



**Implementing international conventions:
Allocating legal aid resources to provide services
which reflect international human rights
standards and principles**

Michele McCreadie

General Manager, Legal Aid Services

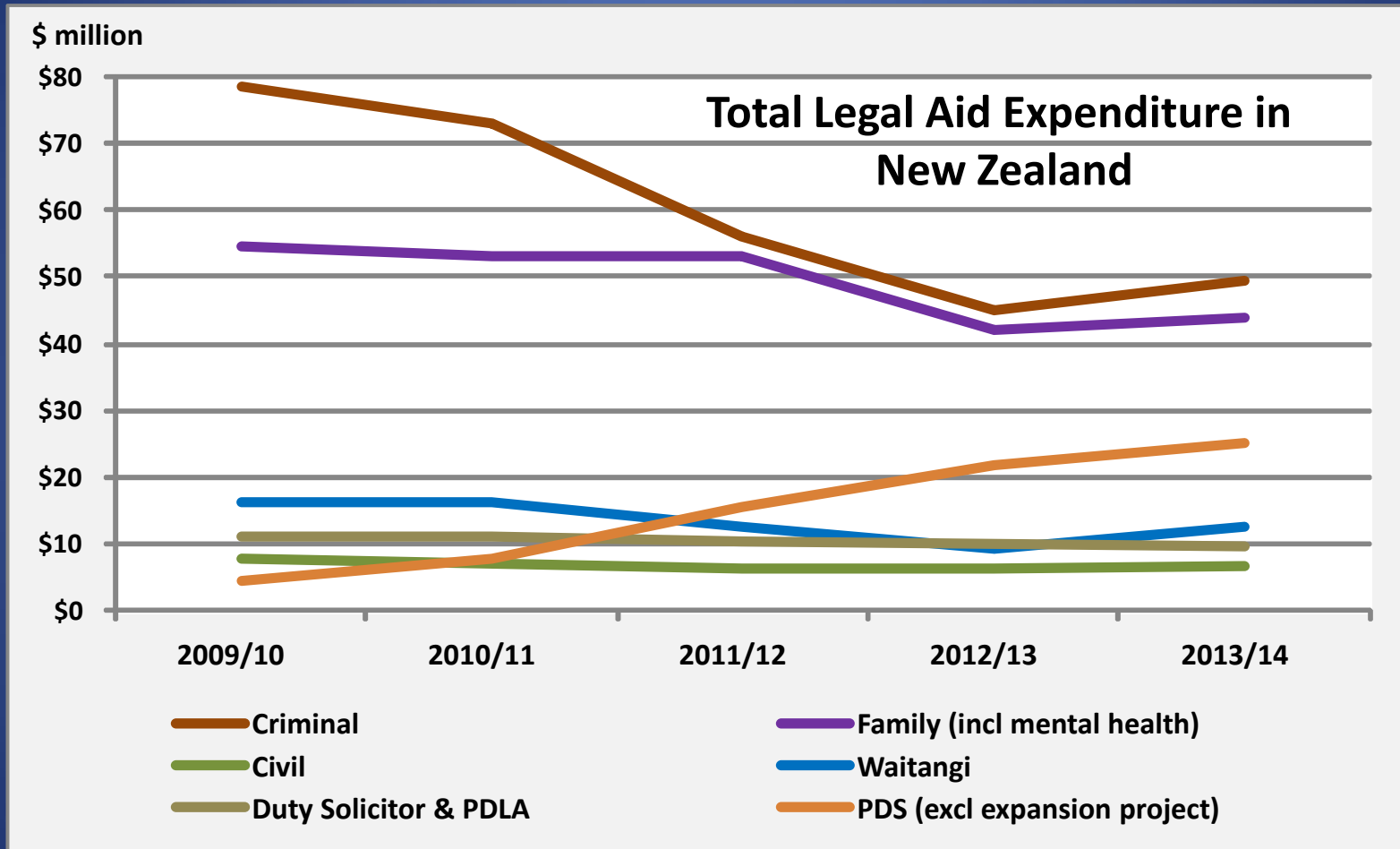
New Zealand

Overview of Legal Aid in New Zealand

- Legal Aid available in New Zealand since 1912 for criminal, 1969 for civil
- Legal Services Act 2011 is the current legislation
- Legal Services Commissioner – statutory position, independence of decision making
- Legal Aid Reform programme of change over past 4 years in response to critical review (Bazeley Report)
- New Zealand population 4.6million
- In 2013-14, 80,157 applications, 70,796 grants
 - Criminal \$61.2m, private lawyers
 - Criminal \$24.8m, Public Defence Service
 - Family \$44.8m
 - Civil \$6.1m
 - Waitangi Tribunal \$12.7m



Legal Aid Expenditure in New Zealand



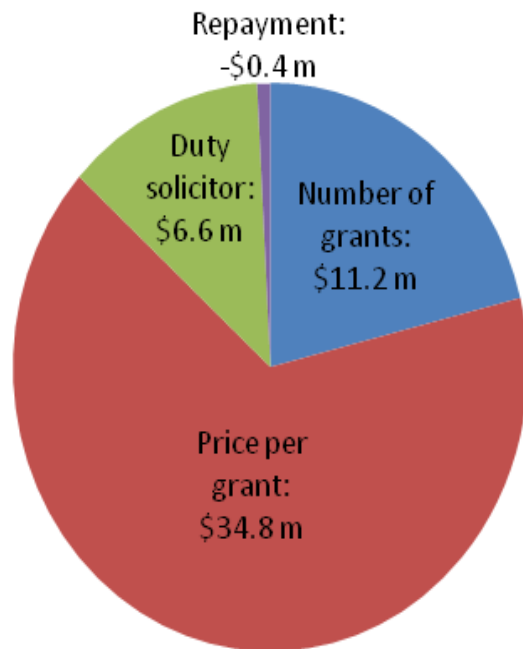
Legal Aid Expenditure in New Zealand – drivers of growth

- Legal Aid Expenditure increased by 66% between 2000 and 2010. An average of 13% per annum from 2005-6
- Expansion of eligibility – especially family cases
- Increases in legal aid lawyer payments – rates and amounts claimed
- Increase in number and length of court cases

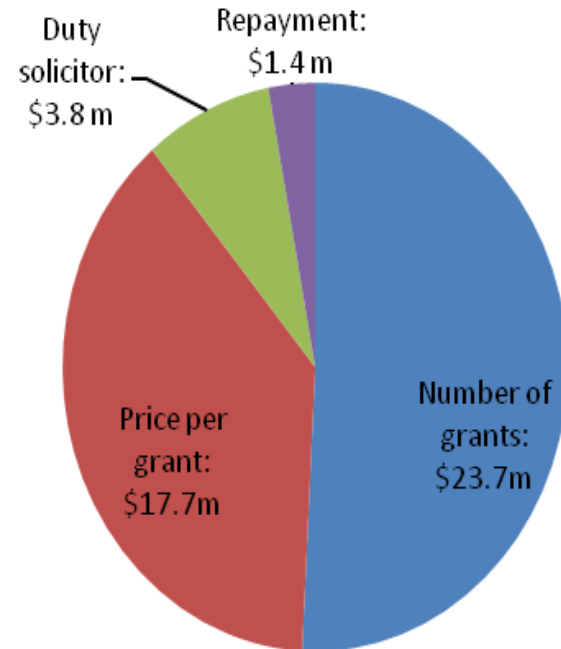


Legal Aid Expenditure in New Zealand – drivers of growth as at 2010

Growth over past decade: \$52.1m



Growth over past 3 years: \$46.7m



Legal Aid Expenditure in New Zealand

– options to control expenditure

- Three broad areas of work to control expenditure
 - New purchase approaches to restrict the cost per case (grant)
 - Eligibility changes to reduce the number of grants
 - Changes to repayment policies and user charges to improve revenue
- Many of the options required legislative change



Legal Aid Expenditure in New Zealand – control of expenditure, factors to consider

- New Zealand Bill of Rights Act 1990 affirms fundamental rights and freedoms set out in the International Covenant on Civil and Political Rights
- New Zealand Bill of Rights Act 1990 Section 24(f) provides that everyone charged with an offence *'shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance'*
- New Zealand Bill of Rights Act 1990 Section 19 if a policy disproportionately targets one demographic group it may be considered to be discriminatory
- Protection of access to justice for certain 'specified' proceedings - domestic violence, mental health, intellectual disability, care and protection, refugees and victims civil proceedings
- Any eligibility restrictions that would disadvantage people on low incomes who have few options to find legal services elsewhere – young Maori men in criminal cases and women with children in family cases
- Waitangi Tribunal proceedings – Government commitment to support the process with legal aid



Legal Aid Expenditure in New Zealand – Controlling the cost per case (grant)

New purchase approaches

- Development of a mixed model ‘public’ and private provision
- Pilot of the Public Defence Service (PDS) in 2008
- Expansion of the PDS – to highest volume criminal courts
- Expansion of the PDS– increasing the share of legally aided cases
- Removal of ‘preferred lawyer’ in lower level criminal summary cases
- 50% of criminal summary cases assigned to PDS by strict rotation system
- Aligns with Bill of Rights Act 1990 principles
- PDS currently managing 28% of criminal legal aid cases nationally
- Considered trial of public provision in family – not progressed

Legal Aid Expenditure in New Zealand – Controlling the cost per case (grant)

New approaches

- High Cost cases – 1% of cases accounted for 26% of I expenditure in 2008/09
- High Cost Criminal case management – introduced Oct 2012
- Operational policy for Waitangi Tribunal legal aid cases – introduced Oct 2012
- High Cost Family and Civil case management – new processes to be implemented late 2014
- Lawyer remuneration reviews are required to be undertaken from time to time



Legal Aid Expenditure in New Zealand – Controlling the cost per case (grant)

New approaches

- Introduction of fixed fees for service – Criminal (March 2012) Family and Civil (ACC)(July 2012)
- Revised disbursements policy (Nov 2012)
- Criminal Bar Association v Legal Services Commissioner – protracted and expensive court case \$500k in legal fees
- Lessons learned especially consultation approaches
- Currently revising fees and introducing new schedules - Employment



Legal Aid Expenditure in New Zealand – reducing the number of grants

Options to restrict eligibility - Means

- Three tests - whether the proceedings are eligible, merits of the case and means of the applicant
- Who will be affected by changes – gender and ethnicity considerations. If a policy disproportionately targets one demographic group it may be discriminatory under Section 19 Bill of Rights Act
- Removing indexation of means thresholds – remove automatic adjustments to financial eligibility
- Initially small effect but has grown over time – strongest effect in family combined with recent changes to procedure in Family
- Restricting criminal eligibility – Section 24(f) Bill of Rights Act
- Not jeopardise the operation of the criminal justice system

Legal Aid Expenditure in New Zealand – reducing the number of grants

Restricting eligible proceedings

- If a policy disproportionately targets one demographic group it may be discriminatory under Section 19 Bill of Rights Act
- Not possible for Waitangi Tribunal – would target Maori population and risk to government targets
- Focus on family – would target women 66% of family applicants, potential harm to women affected by domestic violence, equal voice for parents in care of children
- May create expenditure elsewhere in justice or social system

Legal Aid Expenditure in New Zealand – increasing revenue



- Lack of incentives to repay legal aid debt
- 25% of cases will have a repayment (debt) established
- Legal Services Amendment Act 2013
 - Re-introduction of the ‘user charge’ in Family and Civil legal aid cases
 - Application of interest to legal aid debt – cost to government of ‘lending’, capital charge rate 8% not compounding
 - Use of attachment orders – mechanism of last resort
- Discretion to ‘write off’ debt and/or interest including where would cause serious hardship
- Clear exceptions for domestic violence, mental health, intellectual disability, care and protection, refugees and victims civil proceedings

Legal Aid Expenditure in New Zealand - Management of total expenditure

- In New Zealand legal aid is demand driven
- Budget 2010 set a guideline budget for the first time
- Guideline budget adjusted to match throughput via annual forecasting exercise for next five years
- Allow time for changes to manage back within guideline budget
- Forecast and appropriation (budget) set at start of financial year – no cap
- Under spends transferred to Justice Sector Fund then returned as required



What are ways in which legal aid organisations may effectively offer services at the early stages of criminal investigations?

- **Police Detention Legal Assistance Scheme** – service designated under Legal Services Act 2011. Free to all who are arrested, detained or being questioned about an offence.
- **Duty Lawyer Service** – Free legal help to people charged with an offence who don't have a lawyer.
- **Community Law Centres** – free legal education, initial legal advice, minimal means test.
- **Section 16a, Legal Services Act 2011.** Automation of non discretionary decisions in certain criminal cases - speed up decision making on legal aid in the early stages of criminal cases
- Information provided to Police Prosecutions re legal aid assigned counsel each working day
- Bring together Defence and Prosecution as soon as possible
- Early provision of Police disclosure to the Defence



What are ways in which legal aid organisations may maximise the benefits of out of court dispute resolution services for legal aid applicants or recipients?

- Criminal Procedure Act 2013 – legal aid fee schedules structured to incentivise the behaviours required to maximise the benefits
- Legal aid fee schedules linked to case processes – incentivise behaviours required to resolve disputes at an early stage
- Funding for mediation of disputes in some civil cases eg ACC, employment (55% of employment cases settle in mediation)
- Recent Family Justice changes introduced Family Dispute Resolution – Family Legal Advice Service available to eligible people in out of court phase. Simple financial means test

What is the extent to which legal aid organisations may provide legal aid services through use of technologies? What are the limitations?

- Development of a vision for the future – Future Operating Model from the perspective of legally aided person
- Clear picture of the attributes of the future – automate the simple (non discretionary) and focus people on the complex
- Section 16a Legal Services Act - automation of certain criminal grants where discretion not required
- Move to on line applications for legal aid
- Limited by legislation, financial resources and privacy/security



Should legal aid organisations play a prominent role in death penalty issues?

- Not relevant in New Zealand
- New Zealand removed the death penalty for murder in 1961, and for treason in 1989

Should legal aid organisations play a prominent role in assisting indigenous people?

- Treaty of Waitangi signed in 1840 between most Maori chiefs and Crown (Queen Victoria)
- Treaty of Waitangi – principles include a duty of partnership, duty to act reasonably, protect Maori interests and remedy past breaches
- Waitangi Tribunal – primary forum for hearing and reporting on Maori claims against the Crown alleging breaches of the Treaty
- ‘Truth and reconciliation’ process
- Established by statute in 1975 as a standing Commission of Inquiry
- Waitangi Tribunal establishes that a breach of the principles has happened
- Settlement process follows the Tribunal process
- Aims to advance the wellbeing of the Crown- Maori relationship
- Statutory duty to inquire into every claim registered
- Legal aid is available for Waitangi Tribunal cases



Should legal aid organisations play a prominent role in assisting indigenous people?

- Applicant must be Maori, must be a member of the group making the claim
- Statement of claim must be made to the Tribunal – claim must be registered by the Tribunal
- Case law – Lands Case resulted in changes to the Legal Services Act
- Legal Services Act has a protective umbrella for Waitangi proceedings
 - No financial means test at time of application
 - If there is reason to believe that the claimant group are reasonably able to fund legal representation, then we may seek details.
 - In practice this rarely happens and never been enacted
 - Not subject to repayment
- Legal aid services in Waitangi Tribunal proceedings must be
 - directly relevant to the Treaty claim
 - necessary to progress the Treaty claim
 - consistent with what aid has been granted for and any conditions applied to that grant of aid
 - cost effective
- Waitangi Tribunal legal aid \$12m in 2013/14 – 10% of total expenditure



Any questions?