction in eligibility means an estimated 110,000 fewer low income New Zealanders are now eligible for legal aid than was the case in 2008.<sup>6</sup>

*Civil legal problems are common and can have a substantial impact on people's lives*

- Legal problems associated with civil and family law are relatively common. An Australian survey of legal need found that close to half of the 20,000 respondents experienced one or more civil or family legal problems over a twelve month period.<sup>7</sup> Australian research provides guidance in assessing legal need in New Zealand as the majority of these legal problems were associated with proceedings which would be eligible for legal aid in New Zealand.<sup>8</sup>
- More than half of respondents to the Australian survey considered the legal problem had a 'severe' or 'moderate' impact on their everyday life, which would likely require representation to support resolution between parties. The most common types of civil proceedings which receive legal aid in New Zealand are shown in Table 2 below:

**Table 2: Civil proceedings commonly granted legal aid**

Civil (family law) proceedings	Civil (other) proceedings
Applications for protection orders	Accident compensation proceedings
Care of children proceedings	Employment disputes
Child protection proceedings	Historical claims of abuse
Compulsory mental health treatment orders	Refugee and immigration proceedings

5 CPI inflation calculated to mid-2016 via the Reserve Bank inflation calculator and Westpac CPI forecast as at April 2016.

6 Ministry of Justice estimates based on Census 2013 data provided by Statistics New Zealand.

7 C. Coumarelos, et al. (2012) *Legal Australia-Wide Survey: Legal Need in Australia*. Sydney: Law and Justice Foundation of New South Wales.

8 Legal problems identified in the Australian survey which are not applicable in New Zealand (eg, the personal injury suits barred by Accident Compensation Act 2001) make up a minority of the overall reported legal problems.

12. Legal problems tend to cluster, and are disproportionately experienced by people on low incomes. While not all individuals who experience multiple legal problems are financially disadvantaged, as disadvantage increases, so too does the likelihood of experiencing multiple and substantial legal problems.<sup>9</sup>

*Resolving legal problems is expensive, but leaving them unresolved can be harmful*

13. Resolving legal problems can be expensive. People who have become ineligible for legal aid through the effects of inflation cannot necessarily afford to pay for a lawyer to assist them to reach a fair resolution. The average amount paid to a lawyer for a legal aid case associated with civil or family law is approximately \$2,100.<sup>10</sup> Costs to privately instruct a lawyer are likely to be even higher, as they are not price-controlled by government.<sup>11</sup>
14. People who cannot afford to pay a lawyer and do not qualify for legal aid are likely to either represent themselves, or leave their legal problems unresolved. In self-representing, people may be disadvantaged compared to those people with professional legal representation. International studies indicate that case outcomes are adversely affected by a lack of legal representation, although this seems to be largely linked to lawyers' procedural familiarity rather than the quality of legal advice.<sup>12</sup>
15. Leaving legal problems unresolved can lead to them escalating into more serious issues, and impose costs by increasing the demand for other social services.<sup>13</sup> A growing body of international evidence documents the economic and societal benefits of legal aid and other forms of free or low-cost legal assistance for people on low incomes.<sup>14</sup>

*But increasing eligibility for legal aid has direct financial implications to the Government*

16. Increasing the civil eligibility thresholds to fully counter the effects of inflation is estimated to cost approximately \$11.900 million per year. Current forecast expenditure for the 2016/17 financial year is \$135.830 million, meaning increasing eligibility would represent an 8% increase in the total cost of legal aid.<sup>15</sup>
17. These costs are uncertain, but represent the Ministry's best estimate. Based on Census 2013 income data, we estimated the population currently eligible for legal aid and the additional people who would be made eligible by increasing eligibility. We estimated the cost of increasing eligibility by multiplying the proportional increase of people who would be made eligible by the forecast legal aid expenditure under the current policy settings.
18. However, the Legal Aid appropriation is demand-driven. Expenditure on legal aid is a direct outcome of the number of cases taken to court, and the cost of conducting these

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9 H. McDonald, et al. (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.

10 Ministry of Justice data, payments to lawyers for civil and family cases in the 2011/12 and 2012/13 financial years.

11 Government sets standard payment rates which apply to all legal aid lawyers, rather than paying individual lawyers' market rates which they charge private customers.

12 K. Williams (2011) *Research Summary 2/1: Litigants in Person - A Literature Review*. London: Ministry of Justice, p.6.

13 Productivity Commission (2014) *Access to Justice Arrangements, Inquiry Report No. 72*. Canberra, p.666.

14 For example, L. Abel & S. Vignola (2010) 'Economic and Other Benefits Associated with the Provision of Civil Legal Aid,' *Seattle Journal for Social Justice* 9.1.

15 Ministry of Justice (2016) *Justice Sector Legal Aid Forecast 2015-2020*. Wellington: Ministry of Justice.

cases. The Government must continue to pay for legal aid representation in eligible cases even if the limit of the appropriation is reached, and additional funds appropriated by Parliament to cover these costs.

### *Objectives and assessment criteria*

19. Increasing the civil and family eligibility thresholds would offset the effects of inflation since 2008. Any increase to the eligibility thresholds must balance the opportunity to improve access to justice against the direct costs to Government.
20. Any increase to the eligibility thresholds will be aligned with the existing legal aid scheme, which prioritises legal aid funding going to people based upon their ability to pay for representation (rather than the proceeding type). The options are constrained by this principle.
21. The options will be assessed against three criteria below:
  - 21.1. Affordability: The option considers the direct, quantifiable costs to Government over the Four Year Plan period (2016/17 – 2019/20).
  - 21.2. Effectiveness at ensuring access to justice: The option achieves the desired improvement in access to justice for the maximum number of people. This minimises the flow-on costs of self-representation to courts and of legal problems remaining unresolved. It transfers the costs of resolving legal problems away from people on low incomes who lack the means to effectively do so. It increases public confidence in the fairness and accessibility of the justice system.
  - 21.3. Ease of change: The option assesses the financial and administrative resources required to effect change (eg, the costs of making regulations, changing forms and IT systems, and promulgating the changes).

## **Options to increase eligibility**

22. Six options have been identified for increases to eligibility:
  - 22.1. Option 1 Maintain status quo: Allocate no additional funding to increasing eligibility thresholds prioritising affordability to the Government over any improvement to access to justice. The problem as defined above would continue (ie, wage and inflation will continue to effectively reduce eligibility for legal aid).
  - 22.2. Option 2 Increase by 6.5%: Amend the regulations to increase eligibility by 6.5% over current levels prioritising affordability to the Government while achieving moderate improvement in access to justice.
  - 22.3. Option 3 Increase by 13%: Amend regulations to increase eligibility by 13% over current levels prioritising improvements to access to justice over affordability. This would fully offset the effects of inflation since 2008.
23. Three further options are more technically complex, but achieve an increase in access to justice while not costing as much in the short-term.
  - 23.1. Option 4 Gradual increase to 6.5%: Amend regulations to gradually increase the eligibility thresholds across the Four Year Plan period. This achieves the same increase in access to justice as option 2 by 2018/19, but reduces the cost of doing so in the intervening years.

23.2. Option 5 Gradual increase to 13%: Amend regulations to gradually increase the eligibility thresholds across the Four Year Plan period. This achieves the same increase in access to justice as option 3 by 2018/19, but reduces the cost of doing so in the intervening years.

23.3. Option 6 Targeted increase: Amend regulations to increase eligibility for certain high priority proceedings only. The Act already incorporates a regime by which “specified applications” are prioritised.<sup>16</sup> This targets an increase in access to justice to high priority proceedings only.

24. Option 6 would establish a separate eligibility scheme for certain high priority proceedings. This is not considered to be a sustainable long-term approach. A general increase in eligibility would likely still be required at some point to maintain current policy settings for access to justice.

**Table 3: Options for amending eligibility for civil and family legal aid**

Option	Affordability	Effectiveness	Ease of change
<b>1 Maintain status quo</b> No direct cost No additional grants	Highest	Lowest	N/A
	Does not address the problem by improving access to justice.		
<b>2 Increase by 6.5%</b> \$23 million over 4YP 11,000 extra grants	Moderate	Moderate	Highest
	Improves access to justice (11,000 extra grants over 4YP period). Minimises IT and administrative cost of change.		
<b>3 Increase by 13%</b> \$48 million over 4YP 22,900 extra grants	Lowest	Highest	Highest
	Significantly improves access to justice (22,900 extra grants over 4YP period). Minimises IT and administrative cost of change.		
<b>4 Gradual to 6.5%</b> \$17 million over 4YP 8,300 extra grants	Moderate	Moderate	Moderate
	Improves access to justice (8,300 extra grants over 4YP period). Administrative costs associated with yearly changes to forms and IT systems.		
<b>5 Gradual to 13%</b> \$36 million over 4YP 17,100 extra grants	Low	High	Moderate
	Significantly improves access to justice (17,100 extra grants over 4YP period). Administrative costs associated with yearly changes to forms and IT systems.		

<sup>16</sup> Specified applications include applications for protection orders, proceedings associated with compulsory mental health and intellectual disability treatment, and proceedings under the Children, Young Persons and Their Families Act 1989 and the Protection of Personal and Property Rights Act 1988. Such applications are exempted from the \$50 user charge and are more likely to be granted aid despite the applicant’s income exceeding the eligibility thresholds.

Option	Affordability	Effectiveness	Ease of change
<b>6 Target increase to high priority cases</b> <b>\$21 million over 4YP</b> <b>9,900 extra grants</b>	High	Low	Low
	Prioritises legal aid funds to people based on their proceedings type rather than their ability to pay for representation, but does so in a manner consistent with exceptions which already exist in the Act. Improves access to justice (9,900 extra grants over 4YP period). Administrative costs associated with the need to develop and maintain a parallel granting process.		

## Consultation

25. The following departments and agencies were consulted in the preparation of this RIS: the Ministry of Business, Innovation, and Employment; Ministry of Education; Ministry of Health; and the Ministry of Social Development. These agencies were consulted as they have an interest in the types of cases most affected by the civil and family legal aid scheme. The Ministry of Social Development agreed that continuation of the status quo is undesirable, and that an eligibility increase was desirable. Other agencies consulted had no comments to add to the analysis. The Treasury was also consulted on this RIS.
26. The public have not been consulted on this proposal as it is Budget sensitive. Recently there has been increased public scrutiny of the potential impact that current eligibility thresholds are having on the number of people representing themselves in court. Such scrutiny has included a speech by the former Chief High Court Judge, Justice Winkelmann, and several articles in mainstream media and legal publications.

## Conclusions and recommendations

27. Maintaining the status quo is undesirable, as it will gradually undermine the effectiveness of the legal aid scheme. The scale, rate and timing of change, however, is fundamentally a financial decision for Government. The preferred option is therefore dependent on the relative priority given to improving access to justice in the context of other social sector initiatives.
28. If improving access to justice for the largest number of New Zealanders is to be prioritised, the preferred option is to increase eligibility by 13% above current levels (option 3). This will fully offset the effects of inflation since 2008.
29. If other social sector initiatives are prioritised, and the funds available for increasing eligibility therefore limited, a gradual increase of eligibility by 6.5% above current levels (option 4) offers the best balance of affordability and effectiveness.

## Implementation plan

30. The preferred option will be given effect by amendments to the Legal Services Regulations 2011. Any amendments would be notified in the New Zealand Gazette and would come into force from July 2016.
31. The Ministry of Justice will also carry out necessary work to update the forms, IT systems and inform the legal profession of the changes. There are no significant implementation risks.

## Monitoring, evaluation and review

32. The Ministry of Justice's Sector Group annually provides a five-year forecast of legal aid expenditure. A breakdown of civil and family forecast expenditure is included in this forecast. The next legal aid forecast is due to be completed in late 2016. That forecast will include assumptions about the increase in expenditure due to any eligibility changes.
33. The Ministry of Justice will also monitor the number of applications received and subsequently granted as part of its business as usual workload. Any wider impacts related to increased access to justice will not be monitored or evaluated.
34. Cabinet requires the Ministry of Justice to report triennially to the Minister of Justice on legal aid policy, to assist Cabinet to make future decisions about the appropriate balance between access to justice and the cost of legal aid. Impacts of this change will be incorporated into the next legal aid report (due between September and December 2018).