

MISCELLANEOUS PAPER 8

**WOMEN'S ACCESS TO JUSTICE : HE PUTANGA MO NGA WAHINE KI TE TIKA
WOMEN'S ACCESS TO CIVIL LEGAL AID**

A CONSULTATION PAPER

The Law Commission

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CONTENTS

	Page
SOME EXPERIENCES OF CIVIL LEGAL AID	1
PART 1 – INTRODUCTION	2
PART 2 – THE CIVIL LEGAL AID REGIME	3
A brief history	3
Overview of the present civil legal aid scheme	4
PART 3 – WOMEN AND CIVIL LEGAL AID	6
PART 4 – PROBLEMS WITH THE CIVIL LEGAL AID SCHEME	11
Lack of information	11
The role of lawyers	12
Clear and understandable information	13
Consumer protection	14
Information for lawyers	15
Transaction costs of applying	15
The \$50 contribution	16
Complicated application form	18
Delays	19
Limited eligibility	20
The limited scope	22
The need for legal advice	23
Other related legal expenses	24
Travel	25
Childcare	26
Communication assistance	26
Client care	27
Effect of the recovery scheme	29
CONCLUSION	32
WHERE TO FROM HERE?	33
APPENDIX	35
SELECT BIBLIOGRAPHY	37

WOMEN'S ACCESS TO JUSTICE: HE PUTANGA MO NGA WAHINE KI TE TIKA

The scope of this project has been determined after extensive consultation with New Zealand women. At meetings and hui all around the country and in written and telephoned submissions, thousands of women have described to the Commission their experiences with the law and identified the ways in which their expectations or needs have and have not been met. It has been made clear that for a great many New Zealand women "access to justice" means ready access to quality legal services and procedures. That quality is measured to a significant extent by the responsiveness of legal services to clients' social and economic situations and cultural backgrounds.

The project team is focusing on four major areas in its report to the Minister of Justice which is due at the end of 1997. These areas are:

- access to legal information
- the cost of legal services, including
 - information about lawyers' fees
 - the civil legal aid regime
 - pro bono work – free legal assistance
 - costs in the Family Court
- access to legal representation and advice, and
- the education of lawyers.

Two consultation papers have already been produced *Information About Lawyers' Fees* (NZLC MP3) and *Women's Access to Legal Information* (NZLC MP4).

Research is now underway on several topics within the remaining areas and consultation papers will be made available in the first half of 1997. These papers include a paper presenting the findings of the consultation process with Maori women, Women's Access to Legal Advice and Representation, Pro bono work – free legal assistance, Costs in the Family Court, and Lawyers' Education.

The Commissioner responsible for this project is Joanne Morris.

Please contact Michelle Vaughan if you would like further information about the project – **Freephone 0800 88 3453**, email mvaughan@lawcom.govt.nz or write to **Freepost 56452, Law Commission, PO Box 2590, Wellington**.

SOME EXPERIENCES OF CIVIL LEGAL AID

“If women can’t afford their services or are not eligible for legal aid then they will just put up with their problems. Where is the justice in the legal system when lawyers’ fees are too much for us to pay? How do we get help?” – *Transcript of hui held with Maori women in Rohe 1*

“Women are particularly disadvantaged. They typically have low incomes/few assets and have to fund childcare. Many of the issues that women face are very central to their being eg custody/child support/occupancy of the home. Owing to their means, they are often reliant on the civil legal aid system which is not always matched as to eligibility levels with the benefit system eg a woman with sufficient children on the benefit can be too rich for legal aid.” – *Submission 323 (lawyer)*

“That \$50 is too much to ask our women and their whanau to pay. Many of them are struggling to cope with their expenses and cannot afford this amount. So in the end they don’t apply for legal aid because of this problem. If that new Act [Domestic Violence Act 1995] is going to let women have the \$50 paid for, why can’t they do this for all the women who need assistance?” – *Transcript of hui held with Maori women in Rohe 7*

“[T]he \$2,000 benchmark is obviously quite inappropriate.” – *Submission 137 (lawyer)*

“I have had clients who have been reluctant to commence [legal proceedings] because of the [statutory] charge – often, however, they have no choice and have to take action.” – *Submission 349 (lawyer)*

“I do note that many women are not aware that there has been a change and are surprised that they will have to repay the grant of aid.” – *Submission 260*

“Often it is the woman with children who is in the house, who structures a property settlement with her retaining the house and who then finds that the house is charged simply because it is the easiest asset to identify. She will then be in a position where she has a long term low equity mortgage, very little ability to service repayments as a consequence and her poverty will become more entrenched.” – *Submission 323 (lawyer)*

PART 1 – INTRODUCTION

1 The cost of legal services has been mentioned many times at the meetings the Commission has held with women throughout New Zealand¹ and in the freephoned and written submissions² it has received. It has been identified as the greatest barrier to most women's access to justice.

2 This paper examines one aspect of the cost of legal services: the civil legal aid scheme.³ Its operation has been the subject of questions and criticism throughout the Commission's consultation processes. This paper outlines the issues raised by women about civil legal aid and seeks comments on them as well as suggestions for solutions to the problems identified.⁴

3 Part 2 provides a brief overview of the origins of the civil legal aid scheme and the current scheme. Part 3 describes why issues relating to civil legal aid are of particular concern to women. Part 4 contains a discussion of the concerns raised by women and lawyers about the scheme. These include:

- a lack of information about the scheme, including that civil legal aid is a loan not a grant,
- the difficulty which women on low incomes have paying the \$50 initial contribution,
- the cost of applying for legal aid,
- the limited eligibility criteria,
- the fear of incurring further debt through the imposition of a statutory land charge, and
- the difficulty many women have repaying the statutory land charge.

Part 4 also contains a series of questions which the Commission would like your comments on.

The paper contains a series of questions asking for comments and criticisms. The Commission would be very grateful for answers to all or any of the questions about which you have particular knowledge, interest or views. Alternatively, we would be very grateful for a more general submission based on some of the ideas contained in this paper.

Please return these responses to the **Women's Access to Justice : He Putanga mo nga Wahine ki te Tika Project, Freepost 56452, Law Commission, PO Box 2590, Wellington**. Alternatively, if you would like to make a submission by telephone, please call **Michelle Vaughan** toll free on **0800 88 3453**. If you would like to make a submission by e-mail, please send it to **MVaughan@lawcom.govt.nz**.

We would like responses by **18 April 1997** please. If you have problems meeting this deadline, please let us know.

¹ The Law Commission has held almost 100 meetings with women throughout New Zealand. It has also held meetings with lawyers at District and New Zealand Law Society level in Auckland, Hamilton, Rotorua, Christchurch, Invercargill, Nelson, Wellington and Hastings. Meetings have also been held with members of the judiciary and with government officials.

² At the time this paper was published the Commission had received almost 500 written and telephoned submissions in response to its call for submissions. The Commission has also received further submissions on the consultation papers *Information About Lawyers' Fees* (NZLC MP3) and *Women's Access to Legal Information* (NZLC MP4).

³ Civil legal aid is provided for a number of non criminal matters – see later discussion in Part 2.

⁴ A number of comments have also been made to the Commission about the operation of the criminal legal aid regime. These concerns will be included in the forthcoming consultation paper *Women's Access to Legal Advice and Legal Representation*.

PART 2 – THE CIVIL LEGAL AID REGIME

4 This part of the paper provides a brief overview of the origins of the New Zealand civil legal aid scheme and the current civil legal aid scheme.

A brief history

5 Civil legal aid was first introduced in New Zealand in 1939 when the Legal Aid Act 1939 was enacted.⁵ The Act did not provide a detailed scheme for legal aid but left any such scheme to be defined by regulations made pursuant to the Act. No regulations were ever made and no scheme for legal aid came into force. Until 1969, civil litigants had to rely on a formal undertaking by the New Zealand Law Society that it would ensure that no person with a reasonable case would be prevented from bringing or defending legal proceedings simply because she or he could not afford to pay for the services of a lawyer. By 1969 it was felt that the arrangement with the New Zealand Law Society was inadequate⁶ and the Legal Aid Act 1969 was enacted.

6 The Rt Hon JR Marshall, on the introduction of the 1969 legislation, outlined the fundamental premise of state assisted access to the institutions it has established to resolve citizens' disputes and enforce their rights:

State supported aid arises from the basic responsibility of the state to ensure justice for its citizens, and this responsibility is not truly fulfilled so long as any citizen is prevented by lack of means from having [her or] his grievances aired and determined fairly and adequately by the courts. The same concept is behind Article 7 of the Universal Declaration of Human Rights, which provides that all shall be entitled, without discrimination, to the equal protection of the law. This requires that the balance of justice should not be loaded in favour of the [person] with means, the large corporation, or the State itself.⁷

7 The 1969 Act made civil legal aid available, to those who met the financial eligibility test, in a wide range of cases including all civil cases and domestic proceedings in the Magistrates Court and all civil proceedings in the Supreme Court (except matrimonial proceedings).

8 Following the *Access to the Law* reports⁸ and *Te Whaingā i te Tika – In Search of Justice*,⁹ the Legal Services Act 1991 was enacted. The Act consolidated and amended the Offenders Legal Aid Act 1954 and the Legal Aid Act 1969. The Act also made provision for the duty solicitor scheme, legal assistance schemes and the establishment and funding of community law centres. The Legal Services Act 1991 also established the Legal Services Board as a Crown Entity to administer the civil legal aid scheme. Other functions of the Legal Services Board include administering the criminal legal aid scheme, the duty solicitor scheme and the police detention legal assistance scheme.¹⁰

⁵ Criminal legal aid was first provided for in the Justices of the Peace Amendment Act 1912 which was then duplicated in the Justices of the Peace Act 1927. The next legislation was the Poor Prisoners' Defence Act 1933. The Offenders Legal Aid Act 1954 made further provision for criminal legal aid.

⁶ "It was unfair to litigants, who felt that there was an element of charity in the services provided. It was arbitrary because not everyone knew of the arrangement that existed. Also, it was not realistic to expect the profession to work without reward." See NZPD vol 502, 1989, 12918-12919.

⁷ NZPD vol 363, 1969, 2680. This sentiment was echoed by the Hon WP Jefferies, then Minister of Justice, on the introduction of the Legal Services Bill in 1989: see NZPD vol 502, 1989, 12917.

⁸ Working Party on Access to the Law, *Access to the Law – Interim Report* (Department of Justice, Wellington, 1982); Working Party on Access to the Law, *Final Report of the Working Party on Access to the Law* (Department of Justice, Wellington, 1983).

⁹ Department of Justice, Wellington, 1986.

¹⁰ Legal Services Act 1991 s 95.

Overview of the present civil legal aid scheme

9 Under the Legal Services Act 1991 civil legal aid is generally available to applicants who meet the financial eligibility test.¹¹ This is calculated by reference to deductible allowances which must leave the applicant with disposable income below \$2,000 (or such greater amount as the District Subcommittee¹² may in special circumstances approve) and disposable capital below \$2,000.

- *Disposable income* is arrived at by deducting from the net annual tax-paid income of the applicant – and sometimes her or his spouse – a series of allowances for the applicant and others associated with or dependent upon the applicant.¹³ This is usually done with reference to the last 12 months but there is some flexibility (s 29(1)).
- *Disposable capital* is generally calculated by deducting the value of the applicant's interests in a home, any vehicle used principally for domestic purposes, and personal chattels (eg, furniture, personal clothing, etc). The subject matter of the dispute is not normally included in the calculation of the person's resources (s 29(2)).

10 Legal aid is currently only provided in proceedings which have been issued or which are intended if a compromise is not possible.¹⁴ It is also available for negotiations to avoid court proceedings. Section 19 of the Act provides that legal aid is available in a wide range of proceedings which include:

- civil proceedings in any Family Court, District Court, High Court or the Court of Appeal;
- appeals to the Judicial Committee of the Privy Council in certain circumstances;
- certain proceedings in the Youth Court;
- proceedings before the Waitangi Tribunal;
- proceedings before any body established by the Government of New Zealand to determine appeals against decisions made by immigration officers and relating to the status of persons as refugees;
- all applications, submissions and appeals under the Resource Management Act 1991 or to the Environment Court; and
- 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.

11 Legal aid is also available in proceedings in the Maori Land Court, Maori Appellate Court, Employment Tribunal, Employment Court or any other administrative tribunal or judicial

¹¹ Both residents and non residents may apply for civil legal aid. Unlike other forms of government assistance (eg, certain social welfare benefits) applicants do not have to be citizens or residents of New Zealand (s 17).

¹² Under the Legal Services Act 1991 there are 19 Legal Service Districts which each have a Committee (s 114). Each Committee must appoint a District Subcommittee for the processing of civil legal aid (s 122). The District Subcommittee's tasks include:

- granting legal aid and approving payment of bills;
- considering applications by lawyers for increases in legal aid grants;
- imposing contributions and charges on aided persons; and
- preparing written cases for the Legal Aid Review Authority in respect of appeals.

¹³ For single applicants without children or other dependants the base-rate figure of \$9,841 income per annum is the cut-off point for assistance. A single person aged 25 years would be eligible for legal aid whether on an unemployment, sickness, or invalid's benefit. Income for unmarried applicants with children or other dependants is assessed using the base figure of \$10,361, plus an allowance of \$4,619 for the first dependent child or relative with a further \$832 for each additional child or relative. The cut off point for assistance is \$15,812 for an unmarried mother with two dependent children. If she were on the domestic purposes benefit her annual income would be \$13,127 (including Family Support payments) and so well within the income criteria. Income for applicants with a partner and children is calculated using the base figure of \$10,361 with a further allowance of \$4,827 for the partner, \$1,872 for the first child and \$832 for each subsequent child. (See Reg 36, Legal Services Regulations 1991.)

¹⁴ From 1 February 1997 civil legal aid is available for certain mediation services.

authority, but only if the District Subcommittee is of the opinion that:

- the case is one which requires legal representation having regard to the nature of the proceedings and the applicant’s personal interest; and
- the applicant would suffer substantial hardship if aid were not granted (s 19(1)(e)).

12 The application for civil legal aid is sent to a District Subcommittee with an initial \$50 contribution (unless exempted).¹⁵ On the granting of aid the District Subcommittee fixes the total remuneration to be paid by the Legal Services Board for the legal services, which includes legal fees, disbursements and expert costs.¹⁶

13 The eligibility criteria and the grounds for refusing legal aid are inter-related. Legal aid can be refused because the proceeding is not a s 19 proceeding, or because the applicant has excess disposable income or disposable capital. However, even where all the criteria are met, the District Subcommittee has an overriding discretion to refuse aid if the applicant does not have “reasonable grounds for taking or defending the proceedings or being a party to the proceedings”. Other grounds for refusal include:

- the contribution required exceeding the likely cost of the proceeding;
- lack of information about the applicant’s financial resources;
- in the case of non-resident applicants, that the proceedings should more appropriately be brought in another jurisdiction; or
- poor prospects of success (s 34).

14 There is also provision for aid to be withdrawn in the following circumstances:

- at the request of the legally aided person;
- if the proceedings have been disposed of;
- if the legally aided person has required the proceedings to be conducted unreasonably which incurs unjustifiable expense to the Legal Services Board;
- if the financial circumstance of the legally aided person has improved;
- if the subcommittee considers that the legally aided person no longer has reasonable grounds for being involved in the proceedings;
- if the subcommittee considers that the legally aided person’s application for aid did not truthfully disclose the person’s resources;
- if the subcommittee is satisfied that the person contravened the Act; or
- where a person’s contribution is more than 21 days in arrears. (s 53).

15 The District Subcommittee can require the applicant to pay a further contribution (ie, on top of the initial \$50) which is determined by reference to excess disposable capital and disposable income. For the first \$1,000 of income above the allowed figure, applicants are required to contribute \$1 for every \$2 of income. For the next \$1,000 of income above the level of income allowed, applicants are required to contribute \$2 for every \$3 of income. After \$2,000 of income above the allowable level, applicants are required to contribute all excess income towards the cost of their legal representation. The further contribution is payable by lump sum or instalment unless the District Subcommittee is of the view that “substantial hardship” will be caused by the requirement to pay (s 37).

16 Unpaid contributions and further amounts due to the Legal Services Board (eg solicitors’ fees, disbursements) automatically become a charge for the benefit of the Legal Services Board over “property retained or preserved” in the proceedings (s 40). The Legal Services Board also has a discretion which enables it to impose a charge on other property, not the subject of

¹⁵ Section 37(1). Applicants for legal aid for domestic violence proceedings are exempted from the \$50 contribution and also from the charge.

¹⁶ Section 35. The actual sum of aid used, less any contribution paid becomes the amount the legally aid person owes the Legal Services Board.

litigation, that is owned by the applicant. More usually the statutory charges are taken over land, most commonly the litigant's share in the family home.¹⁷

17 While a charge over the "property retained or preserved" in the litigation is automatic, the legal aid recipient may apply for a full or partial exemption from this charge under s 45 of the Act.¹⁸ An exemption will be granted by a subcommittee "only if, having regard to the value or nature of the property and to all other circumstances, it is of the opinion that it would be just and equitable to do so" (s 45(4)). The charge can be enforced by the Legal Services Board in the usual manner and in many cases will remain on the property until it is sold.¹⁹ There is also provision for the aided person to repay in instalments money owing under a charge.

18 The amount committed to civil legal aid during the 1995/96 financial year was \$31,172,374. The forecast commitment for 1996/97 is \$34,423,212.²⁰ During 1995/96, 19,609 applications for civil legal aid were granted with an average remuneration rate of \$1,589.70.²¹ The Legal Services Board received contributions to the value of \$931,000 during the 1995/96 year.²² The Board notes in its annual report that the sum of \$4,584,870 has been secured by way of statutory land charges. During the past year \$1,260,731 has been received by the Board in charge income representing a return on the face value of the charges of over 80%.²³

PART 3 – WOMEN AND CIVIL LEGAL AID

19 Many women have told the Commission of their difficulties affording legal advice and representation and have been critical of the assistance provided by the civil legal aid scheme. Lawyers have also been very critical of the scheme on behalf of their women clients. Many of the problems described stem from the low socio-economic status of those who are eligible for civil legal aid.

20 Both women and men experience low socio-economic status and for some of the same reasons, including living in an economically depressed area, lacking necessary work skills or education. However, much of women's low socio-economic status is due to two causes that are unique to women. The first has to do with children, particularly the economic burdens associated with having the primary responsibility for children. The second has to do with the labour market where women are over-represented in part-time paid work and in occupations with low median incomes (for example clerical and service occupations).²⁴

21 The position of women in New Zealand society is made strikingly apparent by information from the 1991 Census.²⁵

¹⁷ Charges can also be taken over chattels, vehicles and shares.

¹⁸ Under the Legal Services Act 1969 Appeal Authorities would grant exemptions from Crown charges, in whole or in part, when the aided persons recovered \$10,000-30,000 and wanted to apply the proceeds to a purchase of a house.

¹⁹ When the property is sold there is provision for the charge to be transferred where the District Subcommittee considers it unjust or unreasonable to require immediate payment of the amount charged (s 49).

²⁰ Report of the Legal Services Board for the year ended 30 June 1996, 15.

²¹ Report of the Legal Services Board for the year ended 30 June 1996, 16.

²² Report of the Legal Services Board for the year ended 30 June 1996, 18.

²³ Report of the Legal Services Board for the year ended 30 June 1996, 9.

²⁴ See for an international comment the *Report of the Fourth World Conference on Women* (Beijing, China 4-15 September 1995) Platform for Action paras 47-48.

²⁵ The results from the 1996 Census are not yet available. Statistics New Zealand advises that from 1991 until the end of 1995, the Consumer Price Index moved upwards by 10.4%. However, income levels did not move upwards to that extent. Also, different groups within the population will have experienced different shifts in their income levels over that period. A rough indication of the current value of the 1991 income dollar figures can be achieved by multiplying the 1991 figures by 10% (see bracketed figures).

- The median income from all sources for women aged 15 years and over in 1991 was \$11,278 (1996 – \$12,405) compared with \$19,243 (1996 – \$21,167) for men.²⁶
- The median total income for Maori women in 1991 was \$10,027 (1996 – \$11,029), 88% of that of non-Maori women.²⁷
- The median total income for Pacific Island women in 1991 was \$9,750 (1996 – \$10,670).²⁸
- In the year to March 1992 women received on average 27% of their regular and recurring income from government income support, compared with 11% for men.²⁹
- Women's total weekly earnings, including overtime, were on average 74% of men's at February 1993.³⁰
- In 1991, over 164,000 (22%) of all children lived in sole parent families.
- The majority of children in sole parent families (86%) lived with their mother.³¹ Eighty-four percent of sole parents with children were women.³²
- The median income of mother-only families in 1991 was \$14,599 (1996 – \$16,058), only 85% of the median income of father-only families,³³ and 34% of the median income of two parent families.³⁴ Eighty five percent of Maori women received incomes of less than \$20,000 in the same period, with 42% of Maori women receiving an income of \$10,000 or less.
- Sole parent households are much more likely than others to be in the poorest 20% of New Zealand households.
- Sole parent families are far less likely than other families to own their own house; women sole parents are less likely than men sole parents to own their own house.³⁵
- In 1991, sole mothers were much more likely to be living in rental accommodation than sole fathers – 39% of sole parents living by themselves in a private dwelling and headed by a woman lived in rental accommodation, compared with 29% of similar families headed by fathers.³⁶
- In 1991, women comprised 36% of the full-time labour force (defined as 30 hours or more in paid work per week) and 76% of the part-time labour force (defined as 1-29 hours in paid work per week). At all ages, women are much more likely than men to be working part-time. In 1991, 31% of employed women worked part-time compared with 8% of employed men.³⁷

²⁶ *All About Women in New Zealand* (Statistics New Zealand, Wellington, 1993) 109.

²⁷ *All About Women in New Zealand*, 109.

²⁸ *Samoan People in New Zealand* (Statistics New Zealand, Wellington, 1995) 45.

²⁹ *All About Women in New Zealand*, 115.

³⁰ *All About Women in New Zealand*, 112.

³¹ *New Zealand Now – Children* (Statistics New Zealand, Wellington, May 1995), 22.

³² *All About Women in New Zealand*, 111.

³³ The greater income of father-only families results from the greater tendency for male sole parents to be in the full-time labour force.

³⁴ The median income of couples with dependent children was \$41,947: see *All About Women in New Zealand*, 111.

³⁵ *All About Women in New Zealand*, 123.

³⁶ *All About Women in New Zealand*, 126.

³⁷ *All About Women in New Zealand*, 103.

22 Research into relationship breakdown has found that women usually carry the responsibility for children of the relationship and provide primary or sole care for them.³⁸ Overseas studies indicate that women in these situations typically have either no financial resources or fewer than their male partners, and considerably less earning potential. Research in the United States showed that divorced women and their children, on average, experienced a 73% decline in standard of living after the first year of divorce, whereas their former husbands experienced a 42% rise in their standard of living.³⁹ A Canadian study produced similar findings⁴⁰ as did an Australian study.⁴¹ Some New Zealand information is contained in a 1990 study by the Department of Justice which showed that overall the income for males was higher than the income for females: 49% of males had a weekly income of more than \$350 (approximately \$18,200 net per year) compared with 20% of females. And 54% of custodial males had an income over \$350 compared to 20% of custodial females.⁴²

23 It is within this context that civil legal aid is provided to those of “insufficient means”. On their face the requirements for eligibility are gender neutral for they specify uniform maximum levels of income and assets which will ordinarily qualify a person for civil legal aid. In fact, however, women more often fall within the eligibility criteria due to their low socio-economic status. However, the process of seeking aid and the conditions upon its grant operate as an impediment for many women for reasons connected with their gender. The Australian Law Reform Commission defined gender as:

A social construction [which] arises from the commonly held values, beliefs and perspectives of an identifiable group of people. It develops over time and becomes part of the culture of the group. Gender describes more than biological differences between men and women. It includes the ways in which those differences, whether real or perceived, have been valued, used and relied upon to classify women and men and to assign roles and expectations to them. The significance of this is that the lives and experiences of women and men, including their experience of the legal system, occur within complex sets of differing social and cultural expectations.⁴³

24 As Professor Mary-Jane Mossman comments:

For those involved in assessing the law’s responsiveness to women’s claims, however, . . . gender neutral categories may be inherently suspect as ‘artificial classifications’, because women were not involved in defining them, because women’s interests may

³⁸ In 1991, 82% of sole parent families were headed by women. This high proportion is partly due to the divorce rate and also due to the number of women raising children on their own. In 1991, 52% of divorces involved children. Of all sole parents in 1991, over half were divorced or separated. “The true figure for maternal custody of all the children for the total sample would probably lie somewhere between 80% and 74% at 6 months after separation, 81% and 71% at one year and 77% and 67% at two years after separation (*A Survey of Parents Who Have Obtained a Dissolution* (Family Court Custody and Access Research, Report 2, Department of Justice, Wellington, 1990) 44). At the time of dissolution the most usual arrangement was for the children to live with their mother (46).

³⁹ See Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1982), 185. The data was collected as part of a ten year study of the social and economic effects of California’s no fault divorce reforms. The research involved the analysis of statistical random samples of 2,500 court workers and in-depth face-to-face interviews with over 400 attorneys, judges and divorced men and women. Kathleen Mahoney in *Gender Bias in Family Law – Deconstructing Husband Privilege* (Paper Presented at the NZLS Family Law Conference, 1995) commented that “[a]lthough no empirical study has been done in New Zealand, fifteen years of matrimonial case law reveals the same patterns” citing Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, New Zealand, 1992), 231.

⁴⁰ Marnie McCall and Diane Pask, *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (Canadian Research Institute for Law and the Family, Calgary, 1989).

⁴¹ *The Economic Consequences of Marriage Breakdown in Australia* (Australian Institute of Family Studies, Melbourne, 1985).

⁴² *A Survey of Parents Who Have Obtained a Dissolution*, 26.

⁴³ Equality Before the Law (ALRC DP54, 1993), 1.

have been less valued or understood in the process of defining categories, or because legal aid programmes have replicated categories from the legal system which have not taken women's experiences into account. For these reasons, a categorical scheme of entitlement to legal aid services may mean that, in practice, women's needs are less well served than those of men.⁴⁴

25 Professor Mossman's analysis would seem to account for many of the problems which women have told the Commission they experience when seeking to utilise the civil legal aid scheme. For example, women who provide care for dependants have described their great difficulties attending legal offices and the courts. Women as caregivers are often tied, by the needs of those in their care as well as by their budgets, to their home and more immediate environment. Even if a lawyer's office is equipped to provide care for children and others, the difficulty and expense involved for women in bringing those in their care with them to any appointment, or series of appointments, may well make the prospect impossible. And if alternative care cannot be arranged or afforded, legal services simply have to be foregone.

“A city lawyer was confident a particular woman client could have made a successful claim which would have been very worthwhile financially. However, the woman abandoned the claim when she was made aware of the number of times she would likely have to travel into the city from the outer suburbs to attend appointments with the lawyer and others: it was impossible for her to obtain childcare during the times she would need to be away from home.” – *Submission 8*

26 Because women are more often confined to their homes and more immediate environment than are men, accessing information about the legal system and legal services is more difficult. The problem is compounded for women who are from minority linguistic backgrounds.⁴⁵ There are not often corner legal offices in the suburbs or in rural areas.

27 In addition, women are the predominant users of civil legal aid in family law matters.⁴⁶ Family litigation has particular causes, subject matter and effects on the parties. However, the civil legal aid scheme makes no special allowance for the family law litigant, except in cases of domestic violence.

28 Because the most common cause of family litigation is the breakdown of the family unit, it is often concerned with resolving disputes over family property – usually the matrimonial home – and the care of any dependants – usually children. While many disputes can be resolved without the courts, in family disputes this is often more difficult due to the emotionally charged nature of the matters being dealt with and the previous relationship between the parties.

⁴⁴ Mary Jane Mossman, “Gender Equality, Family Law and Access to Justice” *Int J of Law and the Family* (1994) 357, 363.

⁴⁵ In *Quarter Way to Equal: A report on barriers to access for legal services for migrant women* (Women's Legal Resource Centre, NSW, June 1994) it was found that, overall, women from minority linguistic backgrounds had a lower level of English proficiency than males of the same background (93). At the Commission's consultations with refugee and migrant women in Auckland and Christchurch the same point was made by the women present.

⁴⁶ Approximately 80% of all civil legal aid relates to the Family Court: *A Review of the Family Court: A Report for the Principal Family Court Judge* (Auckland, 1993) 144. The “Civil Legal Aid File Survey” conducted as part of the Access to the Law project in 1981 found that 86% of applicants in domestic proceedings were women (*Access to the Law - A Research and Discussion Paper – Appendices 1-8*, 83).

“[T]he issues which touch [women] are more central to their being eg custody/child support/occupancy of the house.” – *Submission 323 (lawyer)*

“Due to a lack of cashflow the woman is in a weaker bargaining position than her ex-partner and the ex-partner who is often used to dominating the woman, (whether financially, physically, mentally and/or emotionally) is able to continue to do so as he often has more experience in legal proceedings (or can afford more aggressive representation) or can afford to delay the proceedings (which frequently occurs) or initiate proceedings (no matter how weak the case) as a weapon in the whole process. The unequal bargaining power is also significant when attempting to negotiate a settlement with the man often being able to afford to hold out and therefore has the stronger position in settlement.” – *Submission 58*

29 A clear message from the Commission’s consultations has been that women have turned to the courts as a last resort when no settlement of the dispute is possible. While the courts in these cases are concerned to divide any property equitably between the parties without apportioning blame and where children are involved, to protect the welfare of those children, the studies indicate that women almost always suffer financially after relationship breakdown. Similar data prompted Justice L’Heureux-Dubé of the Supreme Court of Canada to state:

the general economic impact of divorce on women, is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice.⁴⁷

30 However, the civil legal aid regime does not take account of the economic impact of family breakdown. Once the litigation is completed and when property is available a statutory land charge will usually be imposed. The imposition of a charge on property at the end of the litigation is the scheme’s way of making sure that those who benefit from their litigation do not secure a windfall at the expense of the state. There is no formal process within the civil legal aid scheme for considering the nature of family litigation, the reasons why litigation was necessary and the social position of litigants when a charge is imposed. As noted by Lord Scarman:

[T]he existence of the poverty trap set by legal aid legislation [lies] in the very heartland of the modern matrimonial law. A legally aided wife, whose only provision for her future support is the home awarded to her . . . finds its value diminished catastrophically by the charge imposed by law for the benefit of the legal aid fund in respect of the costs of her divorce case. The charge works no injustice where the woman is otherwise well supported or the house of great value: but for the appellant, a woman of limited means, the charge, when enforced, snaps shut, almost totally destroying her one capital asset.⁴⁸

Part 4 provides more detail on the problems experienced by women.

⁴⁷ *Moge v Moge* (1993) 99 DLR (4th) 456, 497.

⁴⁸ *Hanlon v The Law Society* [1981] AC 124, 185 (Lord Scarman).

PART 4 – PROBLEMS WITH THE CIVIL LEGAL AID SCHEME

31 This part of the paper contains a discussion of the issues raised by New Zealand women about the civil legal aid scheme and its operation. The concerns raised by women all occur within the context of their use of civil legal aid in family proceedings. As noted earlier, women are the predominant users of civil legal aid in family litigation. The issues outlined in this part range from a lack of accessible information about civil legal aid to the impact of the statutory land charge.

Lack of information

32 In the 1981 review of the civil legal aid scheme it was found that:

the most significant trend emerging from the interviews conducted with civil legal aid clients was the widespread public unawareness of the scheme. Deeper than this, was an ignorance of available legal resources generally.⁴⁹

33 More recently the 1993 Women’s Suffrage Centennial Forum on legal aid considered that there was a lack of information available about legal aid and made the following recommendations:

12 That there be more resources, including training videos for lawyers as well as community groups about the operation of the scheme as well as pamphlets with simple and precise information.

13 That there be television advertisements to publicise the availability of legal aid.⁵⁰

34 At meetings throughout the country and in written and telephoned submissions Maori and non-Maori women have told the Commission of the lack of available information about civil legal aid which results in a lack of awareness of the scheme or actual misinformation about the way it operates.⁵¹ The problems relating to lack of information appear to be particularly acute for Maori women.

“There is nothing in the Family Court but there is information in the criminal court. So getting into the Maori networks is the way to go. Do we send out information or does the Legal Services Board do a drive campaign? For example, send it to kohanga reo, on Maori airways, put it into the Family Court and not just in the CAB. Let’s contact “Marae” or “Te Karere” on TV, but we need to network the information to Maori.” – *Transcript of hui held with Maori women in Rohe 7*

“We don’t know anything about it.” – *Transcript of hui held with Maori women in Rohe 3*

“Legal aid is only given when you have been really strictly means-tested. Many of our Maori women do not know what legal aid is or what the criteria is for getting legal aid. There is a real need to have that information given to them. It seems that no-one, not even their lawyers, are informing them about legal aid.” – *Transcript of hui held with Maori women in Rohe 8.*

⁴⁹ *Access to the Law – A Research and Discussion Paper – Appendices 9-14, 449.*

⁵⁰ “Are Women Getting the Help They Need from the Legal Aid Scheme?” – *Report from Women’s Suffrage Centennial Forum* (Legal Services Board, Wellington, New Zealand, 27 November 1993).

⁵¹ It was noted in *In the Interests of Justice* that a significant number of those who had not applied for

“What does legal aid do? Can you apply for it for any court proceedings?” – *Transcript of hui held with Maori women in Rohe 4*

“No we don’t understand what it is or how to get it.” – *Transcript of hui held with Maori women in Rohe 4*

“That legal aid thing, isn’t that when you don’t have to pay for anything your lawyer does?” – *Transcript of hui held with Maori women in Rohe 4*

“Other women I know didn’t even know what legal aid would do for them.” – *Transcript of hui held with Maori women in Rohe 3*

35 The reasons women experience difficulties accessing legal information are related to their low socio-economic position. As part of its work on *Women’s Access to Legal Information*⁵² the Commission identified the legal information produced about civil legal aid (see Appendix), domestic violence, and custody matters. In *Women’s Access to Legal Information* the Commission discussed the problems experienced by women and sought submissions on possible solutions.

The role of lawyers

36 While a number of community organisations provide information about civil legal aid, it is lawyers who have a specific obligation to provide information to clients. The commentary to Rule 1.02 of the New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors*⁵³ states that “[i]f a client is eligible for legal aid the [lawyer] has a duty to draw that fact to the client’s attention”. However, from what the Commission has been told, for many women, lawyers are not seen as an obvious source of information. In many cases this relates to the fear of the cost of approaching a lawyer.

37 Logically, if cost is seen by women as a major impediment to seeking legal advice it is very unlikely that women will approach lawyers to find out about legal aid unless they know that there is no charge for doing so. The Commission is aware that a number of lawyers offer an initial free interview where information about legal aid could be provided. However, this practice is not always well publicised nor does it appear to exist nationwide.

38 Further, from the submissions received from lawyers and the comments made by women, the Commission is unsure whether the commentary to Rule 1.02 is always followed.⁵⁴

criminal legal aid either did not know about criminal legal aid or had such limited knowledge about the scheme that they did not know that they didn’t realise that they hadn’t applied (75).

⁵² (NZLC MP4, Wellington, 1996)

⁵³ The rule states: “A practitioner as a professional person must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner’s fields of practice from any particular client or prospective client.” (4th Edition, 1996).

⁵⁴ The findings of a recent study are also interesting. The study involved the completion of a questionnaire and interviews by women who had sought assistance from women’s refuge. The sample size was 22. It found that only 62% of lawyers asked their clients if they required legal aid and of that 62%, 67% of lawyers explained what legal aid was and how to get it. The study also found that 28% of clients incurred legal costs they were not expecting and 9% of clients had problems meeting the costs of the case: Kerry Francis, *An Analysis of the Lawyer/Client Relationship – Where the Client is a Battered Woman or Woman in a Violent Relationship* (Paper completed for LLB at Victoria University, Wellington, 1995).

“While the commentary [to the Rule] states that it is the duty of the practitioner to draw legal aid eligibility to the client’s attention, in my experience this is not always done . . . Insufficient information is available about legal aid and clients are in the hands of their lawyers who sometimes consider legal aid too much of a fag to go through.” – *Submission 323 (lawyer)*

39 Many of the lawyers who made submissions to the Commission stated that they often do not know their clients’ incomes. Many have indicated that it is quite inappropriate to find out such information. By contrast, Maori women have mentioned that the amount of their income is often the first question they are asked by a lawyer. Some lawyers’ decisions to advise their clients about civil legal aid seem to depend upon whether the clients are in the paid workforce. While the threshold for eligibility for legal aid is very low the test is not one of “unemployment” or “beneficiary status”. It is unclear how lawyers can discharge their responsibility under the *Rules* if they are unaware of their clients’ incomes.

“My three children are in Christchurch and I have no access of them whatsoever. I haven’t seen them for a year now. I have had two lawyers helping me. The first didn’t help me by telling me about legal aid or my rights. My second lawyer is much better and got me legal aid and now I am trying to get my children.” – *Transcript of hui held with Maori women in Rohe 7*

“My lawyer didn’t even explain to me about legal aid, it was after I went to another lawyer that I realised I was eligible. Someone isn’t doing their job properly and making sure we know about it.” – *Transcript of hui held with Maori women in Rohe 7*

Clear and understandable information

40 In consultations around the country women have been uncertain whether legal aid is a loan or a grant. One woman commented to the Commission that this could be because the term aid implies a gift or grant.⁵⁵

“Women are not getting the full information about legal aid and its criteria. Why is it that women are not informed properly about the cost of legal services by their lawyers? Lawyers have a responsibility to inform their clients and it should be in simple writing so that they can read it later.” – *Transcript of hui held with Maori women in Rohe 7*

“I do note that many women are not aware that there has been a change and are surprised that they will have to repay the grant of aid.” – *Submission 260*

⁵⁵

41 Some women have said that they are sure that their lawyers would have told them about the charge, as they are required to do. However, because they were in such a distressed state at the time they have no recollection of the conversation and were later surprised to discover the charge on their property. One woman had recently decided to sell her house and discovered that there was a \$10,000 charge on her home in favour of the Legal Services Board.⁵⁶ Many women have told the Commission how difficult it is to absorb information when under stress and it seems that great care needs to be taken when providing information.

42 Another factor of concern is that lawyers often will not be able to advise women exactly what their liability will be due to the complicated nature of the scheme. This information is vitally important to the decision to litigate, especially for those on low incomes. In its *Review of the Legal Services Act 1991*, the Legal Services Board noted the need for clearer parameters and guidelines so that lawyers can be more specific with new clients about the amount they are likely to have to repay.⁵⁷

Consumer protection

43 The Commission has also heard of instances where lawyers suggest to clients that they should pay privately instead of “bothering to apply for civil legal aid”. This practice is perhaps the result of lawyers being obliged by their rules of conduct to advise clients whether they are eligible for civil legal aid but not being obliged to act for clients on civil legal aid.

J is on the DBP and is not receiving legal aid. Her lawyer said not to apply for civil legal aid because she stood to get such a large settlement when it was eventually settled and she would just have to pay it back out of that anyway. Although she is on the DPB she is paying \$20 per fortnight in costs to her lawyer. To the end of March [1996] she owed her lawyer \$9,300 and she knows her bill will be higher now. The lawyer is charging her accumulated interest on her bill and she can't pay until settlement. – *Submission 387 (telephoned)*

Initially V was on legal aid. V has a charge for \$2,000 on her home. Her second lawyer said “You would be better off not on legal aid as a charge would be made against your house. It would be better if you paid off “so much” on a regular basis”. V has just received a bill for \$900. A friend told her that legal aid rates were lower and she feels as if she has been ripped off. The bill was not itemised and V was unable [to say what her] lawyer's hourly rate was or whether there were any disbursements. – *Submission 330 (telephoned)*

44 If women are in fact eligible for legal aid but are convinced by their lawyers to pay privately they are missing out on the benefits the civil legal aid scheme is able to offer, such as an income assessed contribution and the ability to have a charge imposed rather than immediate payment being required and enforced. Furthermore, if women think that they are getting a “better deal” by paying through a private arrangement, it would seem that there really is a lack of accessible and accurate information available about the civil legal aid scheme.

⁵⁶ Meeting in Lower Hutt 15 November 1996.

⁵⁷ *Review of the Legal Services Act 1991*, 9.

Information for lawyers

“Lawyers tend to assist applicants with decisions whether to apply for legal aid and whether they are eligible. Lawyers are often not sufficiently informed as to the requirements. There seems to be no real guidelines as to special circumstances allowing legal aid to be granted to persons not meeting the financial eligibility test.” – *Submission 323 (lawyer)*

45 The civil legal aid scheme is complex. Determining whether a client is eligible for aid is sometimes not a straightforward process. The most recent New Zealand Law Society seminar on civil legal aid was held in March 1992. The Legal Services Board recently provided information to all practitioners about the changes to the civil legal aid scheme brought about by the Domestic Violence Act 1995. Little other information or training has been provided to lawyers.⁵⁸ However, as noted above, the Legal Services Board is aware of the need for further information.

QUESTIONS

- 1 What steps can be taken to ensure that the implications of the legal aid scheme are understood by clients?**
- 2 How can information be provided to potential clients?**
- 3 How can the fact that information about civil legal aid is available from lawyers be publicised?**
- 4 Should this information be available for no charge?**
- 5 Would regular seminars on civil legal aid be of assistance to lawyers?**
- 6 Who should be providing these seminars?**
- 7 How else could information about civil legal aid be provided to lawyers?**

Transaction costs of applying

46 Both lawyers and women have talked to the Commission about the difficulties experienced in applying for civil legal aid. Three problems have been identified: the \$50 initial contribution, the complexity of the application form, and the delays associated with processing the application form. This section discusses those problems.

⁵⁸ The Bay of Plenty District Legal Services Committee ran a series of seminars between 20–28 March 1996.

The \$50 contribution

“Few women have \$50 available for a contribution.” – *Submission 295 (lawyer)*

“That \$50 is too much to ask our women and their whanau to pay. Many of them are struggling to cope with their expenses and cannot afford this amount. So in the end they don’t apply for legal aid because of this problem. If that new Act [Domestic Violence Act 1995] is going to let women have the \$50 paid for, why can’t they do this for all the women who need assistance?” *Transcript of hui held with Maori women in Rohe 7*

“A lot of our Maori women do know what legal aid is but they still can’t afford it. The \$50 fee is too much for them to pay. There is no money to pay their legal aid loan back.” – *Transcript of hui held with Maori women in Rohe 9*

“Why do we have to pay [\$50] before we get some justice in our lives?” – *Transcript of hui held with Maori women in Rohe 9*

“The initial fee of \$50 is still a big problem for many of our women. Why can’t that fee be waived because it’s too much to expect women to pay.” – *Transcript of hui held with Maori women in Rohe 11*

47 Many women described to the Commission their concern at having to pay the initial \$50 contribution required by the regulations for all matters except those involving domestic violence. As mentioned earlier, in 1991 the median income for New Zealand women was \$11,278 (1996 – \$12,405). The \$50 contribution is at least 23% (1996 – 21%) of the weekly income of half of New Zealand women. And for the 30% of New Zealand women who earn less than \$10,000 per annum, \$50 is at least 26% of their weekly income. The study *Women on Low Incomes*⁵⁹ found that low incomes had led to women restricting their spending on daily necessities such as food. Rent, power, the phone bill and sometimes healthcare were paid for first and food would be bought with what was left over.⁶⁰ In light of this, it is not surprising that the Commission has been told that the \$50 contribution is more than many women can afford.

“Of course [the \$50 is a disincentive]. Many lawyers pay the \$50 for their clients as yet another impost because the clients are too poor to pay it and at least it gives the lawyer the work. The administration is such that it must be asked whether the contribution is worth the candle.” – *Submission 323 (lawyer)*

⁵⁹ An initial study examining the situation of women living on a low income – a report based on research by Peggy Duncan, Elizabeth Kerekere, and Dinah Malaulau for The Young Women’s Christian Association of Aotearoa-New Zealand and the New Zealand Council of Christian Social Services (June 1996). The study involved the interviewing of 48 women in six focus groups. Over half the women were younger than 30 years, with most under the age of 25 years. There were no women in the 55-59 age group and very few women between 45 and 55 years. Almost half of the women were single (45%). Forty one percent of the women were Maori, 31% NZ European or Pakeha and 14% were Pacific Island. Nearly 20% of the women involved in the study had income from sources other than New Zealand Income Support (IS) benefits. Over 80% received income from IS: just under 50% were on a Domestic Purposes Benefit, and nearly 20% were on National Superannuation.

⁶⁰ *Women on Low Incomes*, 8.

48 The reasons for this initial contribution have never been clearly stated. It appears that it may have been introduced as an inhibitor to unmeritorious claims and as a revenue matter.⁶¹ The contribution was originally \$30 in 1969. It was reduced to \$15 in 1974 because it was found that it was being waived more than expected. The reduction was intended to render the contribution obligatory for all but the poorest applicants. In 1980 the contribution was increased to \$25 in recognition of the reduced monetary value of the \$15 since 1974 due to inflation.

49 A number of lawyers have commented that women do not continue with legal matters when asked for the \$50.⁶² Others have told the Commission that having paid the contribution on behalf of their clients, many clients are now repaying the \$50 at the rate of \$5 per week.⁶³

“In many cases we write off the \$50 initial contribution if the case genuinely warrants it.” – *Submission 361 (lawyer)*

“\$50 initial contribution difficult. Often get clients to pay it off to our firm – would be better if they could pay it off to the legal subcommittee. \$50 very high for a beneficiary.” – *Submission 343 (lawyer)*

Our own firm has lost count of the times we ourselves have paid the \$50 on behalf of clients to ensure they did get legal aid.⁶⁴

50 At one meeting the Commission was told by a lawyer that:

A woman had gone to a law firm and had filled out an application for legal aid. The solicitor had told her that they needed \$50 and she had said she would pay that. The solicitor’s firm did not put in the legal aid application and she then received a bill for \$400. Upon querying this she was told that she hadn’t paid the \$50 so they hadn’t applied for legal aid.” – *Meeting in Christchurch, June 1996*

51 District Subcommittees have the power to give an exemption from the \$50 contribution where the applicant has no disposable income and the payment of the contribution would cause substantial hardship (s 37(1)). Unfortunately there is no data available to indicate whether the initial contribution is being waived and in what circumstances. The Legal Services Board Guidelines indicate that exemption from the initial contribution will be rare.⁶⁵ The comments of women and lawyers certainly suggest that a waiver is seldom granted. Those comments also suggest that there are variations between regions in the exercise of the discretion to waive the contribution. This might suggest that some monitoring of the District Subcommittees’ decision-making processes is needed.

⁶¹ See discussion in *Access to the Law: A Research and Discussion paper*, 8-9.

⁶² Meeting of lawyers, Rotorua, May 1996.

⁶³ Meeting of lawyers, Rotorua, May 1996. Meeting of lawyers, Nelson, May 1996.

⁶⁴ Quotations from a report prepared for the Law Commission by Ida Malosi and Sandra Alofivae entitled *Report on Consultation with Pacific Island Women* during 1996, 30. The consultation process upon which the report was based involved 60 Pacific Island women, aged between 25 and 50 and living in the Auckland area.

⁶⁵ *Legal Services Manual* (June 1995) Part 1, ch 3, 1.

“The subcommittee never gives an exemption for the \$50 contribution. That can be very difficult.” – *Submission 287 (lawyer)*

“There is a part on the form where it says one can be exempted from paying the fee but I have never ever seen this happen.” – *Transcript of hui held with Maori women in Rohe 7*

QUESTIONS

- 8** **Should there be a \$50 contribution?**
- 9** **If there should be, should it be reduced? In what circumstances?**
- 10** **If there should be an initial contribution, in what circumstances should applicants be exempted from paying it?**
- 11** **Are the current reasons for exempting the \$50 contribution adequate?**
- 12** **Should more specific guidelines be drafted to assist District Subcommittees? If so, what should they include?**
- 13** **Should the District Subcommittee decisions be monitored? If so, how?**

Complicated application form

“The forms you fill in are terrible. You have to run around proving this and that. They’re not practical. The women have to run around usually with their four children to Income Support, or the bank to prove they are eligible and it’s a real problem for them.” – *Transcript of hui held with Maori women in Rohe 10*

“Women come in once, they struggle through filling in a legal aid application. They have to get a letter from their boss, income support and pay the initial contribution.” – *Transcript of hui held with Maori women in Rohe 7*

“The cost of the paper work is high and gets passed onto the client.” – *Submission 323 (lawyer)*

52 It seems generally accepted that the application form is complicated. Estimates of the amount of time that it takes to complete the application form vary, from 10 minutes if the client has all the information to 2 hours if more than one meeting with the client is required. Some lawyers have commented that it will usually take clients two appointments to get the legal aid application form completed. If for each visit to her lawyer a woman has to arrange transport and organise childcare (at a cost), all to provide information for something that she

is not sure she will get and which is going to cost her \$50 at the outset, it is not surprising that the process of applying for legal aid can become too onerous.

53 In *A Review of the Family Court* the following comments were made:

Almost universally, the size and complexity of the legal aid application form was cited as a major irritant. Lawyers have indicated that they have to oversee the completion of the form, that it often occupies two or three different points in time, and is unnecessarily full. We conclude that its complexity is often a deterrent to its completion and thus a possible grant is avoided – but this is not an appropriate method of eliminating an application for legal aid.⁶⁶

54 The Report from the Women’s Suffrage Centennial Forum recommended that the legal aid form be simplified and that there be a simpler process for determining eligibility.⁶⁷ The New Zealand Law Society suggested that a simplified form should be available if an applicant receives a means tested social welfare benefit or an accident compensation entitlement below a certain level.⁶⁸ The Commission asked for comment on this suggestion at some of its consultations with lawyers. One of the main concerns aired was that the approach could be open to abuse by those who are asset rich.

55 Another proposal that has been made is that the Legal Services Board should issue guidelines on what information is required and how the forms should be completed by lawyers.⁶⁹ In the *Review of the Legal Services Act 1991*, the Legal Services Board acknowledged the view expressed by many of the participants in the review that the civil legal aid application form is complex and needs simplifying (7).

56 The Commission understands that the Legal Services Board is currently investigating proposals in respect of the simplification of the criminal legal aid application forms and if these are successful, that modifications may be introduced in respect of civil legal aid application forms.⁷⁰

QUESTIONS

14 What comments do you have on the application form?

15 How could the application form be simplified?

16 What comments do you have on the New Zealand Law Society suggestion of a simplified form for certain applicants?

Delays

57 Determining eligibility for civil legal aid is not a straightforward process. Difficulties occur when the applicant fulfills the disposable income criteria (ie, earns no more than the statutory allowances) but not the disposable capital criteria. In those cases, the applicant’s eligibility for legal aid depends upon the decision of the District Subcommittee. The Legal Services Board noted in its *Review of the Legal Services Act 1991* that:

⁶⁶ (April, 1993), para 5.4.

⁶⁷ *Are Women Getting the Help They Need From the Legal Aid Scheme*, 14.

⁶⁸ *Review of the Legal Services Act 1991*, 7.

⁶⁹ *Review of the Legal Services Act 1991*, 7.

⁷⁰ *Review of the Legal Services Act 1991*, 7.

In a number of key districts respondents indicated that the subcommittee system is under great strain to the point of collapse. Lawyers do not always attend subcommittee meetings regularly and predictably especially when they are under intense pressure from their firms to work chargeable rather than non-chargeable hours. (3)

58 Delays in the processing of the application form by the District Subcommittee may also be a transaction cost. Because of the delay lawyers may begin work for clients who may then be faced with an unexpected bill should the application not be successful. It is clearly desirable that applications are processed promptly.

“When I first saw my lawyer I was told that I would be entitled to legal aid which I did receive. I had to contribute \$50 towards the costs. Unfortunately my ex-husband has since written to the Legal Aid Board telling nothing but lies about me and after about 6 months I am still waiting to hear whether I am still entitled to this help from them.” – *Submission 47*

59 The Legal Services Board has begun piloting a scheme to improve the processing of civil and criminal legal aid in Auckland and Wellington. Again this is a welcome initiative.

Limited eligibility

60 Many women and lawyers have spoken to the Commission about the limited eligibility criteria, commenting that it is only the very poorest members of society who benefit from civil legal aid. A number of women on low incomes who are not eligible for civil legal aid have described to the Commission how they have had to give away their legal rights due to the high cost of enforcing them.

“Women are particularly disadvantaged. They typically have low incomes/few assets and have to fund childcare. Many of the issues that women face are very central to their being eg custody/child support/occupancy of the home. Owing to their means, they are often reliant on the civil legal aid system which is not always matched as to eligibility levels with the benefit system eg a woman with sufficient children on the benefit can be too rich for legal aid.” – *Submission 323 (lawyer)*

“It’s a common problem to have clients ineligible [for legal aid] – a kind of “black hole” particularly with difficult cases which may be expensive and they earn too much to qualify but not enough to pay costs.” – *Submission 68*

“I am not able to apply for legal aid because my income is above the threshold level. The criteria apparently do not allow for any consideration of my fixed outgoings as a consequence of the matrimonial property settlement, or, even more significantly, the massive 3:1 income differential between my ex husband and me which operates to his advantage. He was able to employ the highest-paid family court lawyer . . . to do everything he possibly could to complicate proceedings and greatly push up my costs in the process. My current unsecured legal debt is over \$5000 and at present rates and even assuming no further costs – which on the basis of past experience is unlikely – will take at least another 5 years to repay. My lawyer is highly reluctant to undertake any further work for me because of this debt and is pressing to have it repaid more rapidly.” – *Submission 260*

61 On the introduction of the 1969 Act it was stated:

[The 1969 scheme was] not designed to limit aid to those who are really poor. The principle followed is that aid should be granted, provided the case is meritorious, where the applicant cannot fairly be expected to shoulder the whole burden of the legal costs.⁷¹

62 Under the 1991 Act civil legal aid is available to applicants with disposable income below \$2,000, or such greater amount as the District Subcommittee may in special circumstances approve, unless the applicant's disposable capital exceeds \$2,000 and it appears that they can afford to proceed without legal aid.

63 The 1991 Act restricted the availability of civil legal aid as it retained the \$2,000 benchmarks set in the 1969 Act. In 1981 the comment was made that:

Other than \$2,000 being very roughly comparable to the limit in the UK Act of the day, the only explanation given for it was in a departmental memo. "Disposable income and capital is the amount in excess of that reasonably required to provide for the necessities of decent living according to the standard of the New Zealand community today."⁷²

64 Given the uncertain basis on which the \$2,000 benchmark was set in 1969 it is very difficult to assess the extent to which eligibility for civil legal aid has been eroded in the intervening years. However, some comparisons can be made. In 1969, the average New Zealand weekly wage was \$41.90, which was 2% of \$2,000.⁷³ In 1992, the average weekly wage for non-Maori women was \$292.17 and for Maori women was \$240.76, 14.5% and 12% of \$2,000, respectively.⁷⁴

65 Another instructive comparison may be made, as noted in the *Access to the Law* report, between the number of hours of a lawyer's time that \$2,000 would have bought in 1969 compared to 1996. The paper, which was prepared in 1981, noted that at that time:

[A] brief survey of Wellington cases of legal aid for domestic proceedings gives an indication. In 1970 the average lawyer's fee in those cases was \$11.80 an hour. In early 1981 it was \$40.50 an hour. In 1970 therefore, \$2,000 disposable income bought 170 hours of lawyer's time compared with 49 hours in 1981.⁷⁵

66 Using the civil legal aid rates of remuneration between 13 and 20 hours of a lawyer's time can now be purchased for \$2,000.⁷⁶ If private market rates are used, \$2,000 can now buy approximately 11⁷⁷ hours of a principal's time or 16⁷⁸ hours of a staff solicitor's time compared with the 170 hours it could buy when the 1969 Act was introduced. Given the changes in New Zealand society in the last 27 years (for example, the increase in health and education costs) it is highly questionable whether the \$2,000 benchmark for disposable income and capital remains a relevant measure for eligibility.

"[T]he \$2,000 benchmark is obviously quite inappropriate." – *Submission 137*
(lawyer)

⁷¹ NZPD vol 363, 1969, 2682.

⁷² *Access to the Law – A Research and Discussion Paper*, 22.

⁷³ *Access to the Law – A Research and Discussion Paper*, 22.

⁷⁴ *All About Women in New Zealand*, 227.

⁷⁵ *Access to the Law – A Research and Discussion Paper*, 22-23.

⁷⁶ Junior \$100 per hour; intermediate \$125 per hour and senior \$155 per hour.

⁷⁷ The average hourly rate for principles in 1995-1996 financial year was \$190: see *New Zealand Law Society Profession Report 1996* (School of Management Studies, The University of Waikato, 1996), 46. This study

67 In 1983, the Access to the Law Working Party commented that:

A constantly repeated point throughout both this and the interim reports has been the inequities and anomalies that have arisen simply through a failure to regularly review financial eligibility criteria for legal services and the remuneration rates for lawyers providing those services. All the major schemes have suffered from this basic defect. As noted at various stages in our reports, it is absolutely essential that the established schemes, and any other schemes to be set up which require government funding, have their allocations, rates of remuneration, and any other financial eligibility criteria reviewed regularly. We recommend that there should be annual reviews.⁷⁹

68 And in 1995 the Legal Services Board noted:

[W]hile the Act addresses the needs of people of very limited financial means, particularly beneficiaries, there exists a significant proportion of low income people who cannot afford to pay for their own legal representation and who are ineligible for legal aid. Indeed, a typical criticism of the Act is that the eligibility criteria is set too low.⁸⁰

69 In 1983, the Working Party on Access to the Law recommended that both the specified figures for disposable income and disposable capital be adjusted upwards using the appropriate index to determine price movement from 1969 to 1983.⁸¹ In 1997, it seems that an upward movement in the disposable income and capital figures is long overdue as certain Income Support allowances, eg Housing Supplements, can now push beneficiaries outside of the eligibility criteria.

“[T]he \$2,000 benchmark for disposable capital is far too low . . . and that has the purpose of freezing out many lower middle class and middle class applicants from state assistance even though in many cases legal aid could be repaid in time.” – *Submission 323 (lawyer)*

QUESTIONS

- 17 **Do the basic allowances need to be increased? If so, to what level?**
- 18 **How should the disposable income and capital criteria be assessed?**
- 19 **How often should the eligibility criteria be reviewed?**
- 20 **Is there a better way of determining eligibility?**

The limited scope

70 As noted earlier civil legal aid is available for almost all civil proceedings before courts

⁷⁸ is a self selecting study of 197 law firms throughout New Zealand. It may not be completely representative. The average hourly rate for solicitors was \$128.95 per hour: see *New Zealand Law Society Profession Report 1996*, 46.

⁷⁹ *Final Report of the Working Party on Access to the Law*, para 4.71.

⁸⁰ *A Review of the Legal Services Act 1991*, 3.

⁸¹ *Final Report of the Working Party on Access to the Law*, paras 2.64 and 2.66.

and tribunals. Civil legal aid will cover representation by a lawyer “in steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings” (s 40). In the Commission’s consultations questions have been raised about the scope of civil legal aid. This section outlines those issues.

The need for legal advice

71 Legal aid is currently only provided in proceedings which have been issued or which are intended if a compromise is not possible. For example, aid may be granted for time spent in reaching a matrimonial property resolution. It is also available for negotiations to avoid court proceedings. Civil legal aid is not available for advice to ascertain whether there is a claim to put forward.⁸² However, one lawyer commented that “such advice can usually be moulded within s 20 of the Act as steps preliminary or incidental to any proceedings or arriving at or giving effect to a compromise to avoid or bring an end to any proceeding.”⁸³ The Commission has also heard of lawyers advising their clients to seek unnecessary consent orders from the court so that legal aid can be applied for. While the comments illustrate that the Act can be utilised to render clients eligible for aid for legal advice, the philosophy of the scheme has always been that legal aid is only available for legal representation in proceedings and not for legal advice.

72 In 1981, the community groups involved in the *Review of Legal Aid Schemes* as part of the work on *Access to the Law* commented that they “saw the need to extend the scheme to cover general legal advice. The community groups felt this was the area of greatest need”.⁸⁴ In addition it is commonly said that early legal intervention in a dispute can prevent it from escalating. In 1983 the Working Party on *Access to the Law* stated:

[W]e believe that a strong case exists for making legal aid available for people seeking legal advice from lawyers.⁸⁵

73 The “strong case” was not taken up for financial reasons.⁸⁶ It is clear from the Commission’s consultations that women delay seeking legal advice because of the high costs associated with pursuing legal matters.

“A lot of whanau stay home because they cannot afford a lawyer. The cost of orders, travel, accommodation, childcare are too expensive. Women are putting up with the abuse instead, because of the costs.” – *Transcript of hui held with Maori women in Rohe I*

74 To a limited extent, the need for legal advice to those of insufficient means and others who cannot afford it is taken up by community organisations, for example, community law centres, Citizens Advice Bureaux, and Women’s Refuges. However, there are not community law centres in every legal services district. Citizens Advice Bureaux offer legal advice at quite limited times and are generally more of a referral service than a legal advice provider: they must refer people on

⁸² For example see *LARA Decision No 258/93 28/7/93*, Wellington. In that case an application had been made to obtain advice in custody and non-molestation matters. The District Subcommittee declined aid and the decision was upheld by the Authority.

⁸³ Submission 323 (lawyer).

⁸⁴ *Access to the Law – A Research and Discussion Paper – Appendices 9 – 14*, 453.

⁸⁵ *Final Report of the Working Party on Access to the Law*, para 2.52

⁸⁶ In 1976 the Legal Aid Board presented to the Minister of Justice a draft bill and regulations for extending legal aid to advice based on the English legal advice and assistance scheme. It was rejected for economic reasons and deferred for consideration in a review of legal aid. (See *Access to the Law: A Research and Discussion Paper*, 18.)

to lawyers – who must normally be paid – if the matter is complex. The service offered by Women’s Refuge is very specific. Some lawyers provide legal advice for free, but this is not a nationwide practice, not well known and promoted.⁸⁷ Consequently, there is no nationwide legal advice service offering general legal services at reduced or no cost.

75 In Australia, Legal Aid Commissions provide advice services without means tests. For example the New South Wales Legal Aid Commission will provide 15 minutes of legal advice free. In certain rural areas telephone legal advice will be provided. If more than legal advice is required then applicants must meet a means test and merits test. The United Kingdom operates what is called the “green form” scheme. This scheme is intended to cover preliminary advice and assistance from a solicitor, including advice, writing letters, entering into negotiations, obtaining an opinion and the preparation of a tribunal case. For advice and assistance to be available under the Legal Aid Act 1988 (UK) the client must qualify under the capital and income financial eligibility tests. Under the scheme the solicitor can spend up to 2 hours of work and in some cases (certain matrimonial matters) this can be extended to 3 hours.

76 While the extension of legal aid to cover advice may be an obvious solution, it may not assist all women. Many women have talked of their feelings of discomfort when dealing with lawyers, whether that be due to the office surroundings or the lawyers’ attitudes towards them and their problems. The Commission will be considering these issues further in its work on women’s access to legal advice and representation.

QUESTIONS

- 21 Should legal aid be available for legal advice?**
- 22 If so, in what circumstances should legal aid be available?**
- 23 How else could legal advice be provided to those people of insufficient means?**

Other related legal expenses

77 Many women have spoken of the limited nature of the costs covered by legal aid. A number of issues have been raised.

“The money available for legal aid is used only to pay the lawyer’s fees. There is nothing in legal aid which allows for transport costs and childcare.” – *Transcript of hui held with Maori women in Rohe 1*

⁸⁷ Free legal advice by lawyers will be discussed further in the Commission’s forthcoming consultation paper on pro bono – free legal assistance.

Travel

78 The lack of funds to travel has been a matter of particular concern. In areas where there is no public transport women may be prevented from seeking legal advice because of the cost of travel. Many women have suggested that civil legal aid should cover these costs.

79 As well as preventing women from actually reaching a lawyer, women have said that the lack of funds for travel costs restricts their choice of lawyer. This has been a matter of particular concern for Maori women.

“Only a Maori can understand what Maori go through. We need to connect with another Maori woman, this is really important for us.” – *Transcript of hui held with Maori women in Rohe 2*

“We need [Maori lawyers] because of the cultural barriers that exist between us and the Pakeha lawyers in town. If we had more Maori lawyers it would be much easier for us women to approach them because they know of our culture. So it would be much easier for us to speak more comfortably if we had Maori lawyers [here]. Our elders find it more comfortable talking to a person who is Maori.” – *Transcript of hui held with Maori women in Rohe 7*

80 Section 21(1)(a) of the Legal Services Act 1991 provides that applications for aid must be made to the District Subcommittee for the district in which the applicant resides. The Commission understands that a District Subcommittee will normally only grant civil legal aid to cover the cost of a lawyer employed within the Subcommittee’s district. In cases where aid is granted for a lawyer outside the district it seems to be the practice of District Subcommittees to grant aid only for the lawyer’s fees and not for the lawyer’s travel into the region or for the client’s travel to the lawyer. For women who are reluctant to use lawyers in their region, for example for reasons relating to gender and/or ethnicity, this can significantly increase their costs.

81 At many of the meetings held around the country the Commission was told by women that they would prefer to use a woman lawyer. Maori women have indicated to the Commission that they would prefer to see a Maori lawyer. At one meeting of Maori women, the Commission was told that the women would prefer not to use the lawyers in their town as most are male and unable to communicate with Maori women in a manner the women can understand and relate to. Another disincentive was described as the lawyers’ lack of knowledge about Maori culture or tikanga.⁸⁸ Many Pacific Island women have also expressed a preference for seeing a lawyer of their own ethnicity, although others have indicated that, because of the nature of their problem and a fear of lack of confidentiality within their community, they would prefer to see a Palagi lawyer.

82 Simply providing legal aid money for travel would not solve all of the problems women have described. A preferable or alternative solution for women in remote communities might be the provision of alternate legal services (for example, community law centre services, free phone lines). This issue will be considered in the Commission’s paper on women’s access to legal assistance and legal representation. And to match the needs of women who seek lawyers of their own gender or ethnicity would require greater diversity within the legal profession, although further training of lawyers could also assist. This issue will be considered further in the

⁸⁸ Transcript of hui held with Maori women in Rohe 1.

Commission's work on lawyers' education and women's access to legal assistance and legal representation. *In the Interests of Justice* makes the following comment:

[Criminal legal aid] clients are likely to have experience which the [criminal legal aid] lawyers themselves have never had to confront. [Criminal legal aid] clients are, after all, likely to be poor, have limited education, and be socially and economically marginal. One cannot expect an understanding based on shared experience to naturally arise between [criminal legal aid] lawyers and their clients. That understanding is even less likely where there is a cultural gulf as well as a socio-economic gulf between the lawyer and client. . . . Medical schools have recently begun to recognise those issues, as well as issues of male doctors relating to women with health needs, and are starting to incorporate cultural education into medical practitioners' training and to encourage the development of "self skills". Lawyers could do well to do similarly.⁸⁹

Childcare

83 The difficulties of arranging and paying for childcare have been described by many women as barriers to their ability to apply for legal aid or attend lawyers' offices. Providing money for childcare through the civil legal aid scheme may not be the only solution. It may be of more assistance for there to be more publicly available childcare. This has certainly been an issue raised with the Commission in respect of the Courts. Since many lawyers' offices are clustered around the local court, the provision of childcare there may be one solution.

"Sometimes you get to court and your day was supposed to be in court and it would be delayed and then be delayed again. So you go to court. You'd take a day off work or whatever, centre your whole day around it and it's a hugely anxious period of time. You worry about it for days because it's your children that you're trying to get access to . . . You're sick for days before . . . and for days afterwards – your stomach is churning . . . I actually went to court one day and I was meant to be the first case heard and of course we'd had such a long history they'd decided to give us the whole day, but because it was a Monday morning a whole lot of other things were put in front of us. I didn't get into court until 4.30. In the meantime my two kids were being babysat and I had to keep ringing up and saying, you know, the court hasn't heard my case. I'd gone in for 10 minutes and he says 'Oh, we'll probably adjourn this'." – *Submission 65*

Communication assistance

84 Another issue raised with the Commission is the provision of funding for communication assistance for clients who are hearing impaired or from minority linguistic backgrounds. Usually this assistance is provided by way of interpreter. The Commission understands that civil legal aid would be provided for an interpreter in court proceedings and for the sessions with the lawyer prior to the proceedings. Women have generally been uncertain whether this type of assistance would be available.

85 It would seem that this assistance would not be available when legal advice is being sought. However, there would seem to be good reason for any legal advice scheme to provide

⁸⁹ *In the Interests of Justice* (Legal Services Board, Wellington, New Zealand, 1995), 149.

access to interpreters or alternatively access to legally trained people with a range of language skills.

QUESTIONS

- 24 **Should funding be provided through the civil legal aid scheme to meet expenses associated with seeking legal advice? (for example, travel, childcare, interpreters).**
- 25 **Which expenses should be covered?**
- 26 **Should travel expenses be part of the grant of aid when the applicant has good reason to choose a lawyer from outside of the district?**
- 27 **What should the criteria be?**
- 28 **What other responses might be made within the civil legal aid scheme to reimburse clients for legal related expenses?**

Client care

“[T]o an extent the benefit to the clients can depend on the amount of effort put in by the practitioner and some lawyers may be letting their clients down in that respect.” – *Submission 349 (lawyer)*

86 Both women and lawyers have queried the quality of service provided to those on civil legal aid. Sometimes the low remuneration rates are blamed. Simply raising the remuneration rates to attract better quality lawyers may not be the answer as this will undoubtedly increase the amount a client will be required to pay.⁹⁰

87 It was thought that the “loan not a grant” philosophy of the 1991 Act would encourage those who are legally aided to become actively involved in a partnership with their solicitor to ensure that true value for money is obtained in pursuing and defending claims for which the initial funding is provided through civil legal aid.⁹¹ However, the premise that all people can take an active role in ensuring that the expenditure incurred represents value for money assumes a particular type of client with the confidence and capabilities to understand all that her or his lawyer is doing. As the continuing need for consumer protection legislation indicates, this direct relationship by no means guarantees quality of service.⁹²

⁹⁰ The Legal Services Board has commissioned a study to examine issues related to remuneration which will include: the skills and experience of the lawyers providing legal aid, changes to the legal aid market in the past five years, and the price sensitivity of the legal aid market.

⁹¹ “Legal Aid in New Zealand – the future” *LawTalk* 364, 10 February 1992, 11.

⁹² The 1987 NZLS survey found that 52% of those surveyed were less than completely satisfied with their lawyer’s overall service (16). The breakdown across categories of legal service did not focus on domestic proceedings. Forty three percent of those surveyed were less than completely satisfied with their lawyer’s service on the last occasion (17). The results of the Law Society’s most recent poll are soon to be released.

“When women are bought up with the attitude that they can leave business and legal matters to men to deal with, it is difficult for many to confront these issues and demand explanations and a right for their views to be heard.” – *Submission 244*

“As a woman constantly under threat I lacked the support to be able to evaluate quality in legal representation.” - *Submission 267*

“[A]t first I felt shy or fakama. I’d gone through the affidavit and then she changed it and I would be going through again and thinking “Oh gosh, there’s another mistake” but I tended to think “Oh I don’t wanna say anything. I just wanna leave it.” That’s awful.” - *Report on Consultation with Pacific Island Women 17*

“The lawyer was too pushy. She wouldn’t listen to me. I felt scared everytime I go up to see her. I would tell myself to be strong and stand up to her but when I got into her office I just let her push me around and talk down to me.” - *Report on Consultation with Pacific Island Women 16*

88 Clients are often in a poor position to judge the quality of the service that different lawyers offer as they may only ever use a lawyer very occasionally. At present, there are no restrictions on lawyers who can undertake civil legal aid work and the District Subcommittees and the Legal Services Board are unable to use their experience and knowledge to require lawyers to meet necessary quality standards. The training opportunities provided by the New Zealand Law Society are not compulsory so quality cannot be assured through the Society either.

89 The quality of service provided by lawyers is not an issue confined to the civil legal aid system.⁹³ The Commission has heard many times in its consultations that women perceive their lawyers are treating them “as just another number”, that any concerns they may have about their cases are discounted and that they often do not understand delays in their case or are not told what is happening. The Commission has also heard from lawyers that many of the skills they feel they need in legal practice were not provided during their formal training.⁹⁴ For those who are eligible for civil legal aid, a service provided by the government to the poorest and, arguably, most vulnerable New Zealanders, it seems some guarantees of the quality of service should exist or at the very least some monitoring of the service should be provided.

90 One monitoring measure that is provided in the Legal Services Act is the advice legally aided clients receive of their rights to have their bills reviewed. On legal aid bills there is a statement advising the applicant of their right under s 82 of the Legal Services Act 1991 to have the fee revised by the District Law Society under the Law Practitioners Act 1982 or by a Registrar of the High Court. The Commission is unsure how widespread is the knowledge of this right or its meaning. However, given the comments made during the Commission’s consultations which illustrated the lack of information about lawyers’ fees generally, it would be surprising if knowledge of this right is widespread. Issues relating to the information lawyers should provide clients about their fees is contained in the consultation paper *Information About Lawyers’ Fees* (NZLC MP3, Wellington, 1996).

QUESTIONS

⁹³ The commentary to Rule 1.02 states that “a client shall receive the same standard of service whether the

- 29 How can the public be better informed about the service lawyers' provide?**
- 30 What training should lawyers' receive in client care?**
- 31 Should there be controls on who can provide civil legal aid work?**
- 32 How else could clients be advised of the right to have bills revised?**

Effect of the recovery scheme

The myth of the frolicsome divorcee living it up on the maintenance money has nothing to do with the common reality. Studies show that women and children almost always suffer financially following divorce.⁹⁵

91 An award of civil legal aid is more in the nature of a loan than a grant. Where possible, legally aided persons will make some refund at the completion of their proceedings.⁹⁶ The basis of this approach is that without legal aid an applicant could not bring a proceeding so that when the proceeding concludes it is incumbent on the recipient of legal aid to reimburse the legal aid fund.⁹⁷ It is this aspect of the scheme which has the greatest impact on women and contributes to what has been called the feminisation of poverty.⁹⁸

“While some women report that they have found legal aid to be useful to gain access to legal advice on the dissolution of a relationship, many of these women are stunned to find that legal aid is fully recoverable out of the proceeds of any joint property. This can cripple these women’s chances of gaining home ownership for themselves and their children after their marriage. Without a deposit or an income which is acceptable to the banking industry, they may never qualify for a mortgage. While in principle it appears that women may apply for an exemption to the repayment of legal aid, in practice this discretion is seldom exercised in their favour.” – *Submission 175*

92 Many women and lawyers have told the Commission that the civil legal aid charge acts as a disincentive to litigation. Unfortunately there is little statistical information available about the civil legal aid charging scheme. This will be remedied in part by a study the Legal Services Board has recently commissioned and also by the eventual introduction of a computer system to record information about civil legal aid use.

client is legally aided or not”.

⁹⁴ It is also noted in *In the Interests of Justice* that most of the criminal legal aid lawyers surveyed felt their university education in law gave them few of the practical, service oriented skills they needed (148).

⁹⁵ Chief Judge Young, “Justice is Better Than Chivalry” (1996) New Zealand Law Conference Papers, 20, 23. See also the comments in *Z v Z* (unreported Court of Appeal judgment, HC No 76/96 20 December 1996), 31-34.

⁹⁶ *LARA Decision 312/93*.

⁹⁷ This approach is reflected in *LARA Decision No 235/94* 9/11/94 and *LARA Decision No 131/95* 8/11/94.

⁹⁸ Chief Judge Young “Justice is Better Than Chivalry”, 22.

93 Lawyers have commented:

“For many women their home is their only asset and they are very scared of losing any part of that asset. It is a particular problem for women with a modest bill (ie under \$1,000) who then have to pay about \$200 extra for the charge to be registered.” – *Submission 360 (lawyer)*

“[A] lot of our civil legal aid applications are filed by clients who are involved in family court litigation. Often they are so desperate to have the work done that they’re not thinking about whether they’ll have to repay the grant later.” *Submission 351 (lawyer)*

“I have had clients who have been reluctant to commence work because of the charge – often, however, they have no choice and have to take action.” – *Submission 349 (lawyer)*

“Some women have nothing other than a low equity home and children. They can’t see they will ever be able to get ahead. He’s on the dole without kids moaning about \$10 per week and she ends up paying with a charge. Something stinks somewhere.” – *Submission 337 (lawyer)*

“[The] imposition of charges on matrimonial files by way of charge over home which can effectively erode woman’s equity [is] unfair – she frequently has no ability to clear debt from income as a man can. Charges [are] unfair and inappropriate where legal aid required to resolve custody/access and domestic protection cases.” – *Submission 318 (lawyer)*

“[The loan not a grant philosophy] had prevented women’s access to justice through the court system because few women are prepared to have a charge against their often modest home.” *Submission 8 (lawyers’ comment)*

94 At one meeting the Commission was told of the situation of a woman who had moved to a very small centre where property prices were low. She had bought a property worth \$20,000 to house herself and her children. The woman’s equity in the property was significantly eroded by the Legal Services Board charge because her ex-husband carried out his threat to “break her if she left him” and pursued litigation over the children which she had no choice but to respond to.⁹⁹ Many women have questioned why there is no exemption from the charge in family cases as there is in cases involving domestic violence. If such a change were to be made through legislative amendment (as with the Domestic Violence Act 1995), then careful consideration would need to be given to the types of cases in which the exemption could be applied, the circumstances entitling the exemption, and the amount of property to be exempted from the charge.¹⁰⁰

⁹⁹ Meeting with Rural Community Workers, June 1996. This issue will be considered by the Commission in its work on inter partes costs in the Family Court.

¹⁰⁰ Currently, when assessing eligibility for civil legal aid the applicant’s interest in the home, if less than \$41,000, may be disregarded by the District Subcommittee (Legal Services Board (Civil Legal Aid Applications) Instructions cl 3). Where another person’s resources are taken into account the Subcommittee may disregard the interest of the aided person and the other person in the home if the value of that interest is less than \$82,000. However, if the property is “recovered or preserved” in any settlement or by an order of the court it returns to the pool and is automatically subject to a charge in favour of the Legal Services Board unless an exemption is granted.

95 The New Zealand Association of Citizens Advice Bureaux has commented that:

There is concern that the new scheme is perceived as being tougher, and this deters women seeking advice. One bureau responded . . . “Everyone seems to have a friend who has been turned down or had a charge imposed on them. This image prevents women seeking advice at the best time – the start of the problem.”¹⁰¹

96 The Bureaux also commented that charges deter women from seeking adequate advice and that the charging guidelines are not well known. It seems that where the message of “loan not a grant” has got through it has occurred without an understanding of the situations when costs will be fully or partially met.

97 District Subcommittees may grant exemptions from charges on property recovered or preserved in the proceedings. In these cases the District Subcommittee must consider the values and nature of the property and all other “relevant circumstances”. Currently there is little information available about the reasons exemptions may be granted.

98 It is not clear, for example, whether the District Subcommittee considers future income prospects and future caregiving responsibilities when granting an exemption. If the District Subcommittees do not take account of the future prospects of legally aided litigants then, in light of women’s socio-economic circumstances, there is a real risk of the scheme impacting adversely on women users. It may be that guidelines for Subcommittees which refer to particular features of legally aided litigants’ lives could be of assistance. The publication of the guidelines may also provide women with information about the scheme and the likely costs for them.

99 When property subject to a charge is sold there is provision in the Legal Services Act 1991 for the District Subcommittee to transfer the charge where it would be unjust or inequitable to require immediate payment. In these cases the Commission understands that the priority of the charge in relation to other charges would be a matter for District Subcommittee discretion. It is not clear how often charges are transferred or what priority is insisted upon. However, given current bank lending practice, if the legal aid charge became a first charge on the property this would detrimentally affect the ability of the legally aided person to secure finance and could prevent purchase of the new property. The Commission is also aware of women who have not been aware that the charge on their property could be transferred.

100 In 1996, the Legal Services Board commented in its *Review of the Legal Services Act 1991* that it is too early to put forward a change in philosophy as the

charging and recoveries system is very much in its formative stages . . . Without a charging regime there is little to discourage the excessive use of lawyers and legal services and the promotion of technical defences.¹⁰²

101 Two comments can be made about this passage:

- First, the charging regime has now been altered for those seeking protection orders in recognition of the injustice of expecting those who are protecting themselves from violence to pay for that protection.
- Secondly, it is questionable whether it is only legally aided litigants who make “excessive use of lawyers” and promote “technical defences”. From the comments received by the Commission from both women and lawyers, it is clear that most identify non-legally aided parties as being more likely to exert pressure on legally aided parties by the tactical use of delays and non-compliance with Family Court orders. As well, the appropriate monitoring of grants of aid by the District Subcommittees should prevent matters from becoming excessive. There is also another aspect. From what the Commission has been told it is clear that many women have little understanding of the legal process they are involved in. This suggests that

¹⁰¹ Women and Legal Aid Speech Notes – attachment to Submission 239.

¹⁰² *A Review of the Legal Services Act 1991*, 9.

the excessive use of lawyers may not in all cases be client driven.

Women spoke of lawyers having been controlling of them as opposed to there being a partnership relationship. – *Submission 275*

“Without exception our consultees considered that others, mainly their lawyers, were controlling their access to the legal system. They considered themselves to have had very little input into decisions about their cases and believed they were persuaded on occasions by their counsel to go along with courses of action which they were not happy with and/or did not understand.” – *Report on Consultation with Pacific Island Women, 18*

“For sure I had no control over my case. Because I didn’t know the legal processes and the legalities in it. I didn’t even think to ask my lawyer because I thought he had told me everything I needed to know but he hadn’t. It was only when I started getting ugly about not knowing what was going on that my lawyer kept me up with the play.” – *Report on Consultation with Pacific Island Women 18*

QUESTIONS

- 33 Does the application of the charging regime to family law litigation need reforming?**
- 34 Should family law litigation be treated differently than other civil litigation?**
- 35 Should certain proceedings be exempted from the charge?**
- 36 What amount of property could or should be exempt from the charge?**

CONCLUSION

102 In 1969, the first civil legal aid scheme in New Zealand was introduced in recognition of the State’s responsibility to ensure justice for its citizens by providing access to the institutions it has established to enforce their rights. The 1969 scheme provided civil legal aid to citizens of “small and moderate” means to pursue their legal rights in a range of civil proceedings. In 1991, over twenty years later, a new Legal Services Act retained the financial eligibility criteria set in the 1969 Act.

103 As the statistics clearly indicate, many women fall within the existing financial criteria for civil legal aid due to their over-representation in the lower income groups. However, women are in the lower socio-economic groups for different reasons than men. As noted earlier these reasons include primary responsibility for children, over-representation in part-time work and low participation in the paid workforce. These cause particular problems for women as they seek access to civil legal aid and, as noted in the paper, prevent access for some.

104 Further, the Commission has been told by many women that their fear of incurring debt through the imposition of a statutory land charge has influenced them not to seek legal representation and proceed with their litigation.

105 Many of the women who are assisted by the civil legal aid scheme are involved in family litigation following family relationship breakdown. Family litigation differs from other types of civil litigation in a number of respects. Perhaps its most notable characteristic is the need for the court to consider the welfare of all the parties to the litigation, and in particular that of any children, as it seeks to find an equitable solution to the dispute. The most common result of the litigation following family breakdown is the fall in standard of living experienced by the primary caregiver and any dependants. The imposition of a statutory land charge on the family property after litigation is complete may in many cases contribute to that fall in standard of living.

106 Because of a lack of access to civil legal aid and a fear of subsequent debt women may forego their legal rights by entering into informal agreements or resort to representing themselves. Certainly the Commission has heard of this many times. However, either of these courses of action may have undesirable consequences which may include:

- the loss of the family home and the consequent reliance on rental housing (whether publicly or privately provided);
- inequitable agreements over other property and maintenance (if any) further decreasing women's standard of living;
- significant personal trauma (also to any children) which may have been avoided through legal aid and early legal intervention in the dispute.

WHERE TO FROM HERE?

107 Women have told the Commission that they do not pursue their legal rights because they are unable to access civil legal aid and are also deterred by concerns about lawyers' fees and subsequent charges on their family property. It seems that the civil legal aid scheme is not fulfilling its original intent.

108 The evidence the Commission has gathered during its consultation process suggests that women are experiencing a number of serious difficulties with the operation of the civil legal aid scheme. It is intended that this paper highlight those experiences and provide a basis for developing solutions which are responsive to women's legal needs. The Commission would very much like to receive your views.

This [legal aid] system is good in the respect that if you do not have the “ready” cash to be able to afford a lawyer it can provide the means at the first instance to help out. Having had to apply for legal aid in 5 instances I have found all but one of them to be most discomfoting and leaving me feeling and wondering what I have let myself in for . . .

When I left the matrimonial home in [X] I went to a Refuge in [Y] and when I first applied for legal aid [there] they were uncooperative in the issue of legal aid to myself for two reasons: the first being that I was from [another] area they thought I should apply for legal aid from that area, not [Y’s] resources. The second reason being they did not like my address as being care of Women’s Refuge, mainly because it was a post box address and not a residential address. The post office box address being for the safety, security and secretivity of the Refuge itself and they were at first not prepared to accept this.

The fee of \$50, even though a small amount in today’s world of money, is a large financial burden to bear when you are at a Refuge with nothing but the clothes you and your children are wearing. The overall impression I have got from lawyers with access to the legal aid money tin is that it is a big pile of cash and once your application has been granted it is time for them to reach in and grab as much as they can with little or no regard to having achieved anything positive for their client in the way of any client satisfaction. The ready and easy cash supply seems to rule their every move – or more often lack of any move until the amount of legal aid first issued is coming to an end.

My legal aid bill to date (July 1995) is approximately \$8,400.00 and with that I have got an unsatisfactory access programme for my children to see their father, nowhere whatsoever with matrimonial property, all this over 16 months and the legal aid committee in [Y] has twice reviewed my file and tried to put a statutory land charge on the matrimonial home . . . in which I do not reside in even, so that they could recover their fees. This is the most depressing along with the fact of every other thing not happening on any settlements. My problems were already aplenty without the legal aid committee adding to them.

Most people seem to be under the impression that legal aid is freely granted to anyone especially when you see “white collar” criminals and MPs getting it when they appear to have “extravagant” homes, boats, vehicles etc but is in fact quite a doubtful occasion I have found four times out of five. Basically legal aid is a good system for people in “dire straights” who need immediate money for a lawyer but could do without all the “doubts” about actually getting it at the time of application and the client having to think of forgoing everything if the application is in fact turned down.” – *Submission 182*

APPENDIX

The Information	Medium	Languages	Distribution Policy	Cost
Legal Services Board, “Legal Aid Guide – Information about Legal Aid and who can help at the District Court.”	booklet	English Maori Samoan Tongan	Widely distributed at time of release now in response to requests	no charge
Department for Courts, “Going Your Own Way” “Guardianship, Custody, Access”; “Family Courts” (reference to civil legal aid) “Standing up to domestic violence: a guide to Protection Orders and the Domestic Violence Act” (reference to civil legal aid)	pamphlets booklet	English Maori Cook Is Maori Samoan Tongan English Maori Samoan	Distributed to all courts, CAB and to community law centres (clc) in Auckland and Wellington Widely distributed to courts, CAB, refuges, other community groups, legal practitioners, pharmacies, kohanga reo etc	no charge no charge
Income Support, “Getting in Touch – Navigation Guide” (contact number provided.)	booklet	English	Distributed to CAB and community groups, available at ISS offices, also available on request	no charge
Christchurch Community Law Centre, “Civil Legal Aid – A guide for people wanting to apply for legal aid for cases in the Family Court, Civil cases in the High and District Courts and Tribunal hearings”	pamphlet	English	Available to clc workers and clients	no charge
Ture Amo Kura O Heretaunga Community Law Centre, “A Guide to Civil Legal Aid”	pamphlet	English	Available to clc workers and clients	no charge
Dunedin Community Law Centre, “Pregnancy: the Rights of a Pregnant Woman” (section on civil legal aid)	booklet	English	Available to clc workers and clients and on request	free to individual women, small charge for groups
New Zealand Association of Citizens Advice Bureau, “Dissolution of Marriage” (section on legal aid)	Information sheet – stapled A4 pages	English	Distributed to CAB for use by staff but may also be given to the public, distributed to schools on request.	no charge or sometimes the cost of photocopying

The Information	Medium	Languages	Distribution Policy	Cost
Legal Information Service, "Legal Resource Manual" - (chapter on Civil and Criminal Legal Aid.)	manual	English	Is a subscription service available to anyone, used by CAB, budgeting services, a few libraries, solicitors, professional bodies etc	\$200 or (for voluntary organisations) \$63, additional cost for updates.
Mel Bogard/Legal Resources Trust, "The Legal Rights of People with Intellectual Disabilities" (brief description of legal aid in chapter "Solving Problems and Protecting Legal Rights")	book	English	Distributed to IHC branches and residential homes and to community groups	\$25
Lesbians and the Law Group, "Lesbians and the Law" (page on legal aid.)	booklet	English	Complimentary copies sent to women's, gay, lesbian and bisexual groups for initial distribution; available on request.	free or \$8 + GST + postage
Women's Legal Resource Project, "Women Know Your Rights (chapter on legal aid.)	book	English	Available at clc and through clc on request, on sale in some bookshops.	free to women, price unknown

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