

IMPROVING THE LEGAL AID SYSTEM

Feedback document

If you wish to send us your views on the matters raised in the discussion paper then you can make a submission by either filling out this document, or writing to Dame Margaret Bazley, c/o the Ministry of Justice.

Submissions must be received by 5 p.m. on **9 October 2009**. Submissions can be made by:

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The feedback document has been designed to assist you with responding to the matters raised in the discussion paper. You do not have to use this document to make a submission, nor do you have to answer all the questions.

The feedback document has room for you to type in your responses and you can increase or decrease the space as you choose. If you wish to increase the space, just type in the answer box and the space for typing will expand as required.

If you have any questions about how to make a submission, please email legalaidreview@justice.govt.nz.

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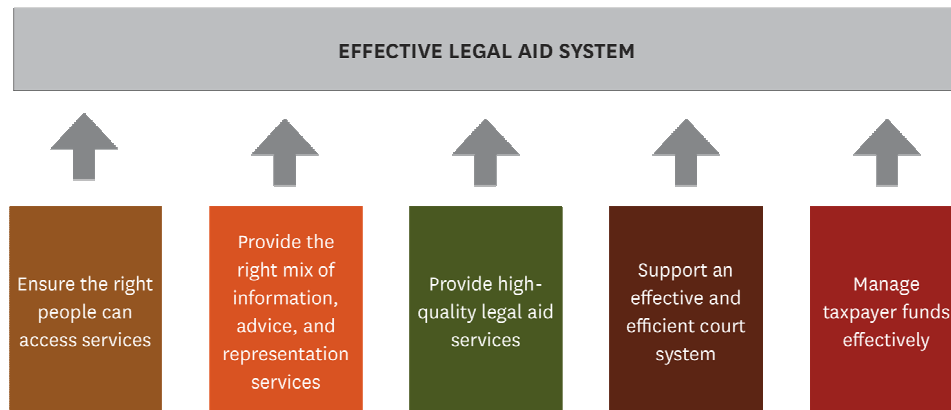
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I request that information supplied in this form be kept confidential.	<input type="checkbox"/> Yes
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QUESTIONS FOR DISCUSSION

WHAT AN EFFECTIVE LEGAL AID SYSTEM LOOKS LIKE



1. Do you agree with the components of an effective legal aid system identified in the picture above, namely
- ensuring the right people can access services
 - providing the right mix of information, advice, and representation services
 - providing high-quality legal aid services
 - supporting an effective and efficient court system
 - managing taxpayer funds effectively?

Subject to question 2, we agree that the 5 elements identified are appropriate parts of an effective legal aid system.

2. Do you consider any other elements need to be added to the components of an effective legal aid system?

A sixth element should be added. That sixth element should prescribe the parameters within which the legal aid system operates. That sixth element is as follows:

The Legal Aid System:

- **Should fix as many drivers of unmet legal need as possible;**
- **Should fix as many of the multiple unmet legal needs that a typical user of the system has;**

- **Should not be structured in a way that exacerbates those drivers or those multiple legal needs;**
- **Should not create new drivers or multiple legal needs;**

Three of the weaknesses in the current system identified by the discussion paper are:

1. The system does not solve the underlying drivers (i.e. family and social difficulties) that draw people into the justice system.
2. The system does not solve the multiple legal needs that a user of the system typically experiences.
3. The system is not focused on helping people to resolve problems before they get into justice system.

The discussion paper states that the majority of users of the Legal Aid system have multiple unmet needs. It also states the majority of users (2/3rds) will use the system more than once. They use the system more than once because they have multiple needs and because the drivers of need remain.

This situation can be remedied to some extent if the system takes a more preventative and holistic focus. As the discussion paper rightly identifies that the system is designed to respond to unmet need – not fix the drivers.

However, if the proposed sixth element is adopted, the system would not be aggravating the situation. Furthermore, the system would be geared to improve the situation to the greatest possible extent by:

- Resolving as many of the multiple needs as possible;
- Preventing as many future needs as possible;
- Resolving as many underlying drivers as possible (or at the very least playing a part).

The Waitakere Community Law Service (“WCLS”) address how the system might be geared in this way later in this submission.

It seems highly likely that a system operating within the parameters of the proposed sixth element will have 4 key benefits:

1. It will greatly enhance access to justice for those who currently experience unmet legal needs;
2. It will enhance community well-being;
3. It will have a positive financial impact on the legal aid system by preventing future problems and shifting dispute resolution process to more cost effective (front-end) locations; and
4. It will have a positive financial impact on the wider social policy agenda by resolving and preventing problems early, reducing the gravity of drivers, and reducing the downstream costs for other social services institutions.

CAN THE RIGHT PEOPLE ACCESS SERVICES?

3. Do you consider that there are any areas of legal need in the community that are not being met to some extent by existing services?

Our discussion with community agencies and communities of interest indicate that sector of the community are not able to access existing services.

Many potential CLC potential clients suffer wide reaching social exclusion. Examples of those groups are Maori, youth, those living in poverty, and those living in isolation due to factors such as abusive family situations, mental health, and cultural isolation.

The most vulnerable groups continue to be:

- Maori and Pacific peoples
- Solo parents
- Unemployed people
- Those in high-density housing
- Beneficiaries
- Those with disabilities or with physical/mental illnesses
- Victims of assault

4. Are services provided in ways that meet the particular needs of Māori and Pacific peoples, and certain vulnerable groups of people (e.g. victims or people with disabilities)?

Many of the most vulnerable groups discussed at question 3 lack the basic resources or the appropriate channels needed to easily access legal services. There are a range of causes for this which are often specific to each group.

The current legal aid system does not appear to provide services where those vulnerable groups are located.

Furthermore, the current system does not do a great job of providing services in a way that is sensitive to the specific needs of vulnerable groups. For example, legal services provided to Maori are not always provided by people or organisations who are trained to recognise the particular dynamics of isolation experienced by Maori. The same can be said of legal services provided to victims of domestic violence.

It is critical that legal services are provide to vulnerable groups in a manner that is appropriate to each groups particular experience of isolation. This may suggest a need for specialist providers or a more integrated provision to legal services (where providers are able to draw on or refer users to other agencies/stakeholders for support).

5. Are there any categories of people who should be able to receive legal aid but who cannot currently do so?

6. Are there any categories of eligible people who should not receive legal aid?

7. Are there any barriers that prevent eligible people from accessing legal aid services?

See question 4.

8. Are there any specific barriers faced by Māori or Pacific peoples in accessing legal aid services?

See question 4.

9. Do people who use the legal aid system also use other social services (e.g. housing, budgeting services, Work & Income)?

Users of the legal aid system do use other social services.

However, many of those services (including the legal service providers) act in relative isolation. WCLS believes legal service providers and other social services are operating in relative isolation largely because their resources are stretched simply through providing their core services. Better integration and co-operation of services would be possible if financial resources were ring-fenced and directed towards that purpose.

WCLS believes putting resources towards improving the integration and co-operation of social service providers (including legal service providers) would have a positive impact on communities by:

- Reducing the number and complexity of unmet legal needs; and
- Reducing the drivers of unmet legal needs;
- Reducing the demand on the legal aid system and the wider social service sector (due to the stated reductions)
- Reducing the financial burden on legal aid system and the wider social service sector; and
- Improving community wellbeing generally.

10. Do you consider that the widened eligibility criteria have had a positive or negative effect on access to justice?

The widened eligibility criteria appears to have has a positive impact on access to justice.

11. What are the likely consequences of limiting eligibility for legal aid?

The likely consequences of limiting eligibility for legal aid will be to increase the level of unmet need for those excluded. It will also increase the effect of the drivers of unmet need by enhancing social exclusion amongst those affected and the community at large.

WCLS believes an increase to the level of unmet need and an increase to the effect of drivers will provide a net cost to the legal aid system and the social sector as a whole.

12. Are there any groups of litigants that should be eligible for legal aid?

13. How could the merits test be strengthened to ensure civil/family legal aid is not available for unmeritorious cases, or cases that have slim prospects of success?

Any change to the merits tests should be made only on terms that ensures it does not exacerbate the legal needs of users or exacerbate the drivers of unmet legal needs.

One of the drivers for unmeritorious cases appears to be the fact that, on the whole, the justice system does not resolve legal issues in a manner that is holistic, clear, and lasting. Nor does it resolve matters in a way that deals with underlying drivers for unmet need.

While it is not the scope of the review to look at the justice system as a whole the legal aid system should be structured in a way that provides better outcomes for all parties and reduces the risk that unmeritorious cases will be brought.

One way of mitigating any negative impact of narrowing the merits test may be to provide better quality and holistic services to those engaged in disputes. This would seem to require better trained and more highly skilled legal aid providers who are sensitive to the dynamics of exclusion and who are better able to provide holistic, clear and lasting outcomes for their clients

14. Should civil/family legal aid be refused on the basis that the matter is one that should be resolved by alternative dispute resolution?

Legal Aid should be refused on the basis that the matter is better suited to ADR only where:

1. The ADR option is coupled with service providers and mechanisms that support holistic, clear and lasting outcomes for users;
2. The users have a access to quality legal information and advice prior to participating in ADR (so that any agreements are made from a legally informed position);
3. People with limited financial resources are not prejudiced in relation to other parties with more financial resources (that is, the ADR is a level playing field); and
4. People with limited financial resources are not excluded from dispute resolution processes (such as the Court) that are available to those with money.

15. Should civil/family legal aid be granted if parties fail to resolve the dispute through alternative dispute resolution?

People with limited financial resources should not be excluded from dispute resolution processes (such as the Court) simply because they have limited financial resources. That is, if the Court system is available to those with money who fail to reach agreement through ADR then the Court system should also be available to those with limited resources.

16. Where there are other sources of funding (e.g. conditional fee agreements or Treaty of Waitangi claimant funding from the Office of Treaty Settlements or the Crown Forestry Rental Trust), should people be required to exhaust these possibilities before obtaining legal aid?

To the extent that those funding sources are genuinely accessible WCLS sees no reason why they should not be used first. The legal aid system is designed to meet unmet needs.

However, WCLS has reservations about how this test could be applied in a manner that does not create a further barrier to justice and a further layer of bureaucracy (together with associated costs).

17. If an applicant cannot find a lawyer who will enter into a conditional fee agreement, should that be a relevant consideration in the merits test (e.g. in assessing the prospects of success)?

Yes.

18. Should all State-funded legal assistance be administered by one agency?

19. If multiple agencies fund legal assistance, how can this be managed in a way that assures taxpayers that their funds are being used appropriately?

20. What reasons make it important for people to make some contribution towards their legal costs where they can afford to do so?

21. Do you think that people who are in the low-income bracket (e.g. entitled to a Community Services Card) should have to repay legal aid?

People on low incomes or who experience other social exclusion should not have to repay legal aid where:

1. There is a risk the repayment regime will exacerbate the drivers of unmet legal need;
2. There is a risk the repayment regime will exacerbate other unmet legal needs experienced by that person; or
3. There is a risk that the repayment regime will create a new unmet legal need or driver for that person.

Where a recipient of legal aid can repay legal aid without any of those risk WCLS sees no reason why they should not contribute. One example of this would be where a recipient obtains a significant asset or sum as an outcome of a legally aided process.

22. Is there a risk that the repayment regime will create or exacerbate problems of indebtedness?

1. There is a risk the repayment regime will exacerbate the drivers of unmet legal need;
2. There is a risk the repayment regime will exacerbate other unmet legal needs experienced by that person; or
3. There is a risk that the repayment regime will create a new unmet legal need or driver for that person.

These factors exist in relation to indebtedness.

23. Is there a risk that the repayment regime will dissuade people from applying for legal aid?

Yes, see question 21.

24. Do you have any suggestions for managing the costs of administering the repayment regime?

ARE WE PROVIDING THE RIGHT MIX OF SERVICES?

25. Does the legal aid system enable people's needs to be viewed in a holistic way, and is there room to do this better?

The legal aid system currently responds poorly to viewing needs in a holistic manner.

Three of the weaknesses in the current system identified by the discussion paper are:

1. The system does not solve the underlying drivers (i.e. family and social difficulties) that draw people into the justice system.
2. The system does not solve the multiple legal needs that a user of the system typically experiences.
3. The system is not focused on helping people to resolve problems before they get into justice system.

The discussion paper states that the majority of users of the Legal Aid system have multiple unmet needs. It also states the majority of users (2/3rds) will use the system more than once. They use the system more than once because they have multiple needs and because the drivers of need remain.

The legal aid system has a clear opportunity to take a more preventative and holistic focus towards those users. This in turn provides a clear opportunity to:

- Resolve as many of the multiple needs as possible;
- Prevent as many future needs as possible; and
- Resolve as many underlying drivers as possible (or at the very least playing a part).

As discussed at question two there appear to be 4 key benefits of a preventative

and holistic approach:

1. It will greatly enhance access to justice for those who currently experience unmet legal needs;
2. It will enhance community well-being;
3. It will have a positive financial impact on the legal aid system by preventing future problems and shifting dispute resolution process to more cost effective (front-end) locations; and
4. It will have a positive financial impact on the wider social policy agenda by resolving and preventing problems early, reducing the gravity of drivers, and reducing the downstream costs for other social services institutions.

Three ways to improve the holistic and preventative delivery of services are:

1. By focusing on early advice and support;
2. By putting resources towards improving the integration and co-operation of social service providers (including legal service providers) would have a positive impact on communities by:
 - Reducing the number and complexity of unmet legal needs; and
 - Reducing the drivers of unmet legal needs;
 - Reducing the demand on the legal aid system and the wider social service sector (due to the stated reductions)
 - Reducing the financial burden on legal aid system and the wider social service sector; and
 - Improving community wellbeing generally.
3. By making it mandatory for legal service providers (including legal aid lawyers) to undertake an holistic assessment of a user's needs and to identify ways of addressing them (whether directly by the provider, through referral, or through properly funded support mechanisms within the justice system).

26. What advantages do you see from focusing on early advice and support?

Focusing on early advice and support provides the legal aid system with a greater capacity for more preventative and holistic outcomes. This in turn provides a clear opportunity to:

- Resolve as many of the multiple needs as possible;
- Prevent as many future needs as possible; and
- Resolve as many underlying drivers as possible (or at the very least playing a part).

The key outcomes of these opportunities are:

1. It will greatly enhance access to justice for those who currently experience unmet legal needs;

2. It will enhance community well-being;
3. It will have a positive financial impact on the legal aid system by preventing future problems and shifting dispute resolution process to more cost effective (front-end) locations; and
4. It will have a positive financial impact on the wider social policy agenda by resolving and preventing problems early, reducing the gravity of drivers, and reducing the downstream costs for other social services institutions.

27. Can you identify any particular legal advice and information services that could work more effectively if they were joined up or co-located with other services?

Meeting Needs of Vulnerable Groups

Legal services that align with the needs of the most vulnerable groups could be better provided where those vulnerable groups are located.

As discussed at questions 4 and 5 many potential CLC clients suffer wide reaching social exclusion. Examples of those groups are youth, those living in poverty, and those living in isolation due to factors such as abusive family situations, mental health, and cultural difference.

Many of the most vulnerable groups lack the basic resources or the appropriate channels needed to easily access legal services. There are a range of causes for this which are often specific to each group.

It is critical that legal services are provide to vulnerable groups in a manner that is appropriate to each groups particular experience of isolation and in a manner that they can access. This may suggest a need for: specialist providers; more integrated provision to legal services (where providers are able to draw on or refer users to other agencies/stakeholders for support); and more outreach services or services provided through channels vulnerable groups can access.

Providing Support to Court System

CLCs are asked by clients to assist in legal areas that reduce demand on the Court system but are provided to at a cost to meeting high unmet needs of vulnerable groups. In particular, providing services holistic services to vulnerable groups. Some services could be more effectively provided through duty solicitor's or legal service providers who are based in the Court and have specialist knowledge of Court processes.

28. Is the mix of community-based information and advice services appropriately targeted to needs in the community?

The mix of information and advice services is not effectively targeted in the

community.

The most vulnerable groups continue to be:

- Maori and Pacific peoples
- Solo parents
- Unemployed people
- Those in high-density housing
- Beneficiaries
- Those with disabilities or with physical/mental illnesses
- Victims of assault

Services and resources continue to be targeted at one-off events. Insufficient resources are targeted towards holistic care of client and preventative services.

29. What do community law centres (CLCs) contribute to the justice system that is unique to them?

CLCs contribute a number of matters that are unique to them.

1. WCLS provides free legal services. We do not charge any of our clients for any of the services we provide. CLCs that operate on this model immediately overcome one of the key barriers to accessing justice: money.
2. WCLS operates with “empowerment” as its key strategic outcome. Our goal is not to act for clients but to give clients the legal knowledge and tools to resolve their own disputes and prevent future disputes. CLCs that operate on this model are actively working to eliminate the future and multiple legal needs of their clients. Working to this model is a unique contribution to the justice system.
3. CLCs have a unique and important mandate:
 - to meet unmet legal needs;
 - to ensure communities, not just individuals, receive legal support
 - to resolve and eliminate the proliferation of legal issues throughout communities
 - to enhance the well-being not just of individuals but the family, whanau, and community as a whole.

30. Would there be advantages in standardising the services provided by CLCs on a national basis? Which services should be provided on a national basis?

31. If CLC services were to be standardised, how should they be made accountable for those services?

32. Would there be advantages in using CLCs to deliver more legal aid services (e.g. duty solicitor services)?

As discussed above, there are advantages in providing a greater focus on holistic and preventative services, whether through integration of providers or improving the skills of those providing services to vulnerable groups. To the extent that more legal aid services provided by CLCs advanced that aim then there would be an advantage.

The prospect of housing other legal aid services, such as duty solicitor, raise two key concerns:

1. WCLS is stretched to capacity already. There would need to be a massive redeployment of financial resources into CLCs if they were to provide additional legal services;
2. CLCs have a unique focus. We are charged with a responsibility to assist with systemic change through the provision of services not just to individuals but to communities. Changing the focus of CLCs to include greater provision of services to individuals could undermine this important aspect of the CLC mandate.

33. Do you see benefits in refocusing administration of the legal aid system towards developing a strategic overview of service needs and prioritising services according to identified needs in different communities?

Yes.

34. What changes would be needed to refocus the legal aid system in this way?

Practice must be evidence based.

35. What reasons would justify continuing to limit the conditions under which new forms of legal services can be piloted?

36. Should legal services be treated any differently in this respect from other types of publicly funded services?

THE QUALITY OF LEGAL AID SERVICES IS VARIABLE

37. What could be done to improve the performance of legal aid lawyers in terms of efficiency and quality?

38. Should publicly provided services (e.g. the Public Defence Service) be used to increase the standard of legal aid services where there are particular problems?

39. Could a different approach to legal aid remuneration encourage firms and practitioners to participate in legal aid work?

40. Can you identify any issues other than remuneration that are discouraging lawyers from providing legal aid services?

41. Do you have any suggestions for ways of reducing compliance costs for legal aid lawyers?

42. Do you see advantages in making performance monitoring and quality standards an express part of the legal aid system?

43. What would be the most effective way of enabling practitioners to meet quality standards?

44. Do you consider that any of the following levers may help to enhance the quality of legal aid services:

- time limits and panels for legal aid listings
- training, supervision, peer review requirements
- performance review
- specialisation in the lawyer banding system, such as for lawyers doing appellate work.

45. Can you suggest any additional levers to enhance the quality of legal aid services?

46. Do you consider that either the Legal Services Agency or the New Zealand Law Society should have primary responsibility for the quality of legal aid services, or is there a shared responsibility?

47. What do you see as the most effective ways of improving accountability in the legal aid system?

48. How should cases of poor service delivery be handled in a quality-focused framework for legal aid services?

49. Would more auditing create incentives on practitioners to improve the quality of their service and their professional development?

50. Are there any other forms of performance monitoring which might have the same effect?

51. Do you consider that the Legal Aid Review Panel would be better administered independently of the Legal Services Agency?

52. Do you have any suggestions for the matters which should be subject to review by Legal Aid Review Panel?

LEGAL AID'S EFFECT ON THE COURT SYSTEM

53. Do you consider that legal aid payment steps could help to improve the efficiency of court proceedings, as well as encourage the use of less costly means of progressing cases through the court system?

54. How could legal aid payment steps be structured to achieve these objectives?

55. Do you agree that the preferred lawyer policy is distorting the allocation of criminal legal aid cases?

56. Do you have any suggestions for changes to the preferred lawyer policy that could address the problems identified in this paper?

57. Do you have any suggestions for ways of enhancing the role of duty solicitors?

58. Do you have any suggestions for enhancements to the supervisory structure for duty solicitors?

DOES THE SYSTEM MANAGE TAXPAYER FUNDS EFFECTIVELY?

59. Would there be advantages in capping the legal aid budget?

60. Are there any categories of legal aid expenditure that might be more amenable to capping?

61. How could any disadvantages from capping the budget be avoided or mitigated?

62. Can you identify any ways of reducing demand for criminal legal aid?

63. What do you see as the main drivers of administrative inefficiency in the legal aid system?

64. Do you have any suggestions for streamlining administration of the legal aid system?

65. Do you have any comments on alternative funding models for purchasing legal aid services?

66. What are the benefits and challenges of public provision of legal aid services?

67. Do you consider the Public Defence Service should be extended into any other regions? If so, where and why?

68. Can you suggest for any ways to simplify and standardise the process for determining eligibility?

69. Can you suggest any ways to streamline piloting and consultation procedures in the Legal Services Act 2000 (the Act)?

70. Do you have any examples of unnecessary prescription that could be removed from the Act?

71. Can you identify any operational inefficiencies in the legal aid system?

72. Do you have any suggestions for how the expense involved with high cost cases could be managed down?