

## Questions & Answers: Legal Assistance Amendment Bill

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### GENERAL

#### What does the Bill do?

The Bill amends the Legal Services Act 2011 and other Acts to ensure that legal aid remains affordable in the future. It focuses on improving the quality, efficiency and effectiveness of the legal aid system. It achieves this through adjusting eligibility for legal aid, increasing payments from those legally aided people who are able to afford to repay their debt, and making administrative improvements to the legal aid system.

The Bill and associated regulations implement changes which:

- Tighten the criteria by which applicants can receive legal aid for civil proceedings when their income exceeds the prescribed thresholds (based on applicants' income and assets).
- Allow applications for civil legal aid to be refused if the applicant is in arrears for repayments on previous legal aid grants, unless the interests of justice require otherwise.
- Charge interest on legal aid debt at a rate of 8 per cent (simple, not compound), after a six-month interest-free window.
- Require people applying for civil legal aid to pay a \$50 user charge. There is no user charge for criminal legal aid.
- Allow overdue repayments on legal aid debt to be recovered through notices deducting payments from wages, benefits or bank accounts.

#### When will the changes come into effect?

The Bill is expected to come into effect later this year.

#### Why are you introducing the changes?

The Bill forms a significant part of ongoing legal aid reforms to improve the system and to ensure legal aid services remain affordable in the future and available for those who need them. Expenditure on legal aid rose sharply from \$111 million in 2006/07 to \$173 million in 2010/11, putting the legal aid budget under pressure. In the same period the number of people accessing legal aid grew much more slowly.

Changes made through the Legal Services Act 2011 address issues with legal aid services and administration that were identified by Dame Margaret Bazley's 2009 review of legal aid. That review did not address funding issues and the escalating expenditure associated with legal aid. These proposals seek to ensure legal aid is available in future for those who need it most, while taking account of submissions that interested parties made on the Bill.

The Government has already put in place ongoing operational reforms that focus on improving the quality of legal aid services and reducing administrative costs. For details, see <http://www.justice.govt.nz/policy/justice-system-improvements/legal-aid/overview-of-reforms-to-the-legal-aid-system>

**Are you going to cap legal aid?**

No. People who are eligible for legal aid will continue to receive it. This will be balanced by the expectation that those people who can afford to will make a monetary contribution to ensure the system can remain available.

**How will the Bill affect legal aid clients?**

Civil legal aid clients will need to pay a \$50 user charge. This will be collected by their legal aid lawyer. Having a small charge encourages legal aid recipients to consider whether it is worth taking a case to court, or if it is better to try resolving their dispute out of court.

Clients who have legal aid debts will be charged interest on their debt, at a rate of 8% (simple not compound), after a six-month interest free window.

Overdue repayments on legal aid debt will be able to be recovered through notices deducting payments from wages, benefits or bank accounts.

Clients who are overdue on repayment of their legal aid debt may be refused civil legal aid until they restart repayments.

The Government recognises that not all people will be able to repay their legal aid debt. Those whose income is below the prescribed thresholds have their debt written off by the Ministry of Justice before it is finalised.

Others who find themselves unable to repay their legal aid debt will be able to contact the Ministry of Justice's Debt Management Group, seeking to have their legal aid debt written off.

Criteria for writing off debt include when the debt would cause serious hardship to the aided person, or when writing it off would be just and equitable. This ensures that protections are in place for the most vulnerable people.

**Who will be eligible for legal aid?**

The types of cases people can receive legal aid for will remain unchanged.

The Bill keeps the current financial means test for criminal legal aid. This means people will be eligible for criminal legal aid in the same way that they are now.

The current definition of disposable capital in the means test will remain the same. The original wording of the Bill caused some concern that the value of household goods and tools of trade might effectively be counted as assets to reduce eligibility; this was not the intention, and the easiest way to clarify this is to retain the status quo.

The Bill makes changes which tighten the merits test for granting legal aid in civil matters. In particular the Bill tightens the criteria by which applicants whose income exceeds the prescribed thresholds can receive legal aid for civil proceedings. These thresholds prescribe the maximum income applicants may have, and are set in regulation.

The Government expects the changes to primarily affect family matters, and to encourage parties to resolve more minor matters between themselves, rather than through the court system. The eligibility changes will not apply to vulnerable people, for example, those people making applications under the Domestic Violence Act 1995 or the Children, Young Persons, and Their Families Act 1989. People who are refused civil legal aid due to being in arrears on repayments of their legal aid debt will be able to receive aid once they have restarted repayments.

These changes will help ensure the ongoing viability of the legal aid scheme and ensure legal aid is available in future for those who need it most.

#### **In what circumstances is legal aid written off?**

Legal aid debt, including any associated interest, can be written off in certain circumstances. These include when the debt would cause serious hardship to the aided person, or when writing it off would be just and equitable. This ensures that protections are in place for the most vulnerable people.

#### **WHAT THE CHANGES MEAN FOR LAWYERS**

##### **How will the Bill affect lawyers?**

Lawyers who provide lawyer for the child and youth advocate services will continue to be approved under existing approval arrangements. We listened to submitters' concerns that there is no point in extending the legal aid quality assurance framework to these services.

Lawyers will be able to apply for review or reconsideration of decisions to decline payment of invoices which were claimed outside the approved timeframe.

Lawyers will need to collect a \$50 user charge from civil legal aid clients. There is no user charge for criminal legal aid.

#### **LEGAL AID REFORM**

##### **How do these changes fit within the current legal aid reform?**

These changes complement other legal aid reforms made through the Legal Services Act 2011. That legislation addresses issues with legal aid services and administration that were identified by Dame Margaret Bazley's 2009 review of legal aid. That review did not address funding issues and the escalating expenditure associated with legal aid.

The new proposals seek to ensure legal aid is available in future for those who need it most, while taking account of submissions that interested parties made on the Bill.

##### **Why was the Bill changed?**

The Bill was introduced to Parliament in 2011 and reported back from the Justice and Electoral committee in December 2012.

The Government agreed to change the Bill to respond to public submissions to the select committee, and to align the Bill with proposed reforms to the Family Court, which the Government announced in August 2012.

The new changes allow the Government to strike the best balance between ensuring the financial viability of the legal aid scheme while still protecting the most vulnerable people.

### **What changes were made to the Bill since introduction?**

The main changes made to the Bill at select committee were:

- A reduced proposed user charge for civil and family cases (from \$100 to \$50).
- A change in the point at which legal aid debts will begin accruing interest. Interest will now be imposed six months after the debt is finalised, rather than immediately.
- A removal of the proposal to tighten the financial means test for less serious criminal cases, such as theft, assault or careless driving.
- Retaining the list of types of proceedings eligible for legal aid in the Legal Services Act 2011. This means changes to the list must be made by Parliament, rather than the executive.
- Allowing legal aid providers to apply for review or reconsideration of decisions to decline payment of invoices which were claimed outside the approved timeframe.
- Keeping the existing approval frameworks for lawyers who can provide lawyer for the child and youth advocate services, rather than creating new criteria and standards.
- Allowing overdue repayments on legal aid debt to be recovered through notices deducting payments from wages, benefits or bank accounts.
- Allowing applications for civil legal aid to be refused if the applicant is in arrears for repayments on previous legal aid grants, unless the interests of justice require otherwise.

### **Will the Bill impact on people's right to justice?**

Access to justice is a fundamental principle of the New Zealand justice system, and this government is committed to ensuring that those who require legal assistance can access it. Legal aid is a system that ensures people get access to quality legal advice.

The overarching purpose of the Legal Service Act is to promote access to justice. It does this by establishing a system that provides legal services to people of insufficient means and delivers those services in the most effective and efficient manner. As the purpose of the Act reflects, the Government has responsibilities both to provide access to justice and to use public funds responsibly.

The Bill enables funding to be prioritised to those who have a greater need for legal assistance. The Bill contains exceptions for the following proceedings: domestic violence; mental health; compulsory care due to intellectual disability; care and protection; refugees; and victims' civil proceedings. These exceptions will ensure that vulnerable groups still have access to justice through the legal aid scheme.

### **Why is a user charge required?**

A small user charge helps ensure that there are similar incentives for legally aided persons as for people privately funded legal advice. It encourages legally aided persons to consider whether or not they wish to proceed with litigation. Recovering more money from legally aided persons also helps to contribute to the financial sustainability of the legal aid scheme.

### **Does requiring people to make a contribution towards their legal aid costs deny access to justice?**

No. Initial contributions create a way to share costs between the individual and the taxpayer. A small charge on most family and civil legal aid recipients allows eligibility to be maintained for a wider group.

The \$50 contribution is considerably lower than the equivalent contribution in 1969 – that would be worth \$447 now. Furthermore, initial contributions will not apply to a range of matters, such as domestic violence and mental health cases.

- The initial 1969 contribution for family and civil cases was \$30, equivalent to \$440 in 2011 dollars), and increased to \$50 in 1991 (\$75 in 2010 dollars).
- The Legal Services Amendment Act 2006 removed initial contributions because they were not cost-effective due to an inefficient administrative process. The Bill allows for a more straightforward process.
- The change encourages legal aid recipients to consider whether they wish to proceed with litigation, in the same way that privately funded litigants do.

### **Many legal aid applicants may not be able to afford to pay the user charge. How will the government ensure that the user charge doesn't become a cost for lawyers?**

Legal aid lawyers will be required to invoice the Ministry for a fee for services not including the user charge. The charge is intended to be an up-front contribution. Including the charge as part of the legal aid repayment regime would defeat the intent of the clause. It is up to the applicant and provider to arrange how and when the user charge will be paid.

### **Why do those needing legal aid in a criminal case not have to pay a user charge?**

If a person is involved in a civil case they can choose whether or not they go to court. The \$50 user charge encourages legally aided people to consider whether or not they wish to proceed with litigation.

However, in a criminal case the person has no option, they must appear in court and proceedings continue irrespective of the accused's ability to fund their own defence. The rationale behind the user charge therefore does not apply.

## **DEBT REPAYMENT**

### **What percentage of legal aid customers are currently paying it back?**

Only legally aided people that meet the applicable threshold are required to repay debt, which the Bill extends to include interest which has accrued. The majority of legally aided persons (approximately 75 per cent) do not meet this threshold, so are not required to repay debt.

Of the 7,400 repayment plans that are currently active with the Ministry, approximately 80 per cent were entered into within the first six months after the legally aided person's case was finalised. These repayment plans are generally for low weekly amounts – approximately 75 per cent of plans are for \$25 per week or less. The remaining 25 per cent of plans are made up of payments varying between \$4 and \$3,200. Many of the higher amounts reflect single payments where the debt was paid in full.

Officials estimates that delaying the imposition of interest for six months after finalisation will reduce the revenue gained from charging interest by approximately 20 per cent over the first four years after implementation. However, it is expected the imposition of interest after six months will encourage earlier repayment of more debt during the interest free period.

### **Is it worth chasing the repayments, when the percentage of those who pay back legal aid is so small?**

Yes. Under the Legal Services Act 2011 and the Act it replaced, legal aid grants are subject to the condition that they will be repaid. Legal aid grants are, and always have been, debts which it is expected will be repaid.

There will always be those who cannot repay their legal aid debt. The Act contains a number of provisions under which legal aid debt can be written off. This allows individual circumstances to be taken into account. These provisions are used frequently.

### **How will the interest rate be set?**

The interest rate will be set by regulation, at the capital charge rate. The capital charge rate is currently 8 per cent.

This was a decision made by Cabinet. The capital charge rate was chosen as it reflects the cost to the Crown of 'lending' the money to the users of legal aid.

### **Is there any discretion about whether to charge interest?**

The Bill does not provide any discretion as to whether or not interest is charged on legal aid debt. However, the Legal Services Commissioner does have discretion to write-off legal aid debts, including interest, in particular circumstances, including where the enforcement of a debt would cause serious hardship to the legally aided person.

### **Is 'serious hardship' too high a threshold for writing off debt?**

Legally aided persons must meet the threshold of a certain level of income and/or assets before they are required to repay some or all of a grant. About 75 per cent of legal aid cases do not have a debt established because they do not meet this threshold. The requirement

to repay debt, and the associated interest, therefore only applies to a minority of legally aided persons.

The Legal Services Act 2011 empowers the Commissioner to write off debt in a number of circumstances:

- enforcement of the debt would cause serious hardship to the aided person
- the cost of enforcement is likely to exceed the amount of the debt likely to be repaid, or
- the Commissioner considers that it would be just and equitable to write off the debt.

The threshold of serious hardship is one that is commonly used in legislation, and the application of which is well established in case law. The Income Tax Act 2007 and the Tax Administration Act 1994, for example, both make use of this threshold.

The Government agrees that 'serious hardship' is a high threshold, but it also considers such a threshold appropriate in these circumstances. The majority of legally aided persons are not required to repay their legal aid debt, and there are multiple grounds under which the 25 per cent of legally aided persons who are required to repay their debt can subsequently have it written off. These ensure that protections are in place for the most vulnerable people.

### **What impact will charging interest have on people's willingness to repay debt?**

The Government believes that charging interest on legal aid debt will:

- incentivise prompt repayment,
- provide a source of income to the Crown, helping offset the substantial cost of legal aid, and
- reduce expenditure by addressing the cost to the Crown from holding debt over long periods.

It will also encourage applicants to consider carefully whether or not to pursue a legal case, reflecting the "reasonable litigant" test that privately funded litigants consider.

The imposition of interest on legal aid debt will discourage the practice of legally aided persons sitting on large capital assets, and not repaying their debt until that asset is sold. As this can be well after the establishment of the debt, the debt's real value is often far lower than it was initially.