

Family Court and legal aid reform: overview (July 2012)

This paper should be read in conjunction with the accompanying Cabinet papers and regulatory impact statement:

- Regulatory Impact Statement: *Family Court review (July 2012)*
- Cabinet paper: *Family Court review: proposals for reform (July 2012)*
- Cabinet paper: *Changes to the Legal Assistance (Sustainability) Amendment Bill (July 2012)*

This paper provides an overview of key aspects of reform discussed in the two Cabinet papers noted above. It outlines the links between the two papers and sets out the direction for reform, key decisions and risks with the proposals.

Certain sections of this paper which were previously withheld under the Official Information Act 1982 have now been released. These sections focus on the decisions regarding legal aid, and the links between the Family Court reforms and the Legal Assistance (Sustainability) Amendment Bill.

FAMILY COURT AND LEGAL AID REFORM: OVERVIEW

Purpose

1. This paper provides an overview of key aspects of Family Court and legal aid reform. The proposals are contained in the two accompanying papers:
 - 1.1. Family Court Review: Proposals for Reform; and
 - 1.2. Changes to the Legal Assistance (Sustainability) Amendment Bill.
2. This paper outlines the links between the two papers and sets out the direction for reform, key decisions and risks with the proposals.

Family Court Review

3. The Family Court Review paper proposes a package of reforms to refocus the role of the Family Court and create a modern, accessible family justice system that is responsive to children and vulnerable people. This package of reforms is the most significant change to the family justice system since the establishment of the Family Court in 1981.
4. The package responds to concerns that the Family Court: is not able to focus enough on the most serious cases; has processes that are difficult to understand; and has seen its costs increase greatly in recent years. The reforms focus on cases under the Care of Children Act 2004 as these are the largest single category of applications, and are where costs are increasing the most.

Legal Aid

5. Legal aid expenditure also grew substantially in the decade to 2010/11. Expenditure on family legal aid increased by 93 percent between 2006/07 and 2010/11.
6. The legal aid paper proposes changes to legal aid eligibility to align with decisions from the Family Court Review, and changes to the Legal Assistance (Sustainability) Amendment Bill (the Bill) to respond to submissions. The Bill is currently before the Justice and Electoral Committee.

Links between the Family Court Review and Legal Aid

7. In 2011 Cabinet agreed to a package of legislative and operational changes that reduce legal aid expenditure. The Bill makes legislative changes required to ensure the financial sustainability of the legal aid scheme.

8. Further legal aid reform is needed for two reasons:
 - 8.1. As some submitters noted, the Bill does not strike the best balance between ensuring the financial viability of the legal aid scheme, while still protecting the most vulnerable.
 - 8.2. Without other reforms, unfunded legal aid cost pressures would remain.
9. The only way to make significant savings within the legal aid scheme itself would be to remove eligibility for legal aid for most civil and family cases, including cases about the care of children. I consider this approach untenable. Instead, a mix of further savings and new funding for legal aid is required.
10. The proposals to reform the Family Court encourage faster, less adversarial resolution of family disputes. The proposals have allowed me to take a more balanced approach to meeting legal aid cost pressures, while protecting the most vulnerable, in two ways.
 - 10.1. The Family Court reforms reduce the need for legal aid for family matters. The reforms achieve this by:
 - introducing family dispute resolution (FDR) to focus people on resolving their parenting disputes out of court and therefore reduce the number of applications to the Family Court;
 - having fewer Family Court events; and
 - better targeting the use of legal representation for care of children cases.
 - 10.2. Savings from the Family Court (such as from more targeted use of professional services) would be transferred to the legal aid scheme to offset cost pressures.
11. The proposals take a more balanced approach than reducing legal aid eligibility alone because they affect all court users, rather than only legally aided people. Combined with an actual reduction in expenditure on legal aid in the last two years, the Family Court proposals also provide opportunities to moderate the proposals in the Bill.

Direction for Reform

12. A key objective of the Family Court changes is to minimise negative impacts of parental conflict on children. The most appropriate, durable and proportionate way to resolve most disputes is through an out of court process. FDR will help resolve disputes quickly, minimising the impacts on children. Officials estimate that 1200 families (and approximately 2000 children) will be diverted from the Family Court to FDR.
13. For those who cannot resolve issues themselves, simple court processes with clearly defined tracks will enable early judicial adjudication of cases. All of this

should drive towards a single outcome: to assist the individuals to get on with their lives as quickly and as effectively as they can.

Key Decisions

14. The two accompanying papers seek Cabinet's decisions on the following key proposals.

Reforming the Family Court

- 14.1. **Introducing mandatory FDR.** Before a person can apply to Court they would need to attend FDR, unless an exemption applies (eg, for family violence). FDR would be fully subsidised for those who meet the legal aid threshold.
- 14.2. **Reducing Family Court counselling.** Subject to Cabinet's agreement, FDR would replace most Family Court counselling and mediation services. Judges would be able to refer parties to care of children disputes to counselling if necessary to tackle their parenting relationship and make the outcome more durable. There would no longer be any government funded counselling aimed at reconciliation. An interim measure would reduce funding for counselling later this year.
- 14.3. **Targeting use of lawyer for child.** In cases under the Care of Children Act, lawyer for child would only be appointed where there were serious issues. An hourly rate and a maximum number of hours would be set.
- 14.4. **Having parties represent themselves in some proceedings under the Care of Children Act.** Parties would represent themselves in simple track proceedings and up to, and including, settlement hearings in standard track proceedings. Lawyers could represent parties at formal hearings and in without notice applications.

Aligning legal aid eligibility with the Family Court reforms

- 14.5. **No legal aid for FDR.** Legal representation would not be needed in FDR.
- 14.6. **Legal aid only available for proceedings involving lawyers.** Where legal representation would not be permitted under the Care of Children Act, legal aid for these cases would also not be available for legal advice outside of the Court. Legal aid would therefore only be available for cases on the standard track once the case is set down for a formal hearing or where a without notice application has been accepted by the Court.

Responding to submissions on the Bill

- 14.7. Reducing the user charge for family and civil cases (from \$100 to \$50).
- 14.8. Imposing interest on legal aid debts after six months rather than immediately.
- 14.9. Removing the tighter means test for low-level criminal cases.

- 14.10. Retaining the existing approval frameworks for lawyers for child and youth advocates rather than extending the legal aid quality assurance framework.
- 14.11. Not allowing the removal of civil proceedings from eligibility for legal aid by Order in Council. Cabinet's previous decisions to remove selected relationship property and spousal maintenance proceedings and civil disputes between private parties from eligibility [CAB Min (11) 3/6 and DOM Min (11) 12/6] would instead be progressed by way of the supplementary order paper to the Bill.
15. I will be seeking approval from the Cabinet Legislation Committee to refer the supplementary order paper on the Bill to the Justice and Electoral Committee for consideration. I expect most of the changes will come into effect in March 2013.

Impacts of the changes and risks

16. The reforms need to be progressed as a package. *[Information withheld under section 9(2)(g)(i) of the OIA 1982]*
17. The changes have impacts on, *[Information withheld under section 9(2)(g)(i) of the OIA 1982]*, children, court users and providers of services. Children will benefit from parents being encouraged to resolve disputes quickly and away from court. Court users will benefit from clearer Family Court processes. The proposals also allow the justice system to work within baseline expenditure. The strong protection for children and vulnerable people (including those exposed to violence) will continue.
18. The reforms will negatively affect Family Court professionals, particularly lawyers and counsellors. Targeted use of lawyer for child, less legal aid and not having legal representation in some proceedings will limit work for lawyers. Work for counsellors is also likely to reduce with less government funded counselling. For providers, such as Relationships Aotearoa, it could have an impact on overall viability.
19. Court professionals are likely to articulate both the impact on themselves and their clients, including the impact of increased fees, less legal aid and more self-represented parties. Reduced legal aid eligibility (eg, no legal aid for relationship property proceedings) will affect people on lower incomes.

20. Officials have identified ways to monitor or mitigate the impacts and risks.

Risk or impact	Mitigation and monitoring
Court users	
The additional steps people take before, and costs of, going to Court could mean that some people who should use the Court do not.	Better information, the FDR subsidy and the power to waive fees and user contributions will mitigate this risk.
The legal aid changes are seen as burdensome on low income and vulnerable people. People unable to access legal advice may be disadvantaged in court proceedings. Or they may face increased levels of stress and tension due to legal issues not being resolved.	Legal representation will still be available in care of children cases for without notice applications and formal hearings. People will still be able to access Community Law Centres. People in civil cases may be able to enter into contingency fee arrangements.
Service providers	
There may be too few FDR providers nationally or a lower than anticipated success rate.	The Ministry will work with relevant professional groups to ensure supply and quality of service.
There would be reduced work for counsellors and lawyers (through the reductions in eligibility for legal aid, limits on representation in court and targeted use of lawyer for child).	People who currently provide professional services in Court may become involved in providing FDR.
The lower workload for family and civil lawyers may result in some providers exiting the system, reducing the pool and quality of those available for remaining legal aid and lawyer for child work.	The Ministry of Justice will continue to monitor the supply of legal aid lawyers, particularly family providers, and lawyers for child.
Justice system	
To be successful the recommended reform package will require significant behavioural change by families, professionals who work in the Court (particularly lawyers) and judges. Acceptance of the direction of reforms from these groups will be important.	The rationale for change will be clearly communicated to the affected parties. New obligations on lawyers and parties will also support the behavioural change.
There will be more self-represented parties at court, who require additional judicial and administrative support. The judiciary and legal profession have expressed concern about the potential impact on the court system of increased numbers of self-represented parties.	This risk will be mitigated in the Family Court by the provision of better information. Improved court processes and forms for Family Court cases will also help people navigate the system. The civil court processes and forms are designed to enable people to move through the system by themselves.

[Information withheld under section 9(2)(f)(iv) of the OIA 1982]

21. *[Information withheld under section 9(2)(f)(iv) of the OIA 1982]*

22. *[Information withheld under section 9(2)(f)(iv) of the OIA 1982]*

23. *[Information withheld under section 9(2)(f)(iv) of the OIA 1982]*

Recommendations

24. The Minister of Justice recommends that the Committee:

1. **note** the reforms proposed to the Family Court are the most significant change to the family justice system since the establishment of the Family Court in 1981;
2. **note** that proposals for Family Court reform allow a more balanced approach to meeting legal aid cost pressures;
3. **note** that if some proposals for Family Court reform did not proceed, the related proposals to address unfunded legal aid cost pressures could also not proceed;
4. **note** that proposals for Family Court reform and associated changes to legal aid carry risks;

5. *[Information withheld under section 9(2)(f)(iv) of the OIA 1982];*

6. **note** that the detailed decisions required are contained in the two accompanying papers:
 - 6.1. Family Court Review: Proposals for Reform; and
 - 6.2. Changes to the Legal Assistance (Sustainability) Amendment Bill.

Minister of Justice

Date signed: