

Human Rights
Commission
Te Kāhui Tika Tangata

Secretariat
Justice and Electoral Matters Committee
Select Committee Office
Parliament Buildings
WELLINGTON 6011

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Submission on the Legal Assistance (Sustainability) Bill

This submission is made by the Human Rights Commission. The Commission is an independent Crown Entity with responsibility for administering the Human Rights Act 1993. One of its primary functions is to advocate and promote respect for, and an understanding of human rights in New Zealand society. An important part of this role involves assessing domestic legislation, and providing advice and guidance, on human rights compliance.

The right to a fair trial (in criminal cases) and of access to the courts (in civil matters) are core human rights¹. In recognition of this, the state, in accordance with its international obligations, enables those with comparatively few means who would otherwise be denied these rights to be provided with legal aid. This is in recognition, too, that in criminal cases there is a marked inequality of arms as against the Crown.

It is clear that the costs of providing both civil and criminal legal aid are continuing to escalate and that there is a need for steps to be taken to maintain the affordability of the legal aid budget.

The Commission notes that the Regulatory Impact Statement estimates spending rose from \$48 million from 2007/08 to 2009/10 and is forecast to rise a further \$51 million by 2014/15.

¹ Article 10 of the Universal Declaration of Human Rights provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

The New Zealand Bill of Rights (NZBORA) 1990 is unequivocal about the rights of persons charged with criminal offences. S24(f) states that everyone who is charged with an offence shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance.

Given the clear tensions between two major policy objectives, financial sustainability and the rights to an affordable defence, the Commission is concerned at the absence of public consultation, the NZBORA implications, and the impact on vulnerable groups.

The Legal Assistance (Sustainability) Bill now proposes a number of changes to the provision of both criminal and civil legal services paid for by the Crown. In particular the Bill aims to restrain the growth in the number of people receiving legal aid by:

- repealing the current requirement to adjust eligibility amounts in line with upward movement of the CPI, so effectively freezing the income threshold and steadily reducing the number of persons eligible over time (estimated in the Regulatory Impact Report at 11,600 over the next four-to-five years)²;
- tightening the means and merits tests;
- introducing user charges in part to discourage applicants for assistance in civil cases from proceeding with litigation³; and
- imposing interest charges on outstanding repayments.

The Regulatory Impact Statement frankly acknowledges that the impact of these suggested changes cannot presently be assessed because of other changes taking place within the justice system.

The increased financial liability proposed by the Bill may result in more defendants acting for themselves. In addition to the obvious increased amount of court time required to ensure lay defendants have a fair hearing, it may well be that inadequacies in

² The limits can, of course, be raised under the relevant regulations, but this would no longer be automatic and any adjustment would have to await a Ministerial decision to do so.

³ The Explanatory Note to the Bill reads “The changes will encourage legal aid applicants to consider whether they wish to proceed with litigation...”

representation would needlessly increase prison numbers, increase the likelihood of miscarriages of justice and put pressure on the higher courts with applications to sort out matters that have not been properly resolved in the lower courts by reason of defendants not being adequately represented.

The imposition of interest charges will be an intolerable burden on those who genuinely cannot pay. They will be even less able to pay their debt as it rises due to interest penalties.

International Standards

The Universal Declaration on Human Rights (Declaration) provides that everyone charged with a criminal offence should be granted all the guarantees necessary for his [sic] defence.⁴ The Declaration does not stipulate what these guarantees are. However, the International Covenant on Civil and Political Rights (ICCPR), an internationally binding treaty to which New Zealand is a party, defines a more precise set of guarantees.

Article 14 of the ICCPR provides *inter alia* the right to have legal assistance assigned in any case where:

- the interests of justice so require; and
- without payment if a person does not have sufficient means to pay for it.

The practice of the European Court of Human Rights provides some guidance on state provision of legal representation. In *Benham v. United Kingdom*⁵, the applicant faced a possible penalty of only three months' imprisonment. This was held to be sufficiently severe as to require that legal aid free of charge be given; the European Court of Human Rights stated that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.

Article 14 of ICCPR is reflected in Article 24(f) of NZBORA in relation to everyone who is charged with an offence.

⁴ Universal Declaration on Human Rights, Article 11.

⁵ *Benham vs. United Kingdom* (1996) 22 EHRR 293.

Māori

As is well-known, Māori are disproportionately represented in the criminal justice system. They already have a higher risk of conviction, and likelihood of imprisonment compared with other ethnicities. They are also disproportionately in the lower income brackets.

The Bill will disproportionately affect Māori as a large percentage of those additional persons likely to be forced to represent themselves in person will be Māori.

Identifying the risks associated with the proposed changes, the Regulatory Impact Statement notes that “restrictions to eligibility will disadvantage people on low incomes, who have few options to find legal services elsewhere. Generally this includes young Māori men in the criminal jurisdiction, and women and children in the family jurisdiction.”⁶

Women

Introducing user charges, raising the financial thresholds and increasing repayments risk perpetuating the disadvantages women already face in their access to justice.

Women who require legal interventions (particularly in family matters) often have low incomes/few assets and have to fund childcare. However, the low thresholds for access to civil legal aid preclude a significant number of such women from accessing the service. It was observed in the Law Commission’s study paper *Women’s Access to Justice* that women are over represented among those who are close to qualifying for aid, but who do not qualify and whose income is such that they cannot afford to pay for more than minimal legal advice and representation services.⁷

This can result in women being severely penalised particularly in family disputes. Whereas their ex-partners may have the means to support protracted litigation, women can be coerced into “trading

⁶ Managing the cost of legal assistance in the justice sector, Regulatory Impact Statement, par 55.4.

⁷ For example a woman beneficiary with a large number of dependents may be ineligible for legal aid.

off' their rights to a fair property arrangement in exchange for maintaining their role of providing day-to-day care of their children.

In the past the United Nations Committee on the Elimination of Discrimination against Women has stated:

“While the Committee welcomes the [New Zealand] State party’s efforts to expand eligibility requirements for legal aid, the Committee is concerned about the financial, administrative and cultural barriers women face in accessing legal aid and seeking redress in the courts and about the level of awareness among women of their rights and available remedies and services.”⁸

The position for those who do qualify is improved by the Bill proposing to exclude in a person’s “disposable capital” the value of their household furniture and appliances, their personal clothing and their tools of trade. These items are generally protected from seizure in other circumstances, and this is an amendment the Commission supports.

Recommendations

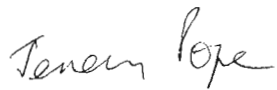
In the light of the above, the Commissions recommends that:

- The link with the CPI be retained and any interest charges be dropped.
- The bill be held in abeyance for a short period of time to enable meaningful public consultation to take place and an opportunity for greater input into the Committee’s deliberations. (The Agency Disclosure Statement explains that the reason for it not having taken place to date was ‘due to time constraints for the programme of work and the ‘Budget Sensitive’ nature of the options identified’ but now that the RIS has been published the major reasons would no longer apply.)
- The Committee reflect on the reasoning behind the introduction of user fees, and in particular whether the

⁸ CEDAW/C/NZL/CO/6 para 40.

discouraging of civil litigants from pursuing their rights is a valid policy objective.

- The Government reassesses the numerous minor misdemeanours presently in the statute book with a view to removing liability to imprisonment where it is not possible to decriminalise the behaviour in its entirety.



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Commissioner