

# **New Zealand Country Report**

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## The Legal Services Agency

1. This section provides a summary of the key features of the Legal Services Agency including its functions, organisation and accountability structures.
2. The Legal Services Agency (the “Agency”) is responsible for the administration of legal aid and related schemes. The Agency is a Crown entity established under section 91 of the Legal Services Act 2000. The Agency took over the granting of Aid from the Legal Services Board (for civil and family legal aid) and Registrars of the courts (for criminal legal aid). The Agency is governed by a Board of six members appointed by the responsible Minister – the Minister of Justice (the “Minister”). The Agency has a Chief Executive Officer, over one hundred staff, and eleven regional offices.
3. The Agency contributes to Government outcomes by supporting the framework for law and order, and governance in New Zealand. It contributes to the equitable and effective administration of justice by ensuring that legal aid and related legal services are available to those qualifying under the Legal Services Act 2000 (the Act) in a cost-effective way.<sup>1</sup>
4. The Agency has responsibility for:
  - administering criminal and civil legal aid schemes;
  - administering the Duty Solicitor and Police Detention Legal Assistance Schemes;
  - piloting and running schemes for employing or contracting with legal aid providers;
  - maintaining a list of approved legal aid providers;
  - developing and maintaining standards for listed providers;
  - contracting with community law centres for the delivery of community legal services; and
  - contracting for and delivering legal information and law related education projects.
5. The Agency is required to comply with any written direction from the Minister. The Minister is required to table any direction in the House of Representatives and must publish the direction in the Government Gazette. The Minister is specifically prevented from giving the Agency a direction intended to bring about a result for one or more individuals.
6. The key accountability documents are the Memorandum of Understanding and the Statement of Intent agreed between the Minister and the Agency.
7. The Memorandum of Understanding is an annual purchase agreement that sets out the outputs that the Agency will deliver, defines performance measures, and presents financial information. It also sets out the Minister’s expectations in relation to the Agency and the reporting arrangements.

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<sup>1</sup> Legal Services Agency’s Statement of Intent, 1 July 2001 to 30 June 2004.

8. The Statement of Intent is a three-year higher level document that reflects the government's ownership interest in the organisation and is tabled in parliament. It sets out the government's outcomes and the Agency's priorities in relation to these outcomes and includes a mission and vision statement and key objectives for the period of the document.
9. The Agency also produces an Annual Report. A copy of the Annual Report can be found at <http://www.lsa.govt.nz>. The Agency reports to the Minister on a quarterly basis and has a three-year business plan.
10. The Agency receives income from government appropriation, interest, contributions and repayments from legally aided persons, and the Law Society Special Fund. Detailed income figures may be found in Appendix Two. Legal aid is demand driven and the annual appropriation is based on forecast growth.
11. The Agency has a Public Advisory Committee. The Committee is required to have people who represent the interests of women, Māori, Pacific Island people, young people, older people, people with disabilities, the legal profession and community law centres. The Public Advisory Committee provides advice to the Agency on a range of issues including the delivery and funding of community legal services. The committee may not give advice on individual grants of aid.
12. The Ministry of Justice is responsible for policy development in relation to legal aid. This includes any policy work relating to criteria set in legislation and subordinate regulation as well as monitoring the performance of the Agency.

## **Legal Aid - Overview**

13. This section provides an overview of legal aid services and processes for the judicare system. This includes descriptions of what services are provided and who provides them, key statistics on grant numbers and expenditure, and an overview of the granting process.

### ***Services provided***

14. Legal aid may be provided when an applicant intends to take proceedings or needs to defend proceedings and includes legal advice and representation. This includes assistance:
  - with resolving disputes other than by legal proceedings;
  - with taking steps preliminary or incidental to any proceedings; and
  - in arriving at or giving effect to any out of court settlement that avoids or brings to an end any proceedings.

### ***Listed Legal Aid Providers***

15. Listed legal aid providers are currently all in private practice. There are approximately 8,000 listed providers. Community law centres employ a small number of listed providers (less than 25).

16. For civil legal aid a person chooses their own approved provider. For criminal legal aid a person may choose their own listed provider, and the Legal Services Agency may allocate them a lawyer if they have no preference. The Legal Services Agency sets standards for and maintains a list of legal aid providers. Legal Aid providers are generally lawyers, however, in some jurisdictions, particularly employment law, where the court or tribunal provides for representatives who are not lawyers, a lay advocate may also be a listed provider.
17. The Agency has the power to audit listed providers. This capacity is still being developed.

### ***The Granting Process***

18. When a person is granted legal aid they must pass the means test and their case must pass the relevant merits test.
19. Granting officers in the regional offices process applications. Staff may also seek the advice of Specialist Advisers, who are experienced lawyers employed or contracted by the Agency.
20. When making a grant of legal aid, the Agency can set a maximum grant. This maximum can be expressed in any way such as a dollar amount, a number of hours, or a period of time. Should the legal aid provider have a need to exceed this maximum grant they must make an application to the Agency for an amendment. When the Agency sets the maximum grant it also fixes the amount of contribution that the aided person will be required to pay as a condition of the grant.
21. The Agency has developed “proceedings steps” for family, criminal and some civil proceedings. These provide guidance to staff making decisions on how much legal aid to grant and are also available to practitioners.

### ***Grant Information***

22. The following table shows the numbers of legal aid grants made in the period 1995/96 to 2001/02.

|               | 1995/96 | 1996/97 | 1997/98 | 1998/99 | 1999/00 | 2000/01 | 2001/02 |
|---------------|---------|---------|---------|---------|---------|---------|---------|
| Criminal      | 33,528  | 37,898  | 41,827  | 52,972  | 45,784  | 44,404  | 44,702  |
| Civil         | 19,619  | 23,920  | 22,500  |         |         |         |         |
| Family        |         |         |         | 24,646  | 22,053  | 19,977  | 19,554  |
| Civil – Other |         |         |         | 3,141   | 2,863   | 2,333   | 2,505   |
| Total         | 53,147  | 61,818  | 64,327  | 80,759  | 70,700  | 66,714  | 66,761  |

Source: Legal Services Board and Legal Services Agency

23. Prior to 1998/99, legal aid grant information was only reported under two categories - criminal and civil.
24. The average cost of a grant varies between proceedings types. The average costs of grants in 2002 were:

- criminal - \$US 414
- family - \$US 804
- general civil grant - \$US 1,542.

Average cost over time (average costs in (\$NZ)).

| Average Cost  | 95/96   | 96/97   | 97/98 | 98/99   | 99/00   | 2000/01 | 2001/02 |
|---------------|---------|---------|-------|---------|---------|---------|---------|
| Criminal      | \$702   | \$754   | N/A   | \$798   | \$669   | \$689   | \$747   |
| Civil         | \$1,590 | \$1,732 | N/A   |         |         |         |         |
| Family        |         |         | N/A   | \$1,487 | \$1,259 | \$1,315 | \$1,450 |
| Civil – Other |         |         | N/A   | \$2,673 | \$2,049 | \$2,398 | \$2,782 |

Source: Legal Services Board and Legal Services Agency

25. The variation in average cost of a grant reflects the relative complexity and amount of time involved in the proceedings types. For example, the average cost of a criminal legal aid grant increased significantly in 2002 because of a small number of expensive and complex murder cases. The average cost of a murder case rose from \$NZ 18,000 in 2001/02 to over \$NZ 34,000 in 2001/02.

### **Expenditure Information**

26. Total expenditure on free legal services, information and research (including administration costs) comes to \$US 57.1m. Expenditure on the legal aid portion of this was \$US 47.3m<sup>2</sup>.
27. Legal aid expenditure comprised \$US 18.7m in criminal legal aid, \$US 18m in family legal aid and, \$4.8m general civil legal aid, and \$2.9m for the PDLA and Duty solicitor schemes<sup>3</sup>.
28. In 2001/2002, New Zealand's population was estimated at 3.98 million people.<sup>4</sup> New Zealand therefore spends approximately \$US 19.15 per person on legal aid related services, \$US 11.80 per person of which is spent on legal aid (judicare).
29. There was 62% growth in expenditure on civil, family and criminal legal aid in the ten years from 92/93 to 2001/02. Expenditure on legal aid grants reached a peak in 1998/99 financial year and has since flattened.

### **Legal Aid Cash Expenditure**

\$NZ (000) GST exclusive, year ended 30 June

<sup>2</sup> Calculated at 0.5545 US as of 23 April 2003.

<sup>3</sup> See sections below for descriptions of these schemes.

<sup>4</sup> Source, Statistics New Zealand.

|                       | 1995/96 | 1996/97 | 1997/98 | 1998/99 | 1999/00 | 2000/01 | 2001/02 |
|-----------------------|---------|---------|---------|---------|---------|---------|---------|
| Criminal              | 23,736  | 26,899  | 28,058  | 32,384  | 29,333  | 30,273  | 33,845  |
| Civil (inc. family)   | 32,141  | 38,093  | 40,372  |         |         |         |         |
| Family                |         |         |         | 39,612  | 34,855  | 33,655  | 32,573  |
| Civil                 |         |         |         | 8,108   | 8,077   | 6,144   | 8,720   |
| Duty Solicitor & PDLA | 3,667   | 4,389   | 4,376   | 4,826   | 4,898   | 4,973   | 5,360   |
| Waitangi Tribunal     |         |         |         | 1,513   | 3,066   | 4,206   | 5,581   |
| Total                 | 59,544  | 69,381  | 72,806  | 86,441  | 80,229  | 79,251  | 86,079  |

Source: Legal Services Board and Legal Services Agency

30. The amount of general civil litigation in New Zealand is small as there is limited personal injury litigation because of state based accident compensation insurance.

31. The main reasons for variations in expenditure on legal aid were:

- increases in the volume of grants made – due to a combination of higher criminal legal aid grant rates by Court registrars (from 71% of applications in 1992/93 to 91% in 1998/99 then falling back to 81% in 1999/2000) and new legislation (such as the Domestic Violence Act 1995);
- increases in the average grant paid. This was because of:
  - (a) increased rates for counsel in criminal cases mandated by a transitional provision in the 1991 Act, which required civil and criminal rates to be brought closer together in the initial years of the 1992 Act's scheme; and
  - (b) some degree of non-compliance with the Legal Services Board's Remuneration Instructions; and
  - (c) inconsistency in initial decision-making as between legal services districts in relation to grant numbers, contributions and charges imposed.

32. Changes to administration of legal aid, implemented by the Legal Services Act 2000, should now improve the consistency of decision-making, and better management of legal aid expenditure. The Legal Services Agency now manages all legal aid grants. This replaces earlier arrangements under which court registrars granted all criminal legal aid and District Legal Services Subcommittees made up of local lawyers granted civil legal aid (which included family law aid).

33. A full breakdown of all expenditure on legal aid and other services such as Community Law Centres may be found in Appendix One.

## **Reconsiderations and Appeals**

34. An applicant for legal aid has a right to a reconsideration of any decision made by the Agency. A granting officer other than the original decision-maker must do the reconsideration.

### **Legal Aid Review Panel**

35. An applicant or legally aided person may apply to the Legal Aid Review Panel for a review of a decision by the Agency in relation to legal aid. The grounds for review are whether the decision is:
- manifestly unreasonable; or
  - wrong in law.
36. The review can be in relation to a broad range of decisions made by the Agency. This can include reviews of the decision to grant or not grant, any conditions imposed on the grant of aid, any contribution required, a maximum grant, decisions about charges on property etc.
37. A listed legal aid provider can also seek a review of a decision by the Agency in relation to the amount payable by the Agency to that provider.
38. The Legal Aid Review Panel is an independent panel appointed by the Attorney General and consists of a mix of lawyer and non-lawyer members. Decisions are made on the papers by teams of up to three people. Each team must have a lawyer member. The panel can confirm, modify or reverse a decision, or direct the Agency to reconsider.
39. In 2001/2002 the Legal Aid Review Panel reviewed decisions on 0.5% of legal aid applications. Of the applications reviewed, 41% of the original decisions were upheld, 1% of the decisions were modified, 27% of the decisions reversed, 29% of the decisions were sent to the Agency for reconsideration and 2% were not categorised.<sup>5</sup> The proportion of Agency decisions reversed by the Legal Aid Review Panel constituted less than 0.2% of applications.

### **Appeals**

40. The Agency or the applicant can appeal a decision of the Legal Aid Review Panel to the High Court or the Court of Appeal on a question of law.

### **Civil Legal Aid**

41. The civil legal aid scheme funds legal advice and representation for individuals (whether lawfully or unlawfully in New Zealand) for adjudicated proceedings in New Zealand. This section provides a summary of the key features of the civil legal aid scheme.

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<sup>5</sup> Source: Legal Services Agency Annual Report, 2001/2002.

42. Legal aid for civil proceedings is not available to any body of persons, whether corporate or not, except where the applicant is one or the other of the following:
- (a) a trustee corporation (as defined in section 2 (1) of the Administration Act 1969) that applies for legal aid in connection with proceedings in which it is concerned in a representative, fiduciary, or official capacity; or
  - (b) a Māori involved in proceedings before the Waitangi Tribunal, for the benefit of a group of Māori of which the applicant is a member.
43. The government has also established a separate scheme to fund any non-profit group that has a recognised legal status seeking representation in the resource management process. The Ministry for the Environment administers the scheme and it operates on a capped fee basis.

### ***Eligibility for Civil Legal Aid***

#### **Merits Test**

44. Civil legal aid must be refused where:
- there are no reasonable grounds for taking or defending proceedings or being a party to the proceedings; and/or
  - the required contribution from the litigant is greater than the likely cost of proceedings.
45. Civil legal aid may also be refused if:
- the applicant's prospects of success are not sufficient to justify a grant of aid;
  - having regard to the nature of the proceedings and the applicant's interest in them (financial or otherwise) in relation to the likely cost of proceedings, the grant of aid is not justified; or
  - for any other cause it appears unreasonable or undesirable that the applicant should receive aid in the particular circumstances of the case.
46. In the case of an appeal, the test is simply whether in the opinion of the Legal Services Agency a grant of aid or further aid is justified.
47. The Legal Services Agency may withdraw civil legal after it has been granted if it:
- is satisfied that the aided person has conducted proceedings so as to incur an unjustifiable expense or has required unreasonably that proceedings be continued; and/or
  - becomes aware that there are no longer reasonable grounds for being involved in the proceedings or that it is unreasonable or undesirable in the particular circumstances for the person to continue to receive legal aid.

## Financial Eligibility

48. The financial eligibility criteria for legal aid have two parts:

- The applicant’s disposable income;<sup>6</sup> and
- The applicant’s disposable capital.

49. Generally, an applicant’s disposable income must not exceed \$NZ 2,000 per year. In calculating disposable income, the Agency considers that person's total income (after tax) during the 12 months immediately preceding the application for legal aid, or during such other period of 12 months as the Agency considers appropriate, then deducts a living allowance as set out below:

| Table 1 Deductible allowances (\$NZ)                      |  |
|---|--|
| Status of applicant                                       | Deductible allowances from net annual income   |
| Single person   | \$ 9,841   |
| Applicant with a partner                                  | \$ 14,668  |
| Sole parent or sole applicant with other dependants       | \$10,361 plus \$1872 for the first dependant and \$832 for each additional dependant |
| Applicant with a partner and children or other dependants | \$15,188 plus \$1872 for the first dependant and \$832 for each additional dependant |

50. The Agency considers whether the applicant has any assets that can contribute to the payment for legal services. The Agency may exempt from its calculations of disposable capital:

- interest in a home up to \$NZ 41,000 for a single person, or \$NZ 82,000 if a partner also has an interest in that house<sup>7</sup>;
- the value of any vehicle used for domestic purposes;
- household furniture, appliances, personal clothing and tools of trade;
- any contingent liabilities that may mature in six months or less;
- unsecured debts;
- a further allowance of \$NZ 500, where the person has a dependant or spouse, or where resources of others are being calculated as the applicant’s resources.

<sup>6</sup> For the purposes of most other benefits the term “discretionary income” is used, and is probably more appropriate. Disposable income is in economic terms income less tax payments. However, legal aid applications are able to deduct certain allowances.

<sup>7</sup> These amounts (\$41,000 or \$82,000) are determined by reference to “the specified sum” set down in section 16(5) of the Joint Family Homes Act 1964, as amended in 1996. Changes in the Legal Services Regulations 2000 have meant that the Agency would now be relying on staff discretion in applying this formula.

51. If the applicant has capital available after these deductions, the applicant must contribute the value of two thirds of the first \$NZ 2,000 worth of assets to the costs of their case, and all disposable capital in excess of this. Where property is at issue between the parties, as it often is in Family Court cases, then that disputed property is ignored for the purposes of this calculation.

### ***Scope of the Civil Legal Aid Scheme***

52. Civil legal aid is available for all civil and family court proceedings and some tribunals. This includes:

- civil proceedings in a District Court or a Family Court;
- civil proceedings in the High Court or the Court of Appeal;
- appeals to the Judicial Committee of the Privy Council in civil proceedings in any case where -
  - (i) the applicant has succeeded in the Court of Appeal and is the respondent in the appeal to the Privy Council, if the grant of aid is approved by the Minister of Justice; or
  - (ii) the Attorney-General certifies that a question of law of exceptional public importance is involved and that the grant of aid is desirable in the public interest:
- proceedings commenced by way of application in a Youth Court under Part VII of the Children, Young Persons, and Their Families Act 1989 or in respect of any review of any determination of, or any order made in, a Youth Court in any such proceedings<sup>8</sup>;
- in any case where the Agency considers that the case is one that requires legal representation (having regard to the nature of the proceedings and to the applicant's personal interest) and that the applicant would suffer substantial hardship if aid were not granted, for proceedings in:
  - (i) the Māori Land Court<sup>9</sup>; or
  - (ii) the Māori Appellate Court; or
  - (iii) the Employment Court; or
  - (iv) the Employment Relations Authority; or
  - (v) any administrative tribunal or judicial authority – not being a tribunal or an authority in respect of any decision from which an appeal lies to any of the following five bodies:
- proceedings before the Waitangi Tribunal;

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<sup>8</sup> This may include, for example, legal representation of a parent or guardian in relation to an application by the state to continue to place a child in secure care.

<sup>9</sup> The primary role of the Māori Land Court is to facilitate and promote the retention, occupation, utilisation, development, and control of Māori Land by Māori owners, their whānau (family), their hapū (tribal group) and their descendants.

- proceedings before the Social Security Appeal Authority;
- proceedings before the Tenancy Tribunal;
- proceedings before a body established under section 63(1)(a)(i) of the Housing Restructuring Act 1992 to hear appeals under section 62 of that Act; and
- proceedings before the Refugee Status Appeals Authority (whether as established by the government of New Zealand or as continued under section 129N of the Immigration Act 1987) in respect of any claim for refugee status made before 1 April 1999, or any other matter relating to refugee status that arose before that date.

53. Legal aid may also be granted for:

- the processing, under Part VIA of the Immigration Act 1987, of any claim for refugee status first made on or after 1 April 1999 (including proceedings on any appeal in relation to such a claim), and the processing of any other matter arising under section 129L or section 129R of the Immigration Act 1987 that first arose on or after that date (including proceedings on any appeal in relation to such a matter);
- any judicial review proceedings (as defined in section 2 of the Immigration Act 1987) in respect of certain refugee claims;
- any application under section 114I of the Immigration Act 1987 for a review by the Inspector-General of Intelligence and Security of a decision of the Director of Security to make a security risk certificate;
- all applications, submissions, and appeals under the Resource Management Act 1991 or to the Environment Court under any other Act;
- all applications, submissions, and appeals to any Council or body in any case where an appeal in relation to its decision lies to the Environment Court.

54. There are a small number of proceedings for which legal aid is expressly not available, or may only be available in certain circumstances. This includes proceedings relating to the status of marriage, unless the Legal Services Agency is of the opinion:

- that the unusual complexity of the case requires that the applicant be legally represented; or
- that the applicant would suffer substantial hardship if aid were not granted.

55. Legal aid is not available in any circumstances for:

- relator actions<sup>10</sup>;
- election petitions under the Electoral Act 1993;
- petitions for inquiry under the Local Elections and Polls Act 1976;
- proceedings incidental to any proceedings mentioned in any of the three preceding bullet points.

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<sup>10</sup> The relator in an action is a person who is aggrieved in a matter of public interest and who satisfies the Attorney-General that the subject matter of the actions is such as to justify the use of the Attorney-General's name.

56. Legal aid is generally not available for dissolution of marriage proceedings. Legal aid is, however, available for ancillary proceedings associated with dissolution of a marriage such as custody and access proceedings.
57. Legal aid is not available for any appeal, made under the Immigration Act 1987, to the Residence Appeal Authority or the Removal Review Authority. The purpose of these exclusions is to prevent a person who does not comply with New Zealand's immigration laws and policies using legal aid to delay their removal.
58. Where there is a possibility that removal from New Zealand would mean a return to a place of persecution or physical danger, that person may receive legal aid to make a claim for refugee status, including an appeal to the Refugee Status Appeals Authority. Since 1 April 1999, legal aid for refugee matters has been available at all stages, including the first instance determination by the Immigration Service.

### ***Contributions and Repayments for Civil Legal Aid***

#### **Contributions**

59. Every applicant for civil legal aid (with the exception of domestic violence cases) must make a minimum contribution of \$50 towards the cost of his or her legal services. The Legal Services Agency can waive the requirement in cases of proven hardship and/or justice and fairness.
60. Further contributions are required if the Agency determines that the person has sufficient disposable income or capital to make a further contribution. The financial eligibility calculations form the basis of the Agency's assessment of the contribution that the person is required to make to the cost of their proceedings. Consequently an applicant for legal aid (whether civil or criminal) may have to pay as part of his or her contribution, the total of the following:
  - \$1 for each complete \$2 of the first \$1,000 of the applicant's disposable income:
  - \$2 for each complete \$3 of the applicant's disposable income that is more than \$1,000 but less than \$2,000:
  - all of the applicant's disposable income that is more than \$2,000:
  - \$2 for each complete \$3 of the applicant's disposable capital that is less than \$2,000:
  - all of the applicant's disposable capital that is more than \$2,000.
61. Contributions may be made as one sum or in instalments (or both). The Agency may vary or waive the sum of the further contribution where substantial hardship would arise or where requiring payment would jeopardise reconciliation in family cases, or for reasons of justice and fairness.
62. Civil legal aid must be withdrawn when a person is more than 21 days in arrears in paying a contribution, except where the applicant can show grounds for extending the payment time. Criminal legal aid can not be withheld pending contribution.

63. In determining an applicant's personal disposable capital, a higher level of exemption is allowed for an applicant seeking aid for criminal proceedings.

### **Repayments**

64. Every grant of civil legal aid is subject to the condition that the aided person will repay the Agency the cost of legal services out of the proceeds of proceedings (if any). This repayment is less any deductions, allowances or write-offs the Agency may have made.

### **Charges**

65. Civil legal aid may be granted subject to a condition that the aided person permits a charge to be registered over any form of property owned by them as security for payment of the assessed contribution and/or repayment for the cost of providing legal services. The cost of services is defined in section 18 of the Act and includes all legal aid lawyers' fees and charges plus any disbursements paid.
66. Any proceeds of proceedings may also be subject to a charge in favour of the Agency for the amount of:
- any unpaid contributions; and
  - the repayment payable under the grant.
67. *Bates v Legal Services Board* [1999] NZLR, 91 endorsed the view that the Board was entitled to the benefit of a charge that almost consumed the entire proceeds of the proceedings. In this case the proceeds of the proceedings included exemplary damages but the aided person was still deemed to have an obligation to reimburse most of the cost of legal services received under the grant of aid.
68. Where a person receives a grant made for proceedings in the Waitangi Tribunal, a charge may not be imposed on any settlement property, or any property acquired out of, or with, the settlement property, or on the proceeds of any disposition of the settlement property. This reflects the fact that the proceedings are primarily against the Crown in relation to past wrongs towards Māori, and it would therefore be inappropriate for the Crown to, for example, take a charge over land it had just returned to Māori.
69. Recovery from contributions and charges in civil and family legal aid was 20% of expenditure in 2001/02.

### **Criminal Legal Aid**

70. This scheme ensures that those facing serious criminal charges who cannot afford to pay a lawyer from their own limited resources are provided, in the interests of justice, with a suitably qualified lawyer.

## ***Eligibility for Criminal Legal Aid***

### **Merits Test**

71. In considering the merits of an application for legal aid under section 8 of the Act, the Agency:
- may grant aid if, in its opinion, this is desirable and in the interests of justice;
  - must consider the gravity of the offence;
  - must consider the consequences to the applicant of any application for aid to assist with representation before the Parole Board or a District Prisons Board;
  - may consider the grounds for appeal in any application for appellate aid;
  - may have regard to any other circumstances that, in its opinion, are relevant;
  - may later modify or cancel a grant of legal aid because the interests of justice are no longer met.
72. In interpreting “in the interests of justice”, the Agency must have regard to the seriousness of the offence and the consequences for the applicant if aid is not granted. Whether the actual charge is subject to a penalty which includes the probability of a term of imprisonment is therefore an important part of this test.
73. The Agency can also consider any other circumstances that, in its opinion, are relevant and can consider whether there are substantial questions of law, whether the proceedings may require cross examination of expert witnesses and whether the individual may not be able to understand the proceedings fully.

### **Financial Eligibility**

74. The financial eligibility criteria for criminal legal aid have two parts:
- The applicant’s disposable income;<sup>11</sup> and
  - The applicant’s disposable capital.
75. The financial test for criminal legal aid is based on whether “it appears to the Agency that the applicant does not have sufficient means to enable him or her to obtain legal assistance.”<sup>12</sup> When determining whether or not an applicant has sufficient means to enable him or her to gain legal assistance, the Agency must have regard to the applicant’s disposable income and disposable capital.

### **Scope of the Criminal Legal Aid Scheme**

76. Criminal legal aid may be granted for:

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<sup>11</sup> For the purposes of most other benefits the term “discretionary income” is used, and is probably more appropriate. Disposable income is in economic terms income less tax payments. However, legal aid applications are able to deduct certain allowances.

<sup>12</sup> Section 8 (1) of the Legal Services Act 2000.

- criminal proceedings in a District Court, a Youth Court (other than for a “child” or “young person” - who is usually represented by a youth advocate), the High Court, or the Court of Appeal;
- appeals to the Judicial Committee of the Privy Council, where the Attorney-General certifies that a question of law of exceptional public importance is involved and that the grant of criminal legal aid is desirable in the public interest;
- proceedings –
  - (i) before the New Zealand Parole Board under section 27, section 65, or section 107 of the Parole Act 2002 (which related to the postponement of parole consideration orders, recall orders, and orders that offenders not be released);
  - (ii) in the High Court on an application under section 68 of the Parole Act 2002 (which relates to appeals against postponement of parole consideration orders and orders that offenders not be released).

### **Contributions**

77. Recipients of criminal legal aid may be required to make a contribution to the cost of legal services as a condition of the grant. Income from contributions for criminal legal aid was 0.2% of criminal legal aid expenditure in 2001/02.

### **Duty Solicitor Scheme**

78. The Duty Solicitor scheme provides assistance on the hearing day to people without legal representation who face criminal charges at a District Court. The duty solicitor ensures the person charged is aware of basic court procedures and that the case is dealt with satisfactorily. This may include advice about legal aid and adjournments, and entering a plea in mitigation, when the defendant is pleading guilty. There are no eligibility requirements for this scheme.

### **Police Detention Legal Assistance Scheme**

79. The Police Detention Legal Assistance Scheme ensures that a person being questioned or detained by the Police may obtain advice or assistance by telephone or in person from a rostered lawyer. This scheme gives practical effect to the intent of the New Zealand Bill of Rights Act 1990. There are no eligibility requirements for this scheme.

Expenditure on the Duty Solicitor and PDLA schemes.

| Expenditure Item<br>(\$NZ GST Excl.)           | 95/96<br>(\$000) | 96/97<br>(\$000) | 97/98<br>(\$000) | 98/99<br>(\$000) | 99/00<br>(\$000) | 2000/1<br>(\$000) | 2001/2<br>(\$000) |
|--|------------------|------------------|------------------|------------------|------------------|-------------------|-------------------|
| Duty Solicitor &<br>Police Detention<br>Scheme | 3,667            | 4,389            | 4,376            | 4,847            | 4,885            | 5,060             | 5,360             |

80. At current exchange rates, the total expenditure on these schemes is \$US 2.97m. The represents US 74 cents per capita on these schemes.

## Community Law Centres

81. Community law centres provide basic legal advice and representation, information and assistance with submissions. Often staffed by volunteers, including law students, the centres complement conventional law firms.
82. The Agency contracts with community law centres for services with money from the New Zealand Law Society Special Fund and a small amount of government appropriation. Income for the Special fund is generated when banks collect the interest payable on lawyers' nominated trust accounts where it is impractical to pay that interest to the owners of those monies, either because it is held for a short period of time or consists of a small amount. 50% of this interest is returned to the banks and 50% goes to the Special Fund.
83. When contracting with Community Law Centres the Agency is required to consult with its Public Advisory Committee and must have regard to the following criteria if there is more demand for funds than money currently available:
- (a) the level of unmet legal need in the community served by the community law centre, relative to that of other communities;
  - (b) the capacity of the community to pay for legal services, relative to the capacity of other communities to pay for them;
  - (c) the effectiveness, or likely effectiveness, of the community law centre in providing those services to the community;
  - (d) the benefit of ensuring continuity in the delivery of services;
  - (e) the need to provide reasonable access by communities to community law centres throughout the country; and
  - (f) alternative providers of legal services that are (or will be) available in practice to the community.

As a matter of good practice, however, these criteria are generally considered for all funding decisions.

84. In order to support this process the Legal Services Agency has undertaken a nationwide review of un-met legal need and is working with local community law centres to assist them with identifying priorities of un-met legal need at a local level.

Expenditure has grown gradually on community law centres.

| Expenditure Item<br>(GST Excl.) | 95/96<br>(\$000) | 96/97<br>(\$000) | 97/98<br>(\$000) | 98/99<br>(\$000) | 99/00<br>(\$000) | 2000/1<br>(\$000) | 2001/2<br>(\$000) |
|---------------------------------|------------------|------------------|------------------|------------------|------------------|-------------------|-------------------|
|                                 |                  |                  |                  |                  |                  |                   |                   |

|                       |       |       |       |       |       |       |       |
|-----------------------|-------|-------|-------|-------|-------|-------|-------|
|                       |       |       |       |       |       |       |       |
| Community Law Centres | 2,918 | 3,611 | 3,895 | 3,981 | 4,389 | 4,976 | 5,379 |

This represents current expenditure of \$US 2.98m expenditure in 2001/02 on community law centres or US 74 cents per person.

## **Legal Information and Law Related Information and Education**

85. The Agency funds legal information and law related education from interest earned from a Research and Education Fund.
86. The Agency's long-term strategy for legal information and law related education, established in 2001, has the Agency as a central repository for education and information resources for all, but targeting those who are most at risk of experiencing significant unmet legal needs. The Agency has established a consultative committee, drawn from community law centres and other community agencies involved in the delivery of legal information and education to inform its development directions.

### *Legal Information*

87. The Agency produces information and education resources and facilitates access to resources produced by others. The Agency produces and publishes both in hard copy and electronically a comprehensive index of legal information available in New Zealand, known as Law Access (available from the Agency's website [www.lsa.govt.nz](http://www.lsa.govt.nz)). Law Access is currently being developed as a complete electronic gateway to legal information available electronically from government agencies, community and educational organisations, and other agencies.
88. The Agency is also addressing issues of coordination and rationalisation of legal information development and availability, both within and outside the justice sector. The Agency has plans to address issues of quality standards for the development of legal information resources.

### *Law Related Education*

89. In the past year the Agency has begun to plan and develop law related education kits that are stand-alone education resources containing all key legal information and teaching resources on a particular topic. The kits can be modified for different audiences and situations, and will be regularly evaluated and maintained.
90. Topics of kits under development or planned include enduring power of attorney, domestic violence and harassment, consumer issues, debt, family law, and legal aid.

## **Research into Unmet Legal Needs**

91. Community law centres deliver a range of community legal services including law reform, legal information, law-related education, advice, assistance and representation. The Agency has undertaken research into unmet legal needs to assist with both service funding, and with local service design and delivery.
92. The Agency has commissioned research to assist it to determine funding allocations between community law centres. The research establishes legal needs scores based on indicators of unmet legal needs. These legal needs scores measure relative unmet legal needs between communities in New Zealand and will become part of national funding guidelines. Once finalised, the guidelines will address the range of criteria required under legislation to be taken into account in funding allocation decisions.
93. The criteria to be considered are wide ranging and include
  - an assessment of the ability of existing services to meet unmet legal needs (including cost effectiveness)
  - the best way to ensure reasonable access to services throughout the country for communities with insufficient means.
94. The Agency has also undertaken a local needs assessment exercise in Auckland to establish priority unmet legal needs in the region. These priorities will assist the 5 local community law centres to understand and prioritise service delivery. The research model uses a matrix of types of legal services and communities of interest to help establish priority services for priority consumers.
95. Over the coming year, the Auckland research will be further developed into a local needs assessment instrument that can be applied to communities throughout New Zealand to guide services design and delivery.
96. The Agency's research reports can be requested by sending an email to [info@lsa.govt.nz](mailto:info@lsa.govt.nz). Further discussion on legal needs assessment in New Zealand is welcomed.

## **New Developments**

### ***Review of Eligibility for Legal Aid***

97. When the Legal Services Agency was established in February 2001, the eligibility criteria from the previous regime administered by the Legal Services Board were carried over.
98. The Ministry of Justice is now reviewing the eligibility criteria. The general objectives are that the eligibility regime should be one that:
  - supports access to legal representation for people with genuine need;
  - is understandable to users and the general public;
  - discourages unnecessary litigation;
  - enables fiscal responsibility; and
  - enables efficient and timely administration of the legal aid scheme.

99. The Ministry has recently completed initial consultation. A copy of the discussion document may be found at [www.justice.govt.nz](http://www.justice.govt.nz). The key issues for the review include:

- the perception that income thresholds are so low that many people are excluded from receiving aid;
- the high legal aid costs of long and complex cases; and
- the perception that legal aid creates incentives to extend cases unnecessarily and consequently causes hardship to non-legally aided parties.

100. In the light of these issues the Ministry has taken a preliminary view that the focus of reform should be on:

- finding ways of expanding the pool of financially eligible people while minimising the fiscal risk to government;
- clarifying and tightening up the merits tests to support improvements in the administration of legal aid – particularly with respect to long and complex cases; and
- supporting further use of alternative dispute resolution – particularly mediation.

101. Some of the notable preliminary recommendations included in the discussion document are:

- a multi-tiered approach to income testing. Recipients from each tier would be required to repay different proportions of their legal aid over time, with a top tier operating on a full cost recovery basis;
- requiring that a legally aided person offer/accept mediation as a condition of a grant of aid, except where there is urgency or risk of harm;
- a prospects of success test for some minor criminal cases;
- removing legally aided people from the shelter from costs; and
- developing a case management approach to large complex cases on a contract for service basis.

102. Further detailed policy work is to be undertaken. We expect to have decisions on the future shape of eligibility for legal aid in New Zealand by the end of the year.

### ***Legal Aid Granting***

103. Since the establishment of the Agency, the focus for the granting of legal aid has been on:

- the establishment of the grants function;
- the development of policies and procedures where gaps existed;
- the smooth transfer of decisions on granting criminal legal aid from the Department for Courts to the Agency; and

- delivering decisions in a timely manner and the establishment of a quality management programme.
104. The Agency has established timeliness and quality standards. While the quality standards were met for the first time in the last quarter, the Agency still struggles to meet its timeliness standards. The Agency and the Ministry of Justice undertook an independent workload review last year, which identified that the Agency would be unlikely to meet the timeliness standards with its current staffing levels.
105. While the focus on timeliness and quality improvement remains, an added focus for the next period is the streamlining of grants policies and procedures. To this end the major initiatives in the grants area are:
- the development of a complex file management system that will provide a transparent method for identifying and managing legal aid applications that present a higher risk than other legal aid cases. This will enable staff to put the most effort where there is most risk;
  - streamlining grants policies and procedures to reduce the overheads for both the Agency and the lawyers; and
  - undertaking a feasibility study and if appropriate piloting e-lodgement and system generated decision-making.
106. In addition, the Agency plans to establish a national debt management team so that it can improve on its recovery of the debt established by Grants Officers as part of the decision-making on applications for legal aid.
107. Another major initiative is the development of a replacement of the Agency's core IT application, LA Office. The Agency is involved with the Australian Legal Aid Commissions in developing an IT solution that will be satisfactory for both Australia and New Zealand. This system is referred to as ATLAS (Australasian Total Legal Aid System). The major issue for the Agency is the bringing together of the requirements of eight different commissions and ensuring that the system is flexible enough to cope with the different legislative bases, policies and procedures. Also, as the Agency is now embarking upon the development of an in-house service, it is still to develop a full understanding of its needs in this area.

### ***Legal Aid Defence Service Pilot***

108. The government has agreed to pilot a scheme for the provision of criminal legal services that will involve the Legal Services Agency employing legal aid providers directly. It is likely that this will begin in 2004 in two of New Zealand's busiest criminal courts.
109. The objectives of the pilot are to:
- provide high quality, consistent, independent, value for money services to legally-aided people;

- improve service flexibility and provide opportunities to test different approaches to meeting cultural and other needs of clients;
- collect benchmarking information to improve the Agency’s understanding of issues facing private practice lawyers when providing legal aid services; and
- to provide opportunities to test new and innovative approaches to the management of legal services, and to encourage the development of areas of expertise.

The pilot service will be evaluated in the course of its operations.

110. Consultation papers and reports relating to the development of the pilot service are available from the Agency’s website ([www.lsa.govt.nz](http://www.lsa.govt.nz)). The Agency will also be reviewing the feasibility of and options for alternative forms of contracting, notably bulk contracting, over the coming year.

### ***Listed Provider Approval Criteria and Service Standards***

111. The Agency contracts with individual practitioners to provide legal aid, and services under the Duty Solicitor and Police Detention Legal Assistance schemes.
112. The Agency has recently completed the development of criteria for minimum experience and training that practitioners must satisfy before receiving approval to act as lead provider on a specific legal aid matter.
113. Where practitioners have not yet attained the required level, the Agency may list them as secondary providers, which permits them to work on a legal aid matter under the direction of an approved lead provider. However, the grant of aid is not increased to compensate for any additional or overlap “time” allowance to reflect the supervision element. The lead provider will submit an estimate and invoice for hours apportioned between the two as agreed between them. This system allows junior practitioners to gain the required minimum experience on both legal aid and private cases.
114. While minimum experience standards have been set based on time and numbers of cases or Court appearances, these remain guidelines. It is recognised that some practitioners may have met quantitative criteria, but still perform below an acceptable level, while others who gain solid experience rapidly may be worthy of earlier listing. To accommodate this, the Agency takes advice from local consultative groups it has established in each Law Society district, and an element of local knowledge of competency can be brought into each assessment.
115. Some members of the law profession have expressed concern that the Agency is setting a higher standard than that required to practice privately, and unease that there is an element of subjectivity in the competency criteria.
116. There are eligible proceedings for legal aid in which representation can be provided by people who are not lawyers (for example in proceedings under the Employment Relations Authority including the Employment Court, some

immigration and refugee hearings, and some Tribunals). Work is underway to establish criteria for listing for these providers, where in some cases there is no governing body.

117. Service standards are under development. These set out to establish a minimum level of performance for listed providers to retain their approvals over time. The standards will focus on contact with the client, on meeting the requirements of the Agency's policies, protocols, and administrative requirements for legal aid. Development has been protracted because of issues that needed to be resolved while writing standards. These issues included:

- the need to recognise that standards should be applicable to individuals rather than firms. The Agency does not currently contract with organisations, and many providers are sole barristers;
- practitioners are concerned about the ability of non-lawyer staff within the Agency to make assessments about performance against standards;
- cross-over with areas in which the profession has disciplinary powers under the Law Practitioners Act (an example is "touting", a practice the Agency wishes to stop within its schemes, but which is not in itself serious enough to be effectively and consistently dealt with by the profession's systems), and
- duplication of the general professional requirements contained in their own rules of professional conduct.

118. The consultation process with the New Zealand Law Society for both criteria and standards has been an important aspect of the development. New listing criteria were introduced on 17 February 2003, and new contracts were issued to over 3000 listed provider lawyers. The Agency expects to have an agreed set of standards in place later in 2003.

### ***Proposed future service developments***

119. The Agency's draft strategic business plan for 2003-6 includes a number of proposed key service reviews. These include reviews of:

- the duty solicitor scheme. The review will assess whether the scheme could be extended to provide greater representation services, which could avoid the need for a grant of legal aid;
- the availability of legal information and advice services, and an assessment of the options for increased service delivery with improved access for people who find services hard to access;
- the options for integration of legal services across the sector and between the justice and welfare services sectors to ensure that clients receive the right service from the right provider at the right time.

## Appendix One – Total Expenditure on Legal Aid and other Services

| Expenditure Item<br>(\$NZ, GST<br>Excl.)       | 95/96<br>(\$000) | 96/97<br>(\$000) | 97/98<br>(\$000) | 98/99<br>(\$000) | 99/00<br>(\$000) | 2000/1<br>(\$000) | 2001/2<br>(\$000) |
|--|------------------|------------------|------------------|------------------|------------------|-------------------|-------------------|
| Administration                                 | 4,247            | 3,855            | 3,875            | 4,323            | 4,733            | 7,372             | 10,006            |
| Legal Aid –<br>Criminal                        | 23,736           | 33,944           | 31,445           | 32,666           | 30,518           | 34,636            | 36,510            |
| Legal Aid –<br>Family                          | 25,824           | 48,483           | 38,929           | 41,799           | 36,332           | 25,245            | 31,869            |
| Legal Aid – Civil                              | 5,838            | 11,140           | 11,194           | 9,377            | 8,613            | 6,248             | 8,048             |
| Duty Solicitor &<br>Police Detention<br>Scheme | 3,667            | 4,389            | 4,376            | 4,847            | 4,885            | 5,060             | 5,360             |
| Legal Aid –<br>Waitangi                        | 480              | 984              | 2,070            | 1,512            | 4,347            | 4,335             | 5,230             |
| Provision for<br>Debt/Debt write-<br>off       | 113              | 82               | (85)             | 1,782            | 889              | 80                | 273               |
| Community Law<br>Centres                       | 2,918            | 3,611            | 3,895            | 3,981            | 4,389            | 4,976             | 5,379             |
| Research &<br>Development                      | 1,266            | 2,144            | 3,254            | 2,761            | 2,352            | 785               | 307               |
| <b>Total</b>                                   | <b>68,089</b>    | <b>108,632</b>   | <b>98,953</b>    | <b>103,048</b>   | <b>97,058</b>    | <b>88,737</b>     | <b>102,982</b>    |

Source: Legal Services Board and Legal Services Agency

## Appendix Two: Legal Services Agency Income

|                                      | <i>\$NZ GST Exclusive</i> | <b>1995/96<br/>(\$000)</b> | <b>1996/97<br/>(\$000)</b> | <b>1997/98<br/>(\$000)</b> | <b>1998/99<br/>(\$000)</b> | <b>1999/00<br/>(\$000)</b> | <b>2000/01<br/>(\$000)</b> | <b>2001/02<br/>(\$000)</b> |
|--------------------------------------|---------------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|
| Annual Government Appropriation      |                           |                            |                            |                            |                            |                            |                            |                            |
| Administration                       |                           | 3,620                      | 3,619                      | 3,620                      | 3,620                      | 4,524                      | 8,820                      | 10,480                     |
| Legal Aid                            |                           | 57,147                     | 62,001                     | 66,065                     | 80,381                     | 72,458                     | 78,162                     | 78,151                     |
| Other Income                         |                           |                            |                            |                            |                            |                            |                            |                            |
| • Interest Received                  |                           | 1,513                      | 2,230                      | 1,609                      | 1,081                      | 1,071                      | 1,422                      | 1,235                      |
| • Contributions Civil Legal Aid      |                           | 931                        | 917                        | 1,167                      | 1,736                      | 1,525                      | 604                        | 2,635                      |
| • Contributions Criminal Legal Aid   |                           | 184                        | 68                         | 94                         | 61                         | 99                         | 138                        | 100                        |
| • Charge Income Civil Legal Aid      |                           | 3,216                      | 4,127                      | 4,679                      | 6,032                      | 9,457                      | 9,532                      | 5,569                      |
| • Discounting of secured receivables |                           |                            |                            |                            |                            |                            | (9,222)                    | 1,876                      |
| • NZ Law Society Special Fund        |                           | 5,552                      | 6,194                      | 5,164                      | 4,950                      | 4,485                      | 5,050                      | 5,669                      |
| • Others                             |                           |                            |                            |                            |                            | 26                         | 123                        |                            |
| <b>Total Income</b>                  |                           | <b>72,163*</b>             | <b>79,156*</b>             | <b>82,398*</b>             | <b>97,861*</b>             | <b>93,645*</b>             | <b>94,629</b>              | <b>105,715</b>             |