

### Submission to Legal Aid Review Committee on the Legal Aid Review

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 50 nationally organised societies and national members. It has 26 branches throughout the country attended by representatives of those societies and some 150 other societies as well as individual members. The Council's function is to serve women, the family and the community at local, national and international levels through research, study, discussion and action.

#### Introduction

NCWNZ has had policy since 1937 calling for free legal assistance in certain circumstances, and in 1968 specifically for domestic proceedings, particularly for women.

Over its many years of advocacy for the rights of women, NCWNZ has been party to numerous consultations, conferences and reports where the issue of women's access to justice has been raised.

In 1995, a delegation was sent to the Fourth World Conference on Women in Beijing, where the *Platform for Action* was launched. Amongst the twelve critical areas of concern described were specific objectives directly relevant to women's access to legal services. For example: "Ensure access to free or low-cost legal services, including legal literacy, especially designed to reach women living in poverty (Actions 58(p) and 61(a), to be taken by governments)".<sup>1</sup>

In 1999, NCWNZ participated in the research conducted by Law Commissioner Joanne Morris, from which the Report, "Women's Access to Justice" was published. NCWNZ considers the "principles and processes," identified in that report, "to be followed by policy makers and lawmakers to promote the just treatment of women by the legal system,"<sup>2</sup> are as relevant today as they were a decade ago.

These are the principles of:

- **Diversity** – diverse responses must be made to meet the diversity of needs;
- **User focus** – services must be responsive to users' needs;
- **Informed participation** – users of the justice system must be kept informed about the application of the system to their circumstances;
- **Community participation** – the laws, procedures and services of the justice system must be developed with community involvement;
- **Co-ordination** – the range of justice system services must be co-ordinated; and
- **Accountability** – justice system procedures and services must be regularly monitored, evaluated and reviewed.

---

<sup>1</sup> Morris, J., "Women's Access to Justice" Law Commission Wellington, 1999, p10.

<sup>2</sup> *ibid.* p17.

NCWNZ wishes to remind the Committee of the five major themes identified in the Report that pervaded women's accounts of the impediments they encountered in their efforts to obtain legal services suitable to their needs. They are:

- **Communication** – which refers to a range of difficulties women had experienced in obtaining sufficient information to decide whether and how to use the justice system to resolve particular problems affecting them and their families;
- **Culture** – which refers primarily to the difficulties experienced by Maori women and women from other minority ethnic groups when seeking legal services responsive to their cultural values;
- **Caregiving** – which refers to the difficulties that women caregivers had experienced in obtaining legal services appropriate to their needs;
- **Cost** – which refers to the cost of legal services and the difficulties women had experienced in obtaining services they could afford; and
- **Control** – which refers to the cumulative effect of the various difficulties women had experienced: an unduly limited ability to participate in the management and resolution of their legal problems.

In the light of these considerations, NCWNZ wishes to draw attention to Article 15 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women which specifically calls for equality for women with men before the law. Two principal areas of concern noted in the CEDAW Monitoring Committee Comments 2003 were:

*419. The Committee notes with concern that women face difficulties in accessing legal services, inter alia, because of the high fee for civil court proceedings.*

*420. The Committee urges the State party to take measures to lower the threshold for women to access legal services, inter alia, through the implementation of an adequate legal aid scheme.*

While there may be some improvement since then as a result of the expanded eligibility thresholds introduced in 2007, NCWNZ believes these issues are still very relevant.

The 2008 CEDAW Monitoring Committee reiterated its concern about *“the continued prevalence of violence against women, particularly Maori, Pacific and minority women, and the low rates of prosecution and convictions for crimes of violence against women. The Committee also expresses concern that the number of protective orders granted to women is declining”* (Para. 24).

Further to this, the Committee called upon the State party *“to ensure that all violence against women is effectively prosecuted and adequately punished. The Committee recommend[ed] that training be enhanced for the judiciary, public officials, law enforcement personnel ...in order to ensure that they can adequately respond to it....In particular, it encourages the State party to study the reasons for the decline in the issuance of protective orders and to consider putting in place additional protective measures for women such as enabling the police to issue protective orders”* (Para. 25).

More specifically in relation to legal aid, the Committee noted that while it *“welcome[d] the State party’s efforts to expand eligibility requirements for legal aid, the Committee [expressed] concern about the financial, administrative and cultural barriers women face in accessing legal aid and seeking redress in the courts and about the level of awareness among women of their rights and available remedies and services”* (Para. 40).

In relation to women's access to justice, the Committee went on to state that it *"requests the State party to analyse and remove impediments women may face in gaining access to justice. The Committee calls upon the State party to provide legal aid services to all women in need and to raise awareness about how to utilize available legal remedies against discrimination, as well as to monitor the results of such efforts. It also encourages the State party to implement gender-sensitivity training to ensure that members of the judiciary, lawyers and prosecutors are fully familiar with applicable legal provisions, sensitized to all forms of discrimination against women and trained to adequately respond to them"* Para.41).

NCWNZ firmly supports these recommendations.

## **Responses to the Questions raised in the Discussion Document**

Key issues are:

### **1. Can The Right People Access Services?**

Generally, yes, although there is significant variability from region to region. Some places do not have firms that will take on legal aid cases.

#### **1.1 What we know about unmet legal needs?**

In some areas women needing urgent protection orders or parenting orders are unable to access a lawyer prepared to do this as legal aid work. Blenheim was cited as an example of a case in point. NCWNZ understands that the situation has improved somewhat.

Members from Manukau commented that some people offering legal assistance are not qualified. The potential clients are not always aware of this fact, and are open to exploitation.

#### **1.2 Are the eligibility criteria drawn correctly?**

Generally yes, although some members felt assets in trusts etc. ought to be taken into consideration as some people have the capacity to hide their real incomes. NCWNZ understands this issue has been addressed.

It was noted by one member, a lawyer, that it is mainly men who earn over the threshold who then decide to represent themselves, and become very bitter when they see "her" getting legal aid.

However, there is strong support for women experiencing violence to have full access to free legal aid. This is supported by formal NCWNZ policy.

#### **1.3 What are some of the potential distortions in the legal aid system?**

Several members commented that in their view *all* legal aid ought to be repaid to discourage frivolous waste of legal services. The incentive ought to be to resolve the issues as quickly as possible. Repayments of \$5 a week are a disincentive to resolve.

One member expressed a view that legal aid is perhaps too readily available, inflating costs.

A noted distortion is the capacity of defendants of criminal cases to ask for their lawyer of choice, which distorts costs. The suggestion was that there should not be a preferred lawyer option for those seeking legal aid.

#### **1.4 Are there issues related to repayment of legal aid?**

In general, women's capacity to repay will be less than men's, as women earn less, but most members considered it reasonable that legal aid should be repaid as the costs are significantly less than what lawyers normally charge anyway.

### **2. Are We Providing The Right Mix Of Services?**

Members' responses were mixed on this question.

#### **2.1 Does the legal aid system enable people's needs to be viewed in a holistic way, and is there room to do this better?**

Members responded to the first part of this question negatively, giving suggestions for improvement. Some said it depended upon the quality of the lawyers, the education of the client, and the honesty of the legal aid lawyers and their assistants. The initiatives of several Justice Departments to try mediation or judge directed short hearings were supported.

#### **2.2 Can you identify any particular legal advice and information services that could work more effectively if they were joined up or co-located with other services?**

Some members stated that they believed Work and Income New Zealand (WINZ), the Families Commission, and Community Law Centres could cooperate more to give advice and explain the systems to clients. However, one member cautioned against duplication of services. There would need to be clear lines of demarcation of roles. Citizens Advice Bureaux and Community Law Centres should only be used where there are no legal aid lawyers available. At present Community Law Centres are not permitted to take on cases that can be funded by Legal Aid. Questions have been asked about why the taxpayer should fund both a Citizens Advice Bureau and a Community Law Centre in one area – in other words, there should be only one or the other.

### **3. The Quality Of Legal Aid Services Is Variable**

#### **3.1 What could be done to improve the performance of legal aid lawyers in terms of efficiency and quality?**

In general, members called for greater transparency and oversight by the Law Society and the Justice system itself. Some suggested that funding of legal aid and prosecutors should be open to public scrutiny so that people can see who is taking advantage of the system.

Some members felt that legal aid lawyers should simply be on a public service salary employed by the Ministry of Justice.

There was also a suggestion that barristers should not be allowed out on their own until they had acquired several years experience.

A call for reduced bureaucracy in the administration of legal aid was also noted.

### **3.2 Could a different approach to legal aid remuneration encourage firms and practitioners to participate in legal aid work?**

Yes. Some members suggested pro bono work should be encouraged with public recognition. Providing legal services at legal aid rates includes pro bono work. Many solicitors provide pro bono legal services to organisations; eg honorary solicitor. One approach would be to have tax deductibility for pro bono legal work.

### **3.3 Do you see advantages in making performance monitoring and quality standards an express part of the legal aid system?**

Yes, although if this meant more bureaucracy, lawyers will pull away even more.

### **3.4 Do you consider that any of the following levers may help to enhance the quality of legal aid services?**

- time limits and panels for legal aid listings
- training, supervision, peer review requirements
- performance review
- specialisation in the lawyer banding system, such as for lawyers doing appellate work

Members supported these suggestions although again with cautions about increasing bureaucracy. One member noted that specialisation in a lawyer banding system already exists.

### **3.5 What do you see as the most effective ways of improving accountability in the legal aid system?**

Some members called for greater transparency and public access to reports on legal aid work, giving recognition to effective firms, and exposing unscrupulous ones. It is important that the Legal Services Agency has appropriate auditing processes.

There was a strong call for more Judge led direction and mediation, with sufficient hours allowed to hear cases properly e.g. half a day.

## **4. Legal Aid's Effect On The Court System**

### **4.1 Do you consider that legal aid payment steps could help to improve the efficiency of court proceedings, as well as encourage the use of less costly means of progressing cases through the court system?**

Yes; if people cannot afford to pay the costs, they are likely to pull out. It was noted that more women are dependant upon legal aid than men.

Streamlining and specialisation of court procedures would also ensure that events such as the recent increase in cases involving drug offences do not cause delays in other types of cases.

### **4.2 Do you agree that the preferred lawyer policy is distorting the allocation of criminal legal aid cases?**

Yes, as noted in 1.3 above.

### **4.3 Do you have any suggestions for ways of enhancing the role of duty solicitors?**

Some members suggested duty solicitors ought to be rostered and that all court lawyers should take their turn. Improved training and professional development may also help.

One member, a lawyer, noted that the system appeared to be working well in her region, with good training and peer support available.

## **5. Does The System Manage Taxpayer Funds Effectively?**

Generally, members said "No".

### **5.1 Would there be advantages in capping the legal aid budget?**

Members supported a cap on the legal aid budget, which is currently determined by police and court efficiency in criminal matters.

### **5.2 How could any disadvantages from capping the budget be avoided or mitigated?**

Increasing the use of Judge led hearings was suggested in criminal matters. Similar crimes e.g. domestic violence, family separation, drug offences etc. could be grouped and heard in batches.

A panel of lawyers could be used to decide if appeals are warranted.

### **5.3 Can you identify any ways of reducing demand for criminal legal aid?**

Some members called for improvements in the initial scrutiny of cases with regard to financial eligibility and outcomes.

It was suggested that the limits for jury trials could be increased.

### **5.4 Do you have any comments on alternative funding models for purchasing legal aid services?**

Members noted the significant disparity between remuneration rates for legal aid lawyers and privately funded or Crown Solicitors. Some commented that "Remuneration rates [for legal aid lawyers] are a joke". Part of the distortion arises because of differences in the way time is charged; legal aid lawyers charge by the 6 minute units, while Crown Solicitors charge a minimum of half day for any job, even if it only involved a half hour.

The Manukau Defenders Office system should be explored.

The capacity of Community Law Centres could also be extended.

Increasing the use of Judge led hearings was again noted in criminal matters

It was suggested that drug and crime money and assets could be used more often to recover legal costs.

### **5.5 Can you identify any operational inefficiencies in the legal aid system?**

Members noted again the bureaucracy involved in accessing legal aid, particularly from the lawyers point of view.

The exploitation of the system where both sides are legally aided without any consideration of escalation of costs is also a concern.

### **Conclusion**

Women's access to justice is of pivotal concern to our members, and an efficient and functional legal aid system is key to ensuring women do have access to justice. NCWNZ trusts that this review will lead to improvements in the system which will ensure better outcomes for women and their families.

NCWNZ thanks the committee for the opportunity to make this submission.

Elizabeth Bang  
**NCWNZ National President**

Christina Reymer  
**Convener Justice & Law Reform Standing  
Committee**