

Reference: 20160390

13 December 2016



Thank you for your Official Information Act request, received on 9 November 2016. You requested the following:

“...copies of all papers prepared and research undertaken by Treasury, over the last 3 years in relation to:

(a) legal aid,

(b) in response to a recommendation from the Ministry of Justice that legal aid rates be increased.”

On 16 November 2016 you clarified that part (a) of this request related to criminal legal aid.

Information being released

Please find enclosed the following documents:

Item	Date	Document Description	Decision
1.	24 July 2015	Aide Memoire - Proposed changes to legal aid funding	Release in part
2.	24 July 2015	Annex 1 to the Aide Memoire - A3 on process to revise criminal legal aid fee schedule and civil legal aid eligibility	Release in part
3.	28 September 2015	Treasury Report - Briefing for Cabinet Business Committee	Release in part
4.	28 September 2015	Cabinet Business Committee Paper - Legal aid: Funding for criminal fee schedules	Release in part

The released aide memoire “Proposed changes to legal aid funding” (item 1 above) included a draft of a Cabinet paper “Legal aid: funding for criminal fee schedule”. I thought it would be more helpful to provide a copy of the final Cabinet paper rather than the draft, and this is included in the attached information (item 4 in the above table).

I have decided to release the relevant parts of the documents listed above, subject to information being withheld under one or more of the following sections of the Official Information Act, as applicable:

- personal contact details of officials, under section 9(2)(a) – to protect the privacy of natural persons, including deceased people
- advice to Ministers under section 9(2)(g)(i) – to maintain the effective conduct of public affairs through the free and frank expression of opinions
- advice to Ministers under section 9(2)(h) – to maintain legal professional privilege, and
- advice still under consideration under section 9(2)(f)(iv) – to maintain the current constitutional conventions protecting the confidentiality of advice tendered by Ministers and officials.

Some information has been deleted because it is not covered by the scope of your request.

In making my decision, I have considered the public interest considerations in section 9(1) of the Official Information Act.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This fully covers the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely

Colin Hall
Manager, Justice, Security and Government Services

TOIA 20160390

Information for release

1.	<u>Aide Memoire Proposed changes to increase legal aid funding</u>	1
2.	<u>Annex 1 to Aide Memoire Legal Aid A3s - Criminal fee schedules and civil eligibility</u>	3
3.	<u>Treasury Report Briefing for Cabinet Business Committee Monday, 28 September 2015</u>	5
4.	<u>Cabinet Business Committee Paper - Legal Aid funding for criminal fee schedules (MOJ)</u>	11

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Reference: T2015/1645

DH-42-0

Date: 24 July 2015

To: Minister of Finance (Hon Bill English)

Deadline: 29 July 2015

Aide Memoire: Proposed changes to legal aid funding

You are meeting with Hon Amy Adams, Minister of Justice, and Hon Simon Bridges, Associate Minister of Justice, at 12 noon on 29 July 2015. The meeting is about possible changes to legal aid funding.

The Associate Minister of Justice has provided an A3 and draft Cabinet paper ahead of the meeting (copies attached).

Two changes are proposed, both of which have funding implications:

- A proposed increase to civil eligibility thresholds. This would partially mitigate the impact of inflation since 2008 when thresholds were last increased, and
- A proposed increase to legal aid funding which would allow the Legal Services Commissioner ('the Commissioner') to revise criminal fee schedules, increasing the fees received by criminal legal aid lawyers.

s9(2)(f)(iv) meaning that the costs of these proposals could not be met within baselines.

Merits of the proposed changes

The proposal to increase civil eligibility thresholds is based on access to justice considerations. The proposed changes are aimed at countering the impact of inflation to maintain levels of access, rather than increasing them. Due to affordability considerations, the preferred option only partially mitigates the impact of inflation. Treasury considers that there are good arguments in favour of the proposed increase to civil eligibility thresholds, but that an increase to funding needs to be considered against other social sector priorities as part of Budget 2016.

The Treasury has some reservations about the proposal regarding criminal legal aid fee schedules. On the one hand, we understand that other fee schedules have been reviewed and increased recently, meaning there is a level of inequality in remuneration between criminal and other areas of legal aid. There are also gaps in the criminal fee

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schedules in that they do not cover (or remunerate) some steps required by the Criminal Procedure Act 2011. On the other hand, we understand there is no evidence to suggest that the current fees have affected quality of service, or that lawyers are exiting the market to a degree which would affect supply of legal services. We acknowledge there is a risk that current fees, being effectively lower than they were in the past, may have an impact in the future. However, it may be more appropriate to monitor the situation carefully, rather than take a decision on funding now to enable an increase in fees.

As context, you should also be aware that a decision not to provide funding to enable the Commissioner to revise criminal fee schedules s9(2)(h)

s9(2)(h)

s9(2)(h)

There would also be a risk of damage to the perceived credibility of the Commissioner as an authority able to act independently of government.

Timing for consideration of funding changes

The proposed funding increases would take effect from 2016/17. For the civil eligibility thresholds, it does not appear that a decision needs to be made at this point in time. We consider it would be preferable to be able to consider this proposal as part of the Budget 2016 process. This would allow consideration against competing priorities within the social sector.

The position on timing is more complicated for the criminal fees schedule issue. As part of the settlement following a 2013 Court of Appeal case, the Commissioner undertook to advise the legal profession of what changes would be made to the fee schedules by March 2015 and implement any such changes in July 2015. This cannot occur until there is certainty about whether funding will be made available or not. A decision now which can provide certainty of funding (whether or not additional funds are made available) would allow the Commissioner to fulfil this commitment to keep the legal profession informed.

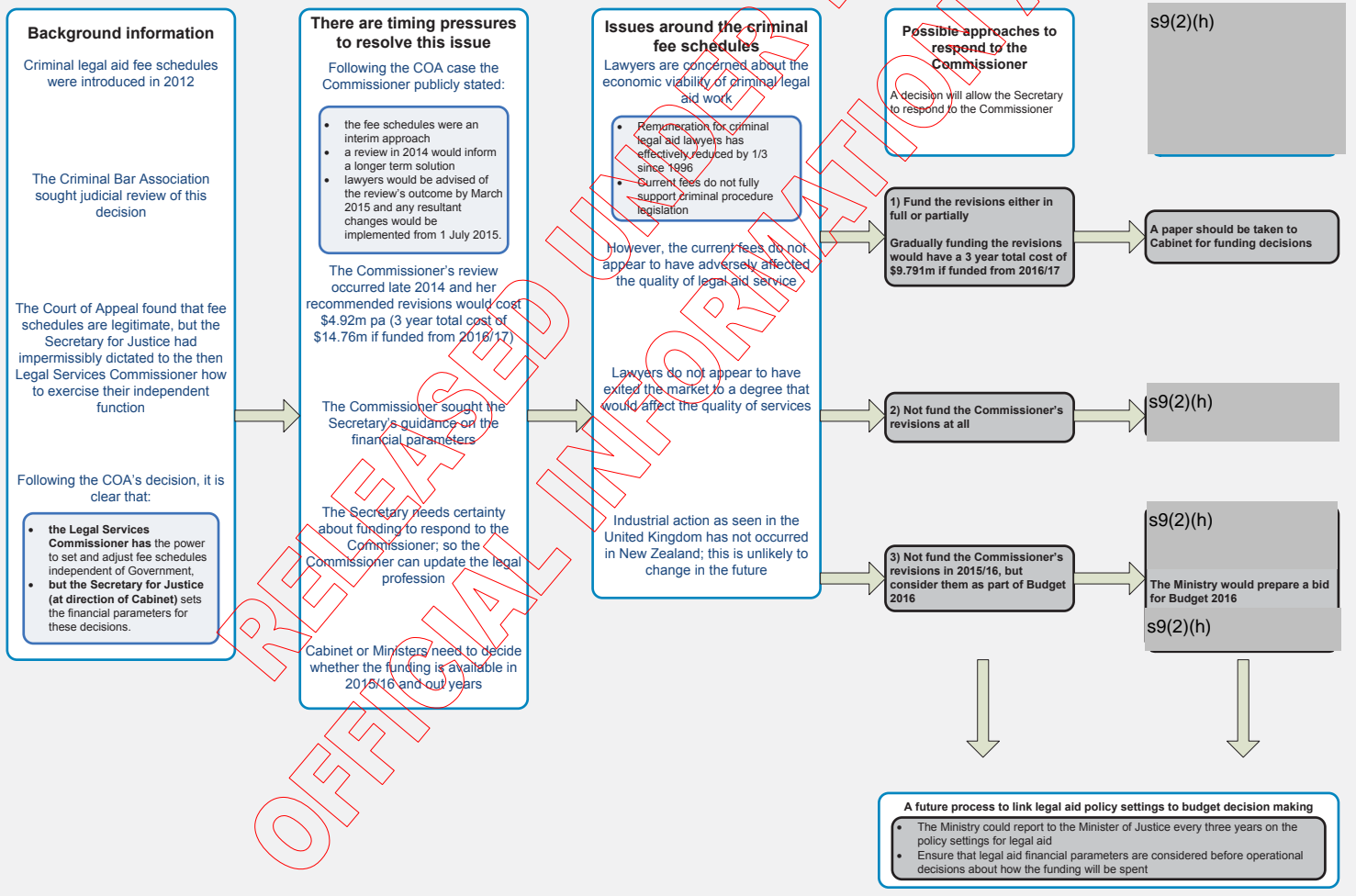
Process for reducing likelihood of out-of-cycle funding requests in the future

We understand that consideration is being given to a process which would reduce the likelihood of out-of-cycle funding requests for legal aid. The draft Cabinet paper contains a proposal for the Ministry of Justice to report to the Minister of Justice every three years on the policy settings for legal aid. This would take place after the annual legal aid forecast is prepared (usually around September), but before Budget decisions are made. We strongly support this proposal, and you may wish to emphasise the importance of improved process in discussions with your colleagues.

Gwen Rashbrooke, Senior Analyst, Justice & Security, 04 917 6239
Fiona Whiteridge, Manager, Justice & Security, 04 917 6304

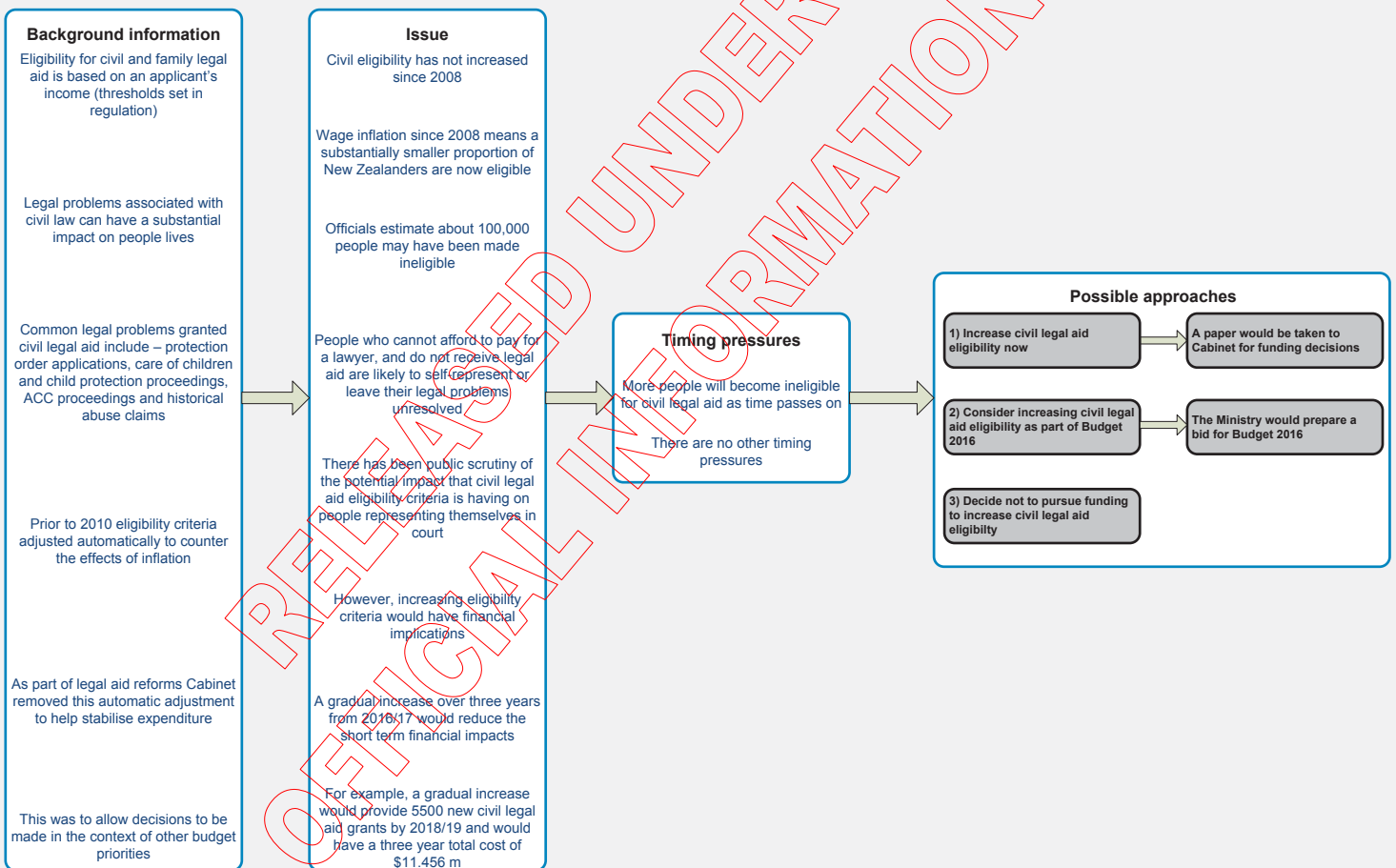
Legal Aid: The Legal Services Commissioner wishes to revise the criminal fee schedules

23 July 2015



Legal Aid: Changing civil legal aid policy settings to increase eligibility

23 July 2015



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Treasury Report: Briefing for Cabinet Business Committee -
Monday 28 September 2015

Date:	25 September 2015	Report No:	T2015/2273
		File Number:	MS-5-2-CBC

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	Read prior to CBC meeting	2:00pm, Monday 28 September 2015
Associate Minister of Finance (Hon Steven Joyce)	Read prior to CBC meeting	2:00pm, Monday 28 September 2015
Associate Minister of Finance (Hon Paula Bennett)	Read prior to CBC meeting	2:00pm, Monday 28 September 2015

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
James Haughton	Senior Analyst, Natural Resources	04 917 6146 (wk)	NA ✓
Colin Hall	Manager, Regulatory Quality	04 917 6227 (wk)	s9(2)(a)

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Enclosure: No

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Treasury Report: Briefing for Cabinet Business Committee -
Monday 28 September 2015

Executive Summary

We are currently aware of four items on the Cabinet Business Committee agenda for Monday 28 September 2015. The table below identifies any relevant fiscal impacts and provides Treasury's comments and recommendations on two of these. The two other papers which we are aware of, for which Treasury has no briefing or comment, are listed below the table for completeness.

Title	Pg	Recommend	Fiscal Implications (\$m GST excl.)					Treasury Comment
			15/16	16/17	17/18	18/19	Out years	
Legal Aid: Funding for Criminal Fee Schedules	4	Support the recommendations in this paper	<i>Operating</i>					This paper seeks Ministers' agreement to increase funding to allow the Legal Services Commissioner to revise criminal fee schedules. It also directs the Ministry of Justice to report every three years to the Minister of Justice on legal aid policy settings (to help avoid future out-of-cycle funding requests of this nature).
			-	1.624	3.247	4.920	4.920	
			<i>Capital</i>					
			-	-	-	-		

Out of scope of request

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Recommended Action

We recommend that you **read** this report prior to the Cabinet Business Committee meeting at 2:00pm on Monday 28 September 2015.

Colin Hall
Manager, Regulatory Quality

Hon Bill English
Minister of Finance

Hon Steven Joyce
Associate Minister of Finance

Hon Paula Bennett
Associate Minister of Finance

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Legal Aid: Funding for Criminal Fee Schedules

Responsible Person: Gwen Rashbrooke, Acting Manager, Justice and Security - 917 6239

First Contact Person: Gwen Rashbrooke

Purpose

1. This paper seeks Ministers' agreement to increase funding to allow the Legal Services Commissioner to revise criminal fee schedules. It also directs the Ministry of Justice to report every three years to the Minister of Justice on legal aid policy settings (to help avoid future out-of-cycle funding requests of this nature).

Comment

2. Treasury provided you with advice on the proposed changes to legal aid funding by aide memoire dated 24 July 2015 (T2015/1645 refers), prior to your meeting with Hon Amy Adams and Hon Simon Bridges on 29 July 2015. We expressed reservations about the proposal regarding criminal fee schedules, noting there were arguments both for and against the proposals. We also advised that process issues needed to be addressed to avoid future out-of-cycle funding requests of this nature.
3. You met with your Associate Finance Ministers on 10 August 2015. Following that meeting, you agreed to support a paper to Cabinet providing increased funding to allow the Legal Services Commissioner to revise criminal fee schedules. Your Minister's office also advised the offices of the Justice Ministers that the Cabinet paper must commit to aligning the process undertaken by the Legal Services Commissioner with the Budget process (to avoid future requests for out-of-cycle funding in future years). The Cabinet paper contains provisions addressing this issue.
4. Agreeing to this policy change has a fiscal cost of \$1.624 million in 2016/17, \$3.247 million in 2017/18, and \$4.920 million in 2018/19 and outyears, which will be a charge against the between-Budget operating contingency.

Treasury Recommendation

5. We recommend that you support the recommendations in this paper.

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Budget Sensitive

Office of the Associate Minister of Justice

Cabinet Business Committee

Legal aid: Funding for criminal fee schedules

Proposal

1. I seek Cabinet's agreement to increase funding to allow the Legal Services Commissioner to revise criminal fee schedules, and direct the Ministry of Justice to report every three years to the Minister of Justice on legal aid policy settings.

Executive summary

2. Legal aid promotes access to justice by providing legal services to people of insufficient means. Criminal legal aid is of vital importance, ensuring the rights of people charged with criminal offences are upheld and contributing to an efficient and effective criminal justice pipeline.
3. Reforms to ensure an effective legal aid system occurred between 2010 and 2013. These reforms focused on the need to manage taxpayer funds more effectively, and reduce the cost of legal aid to ensure its long-term availability.
4. I propose Cabinet:
 - 4.1. agree to increase funding to allow the Legal Services Commissioner to revise criminal fee schedules
 - 4.2. [Out of scope]
5. The remuneration criminal legal aid lawyers receive for each case has effectively reduced by one-third since 1996. The overall income lawyers receive from legal aid has reduced even further, as up to 33% of cases are allocated to the Public Defence Service.
6. In response to the Court of Appeal's 2013 finding that the setting of criminal fee schedules by the Secretary for Justice was unlawful, the Legal Services Commissioner undertook a review of criminal fee schedules. The Commissioner undertook to advise the legal profession of what changes would be made to the fee schedules by March 2015 and to implement these changes by July 2015. The current Commissioner has sought the Secretary's guidance on the overarching financial parameters for legal aid expenditure, to inform her independent decision to revise the fee schedules.
7. There are risks associated with deciding not to increase funding to allow the Commissioner to revise fee schedules. [9(2)(h)] [9(2)(g)(i)]

Table 1 summarises the costs of this proposal. I consider that allocating funding to enable the Commissioner to gradually revise the criminal fee schedules from 2016/17 to 2018/19 offers the best balance of minimising the cost to the taxpayer, while allowing the Commissioner to address the concerns identified above. I am seeking an increase to Vote: Justice from 2016/17 to meet these costs.

Table 1: Costs associated with criminal fee schedule proposals (\$ million)

	2015/16	2016/17	2017/18	2018/19	2019/20 and outyears
Revising criminal fee schedules	-	1.624	3.247	4.920	4.920

8. [Out of scope]

9. As the Commissioner undertook to inform the legal profession of the outcome of the review by March 2015, I am seeking increased confirmation of funding at this stage rather than as part of Budget 2016. A Cabinet decision to increase funding to enable the Commissioner to revise fee schedules from 2016/2017, taken now, would provide certainty and enable the Commissioner to communicate with the legal profession.

10. [9(2)(g)(i)]

11. I have asked officials to carry out further work looking at options to increase access to justice by revising the civil eligibility thresholds, and intend to seek funding for any increase as part of Budget 2016.

Background

Legal aid enables parties with unequal financial resources to have equal access to justice

12. The purpose of the legal aid system is to promote access to justice by providing legal services to people of insufficient means for criminal and civil proceedings. Legal aid enables parties with unequal financial resources to have equal access to justice.

13. However, access to justice must be balanced against the Government's duty to use public funds responsibly. Public expenditure principles of equity, efficiency, and effectiveness guide the nature and extent of services the legal aid system provides.

14. Historically this balance has been reflected in the respective importance, and consequential availability, of criminal and civil legal aid.

Table 2: Comparison of criminal and civil legal aid

	Criminal proceedings	Civil proceedings
Importance	Vital to meet fundamental obligations.	Desirable to address imbalances.
Rationale	Upholds the common law right to a fair trial and implements section 24(f) of the New Zealand Bill of Rights Act 1990. ¹	Helps ensure the cost of legal representation does not prevent people on low incomes from taking otherwise meritorious proceedings.
Availability	Relatively easy to obtain for offences punishable by imprisonment, especially when the charges are serious.	Relatively difficult to obtain, as more stringent eligibility criteria apply based on the applicant's income and the merits of their case.

¹ 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."

15. The Legal Services Act 2011 (the Act) sets out the arrangements which govern the legal aid system. The Act establishes a two tier structure of decision-making:
 - 15.1. the Legal Services Commissioner (the Commissioner), an independent statutory officer, is responsible for the day-to-day operation of legal aid, and
 - 15.2. the Secretary for Justice (the Secretary), at direction of Cabinet, is responsible for high level decisions about the parameters within which the Commissioner operates.
16. Decisions about granting legal aid are made independently of Government. Independent decision-making is an important feature of the legal aid system, which avoids any conflicts of interest the Government may otherwise have when funding legal aid to people who are involved in litigation with the Crown (in particular where the Crown is prosecuting a crime).
17. An effective legal aid system has effects beyond the court system, and for people other than those it ensures are represented. Legal aid is essential to the operation of the justice system. If not well designed, a legal aid system can create incentives to prolong proceedings, and may impose additional costs elsewhere in the justice system. By assisting in the effective resolution of legal issues, legal aid helps avoid the costs they can impose on society such as increasing the demand for social services.

Reforms to ensure an effective legal aid system occurred between 2010 and 2013

18. Reform of the legal aid system began in 2010, following Dame Margaret Bazley's report *Transforming the Legal Aid System* (the Bazley report). That report identified serious challenges for legal aid. System-wide operational failings, abuse of the system by unscrupulous lawyers, and the then Legal Services Agency's inability to ensure the quality of legal aid services threatened the system's viability.
19. In response to the Bazley report, the Government undertook the largest overhaul of the legal aid system in more than a decade. Administrative, operational, regulatory and legislative reforms were implemented, aimed at ensuring an effective legal aid system.
20. Major reforms included significantly expanding the Public Defence Service, implementing a quality assurance scheme for legal aid lawyers, and merging the Legal Services Agency into the Ministry of Justice.

A particular focus of this legal aid reform was the need to manage taxpayer funds effectively

21. A particular focus of this legal aid reform was the need to manage taxpayer funds more effectively. Expenditure on legal aid is demand driven; it is a direct outcome of the number of cases taken to court, and the cost of conducting those cases.

22. [Out of scope]

Cabinet agreed a sustainable and affordable baseline for legal aid was needed.

23. Budget 2010 set the core legal aid appropriation at approximately \$109 million per year.³ The policy settings, such as who is eligible for legal aid and what lawyers are paid, were adjusted to stabilise expenditure and reduce it to the level of the core appropriation.
24. Budget 2015 provided additional funding on an ongoing basis to set the core legal aid appropriation at \$117 million per year from 2016/17. [Out of scope]

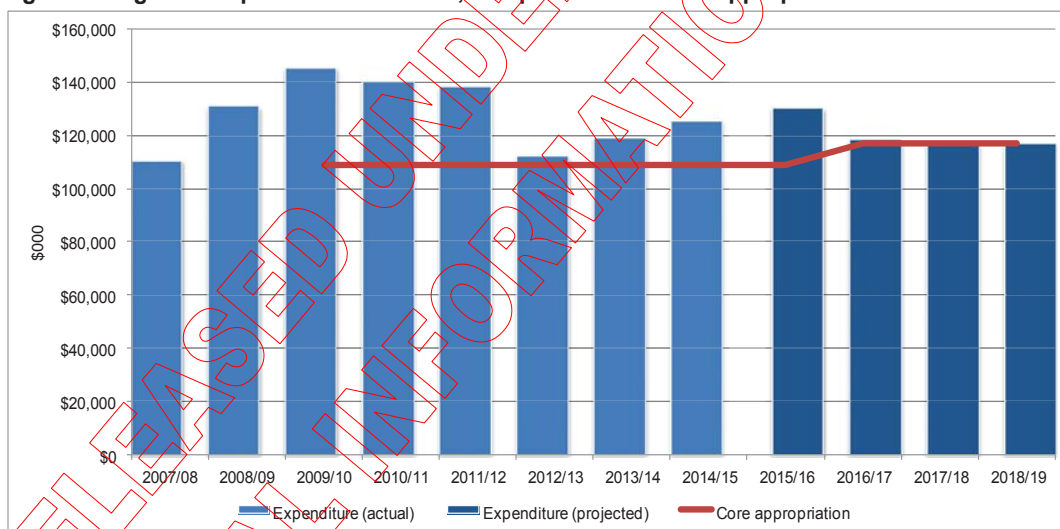
[Out of scope]

³ The legal aid appropriation only funds payments to private lawyers. The Public Defence Service is funded from a separate appropriation, as is the administration of legal aid.

[Out of scope]

- 25. Legal aid reforms between 2010 and 2013 successfully reduced overall expenditure. Figure 1 shows that from 2016/17 expenditure is projected to consistently match the appropriated funds for the first time since 2007/08.
- 26. While the long term projected expenditure on legal aid has reduced, external drivers of expenditure can cause it to fluctuate in any given year. In 2014/15 expenditure in the legal aid appropriation was \$130.359 million (exceeding the appropriation after adjustments by \$4.804 million). Two primary reasons contributed to expenditure exceeding the appropriation; two high cost criminal legal aid cases (which cost \$1.900 and \$1.330 million respectively), and a 5% increase in criminal applications.

Figure 1: Legal aid expenditure over time, compared to the core appropriation



Note: A change in accrual accounting practice depressed expenditure in 2012/13 and 2013/14

[Out of scope]

27.

28.

[Out of scope]

29.

30.

There is an intention to look at civil eligibility thresholds as part of Budget 2016

31. Civil legal aid assists people to resolve legal problems which can have a substantial impact on their lives. These problems include proceedings relating to protection orders, care and protection orders, compulsory mental health treatment, accident compensation appeals and refugee status.
32. Civil legal aid has not increased since 2008. Wage and price inflation since 2008 means a substantially smaller proportion of New Zealanders are now eligible for civil legal aid than was the case in 2008.
33. I have asked officials to carry out work looking at options to increase access to justice by revising the civil eligibility thresholds, and intend to seek funding for any increase as part of Budget 2016.

Proposal 1: Revising criminal fee schedules to increase criminal lawyer remuneration

34. Criminal legal aid is of vital importance, ensuring the rights of people charged with criminal offences are upheld and contributing to an efficient and effective criminal justice pipeline. It represents the largest area of legal aid expenditure (\$56.5 million⁴ in 2014/15). This cost excludes the cost of running the Public Defence Service (PDS) – a further \$25.450 million⁵.
35. The legal aid reforms made significant changes to how criminal legal aid is administered:
 - 35.1. expanding the PDS to operate in all major urban centres and allocating 50% of legal aid cases to the PDS in these areas
 - 35.2. replacing hourly billing with fee schedules as the primary method of paying lawyers⁶
 - 35.3. introducing high cost case management.
36. These changes substantially reduced criminal lawyers' income from legal aid. The volume of work each criminal lawyer receives was reduced by the PDS expansion combined with the Commissioner's policy of assigning cases in a rotation between lawyers. The move from hourly billing to fee schedules reduced the money lawyers receive for each case.

The Criminal Bar Association sought a judicial review of the decision to implement fee schedules

37. Criminal fee schedules were introduced by the Secretary for Justice in 2012. The Criminal Bar Association sought a judicial review of the decision to implement fee schedules.
38. The Court of Appeal found that using fee schedules to control costs is a legitimate purpose of the Act.⁷ But, in developing and implementing the schedules, the Secretary had impermissibly dictated to the then Commissioner how to exercise his independent function to fix maximum grants of legal aid.
39. Following the Court of Appeal's 2013 decision, it is clear that:
 - 39.1. the Commissioner has the power to set and adjust fee schedules as part of the independent function to set the maximum grant, but
 - 39.2. the Secretary, at the direction of Cabinet, sets the financial parameters within which the Commissioner makes her decisions.

⁴ Subject to change should there be any material adjustments required until audit sign-off 30 September 2015.

⁵ Subject to change should there be any material adjustments required until audit sign-off 30 September 2015.

⁶ Fee schedules establish fixed amounts that are paid to criminal legal aid lawyers for completing specific activities, eg, \$225 to prepare for and attend a hearing to oppose bail or name suppression.

⁷ *Criminal Bar Association Inc v Attorney-General* [2013] NZCA 176.

40. In response to the Court of Appeal decision, the previous Commissioner publicly stated that the fee schedules were an interim approach and that a review in 2014 would inform a longer term solution. This review occurred between September and December 2014.
41. During the review the Commissioner consulted with lawyers on the fee schedules. The New Zealand Law Society submission incorporated feedback of nearly 300 criminal legal aid lawyers. The Society's submission noted that lawyers expressed concern about:
- 41.1. the overall economic viability of legal aid work
 - 41.2. their inability to run their practices on the current fees, and
 - 41.3. the future and long-term viability of private lawyers working at the criminal bar.

The Commissioner sought the Secretary's guidance on the financial parameters for legal aid

42. Having completed the review, the current Commissioner has indicated she wishes to revise the fee schedules at an additional cost of \$4.92 million per year. She has advised this figure incorporates the cost of revisions as set out in the table below.

Table 3: Commissioner's intended revisions to fee schedules

Revisions	Example of activity
Filling gaps in the fee schedules for activities required to be performed	Activities required to be performed multiple times by the Criminal Procedure Act 2011 are only included once in fee schedules.
Incentivising efficient practice	Current fees create an incentive for lawyers to wait for sentencing rather than seeking sentencing indications up front.
Increase in certain rates and disbursements	Increase in payment rates for criminal appeals.
Adjustment for change in behaviour	Reduction in expenditure associated with fewer amendments to grant (which allow lawyers to receive additional payments).

43. The Commissioner has sought the Secretary's guidance on the overarching financial parameters for legal aid expenditure, to inform her independent decision.

44. [9(2)(g)(i)]

45. I propose that Cabinet consider the appropriate level of funding for the criminal fee schedules. I note that whether to increase funding, and if so by how much, is a finely balanced decision. Factors relevant to this decision include:

- 45.1. the cost to the taxpayer of any increase
- 45.2. whether the compensation criminal lawyers receive is fair
- 45.3. the need to ensure an effective legal aid system, and
- 45.4. the need to support an efficient justice sector pipeline.

Cost to the taxpayer: \$4.92 million constitutes a 9% increase in funds spent on criminal legal aid

46. The cost of legal services must be considered in the context of public expenditure principles of efficiency and cost-effectiveness.

47. The figure of \$4.92 million per year the Commissioner identified represents an increase of approximately 9% in the funds from the legal aid appropriation spent on criminal legal aid. [9(2)(g)(i)]

Equity of compensation: Criminal lawyer remuneration has reduced significantly since 1996

48. Criminal legal aid lawyers should receive fair compensation for the work they undertake.
49. The remuneration criminal legal aid lawyers receive for each case they take on has effectively reduced by one-third since 1996.⁸ The overall income lawyers receive from legal aid has reduced even further than this figure due to the proportion of cases allocated to the PDS, and the policy of assigning cases in a rotation between lawyers.

System effectiveness: Current fees do not appear to have adversely affected quality of service

50. The Government is responsible, through the Secretary, for establishing a legal aid system which delivers high-quality legal services and ensures access to justice. This is relevant where lawyer remuneration affects the availability of high-quality services.
51. Lawyers have raised concerns that they are unable to effectively run their practices on the current fees. In the UK, lawyers have responded to cuts in payment rates by taking industrial action and exiting the market. Such a response has not eventuated in New Zealand, and there is little reason to assume this will change in the future.
52. Lawyers do not appear to have exited the market to a degree which would affect the quality of legal services. Legal aid data for the last four years indicates a stable supply of approximately 900 criminal legal aid lawyers (excluding PDS lawyers). If anything there is an oversupply of criminal legal aid lawyers – particularly in the urban centres where the Public Defence Service operates.

The justice sector pipeline: Current fees do not fully support criminal procedure legislation

53. High-quality legal services act as an enabler for efficient court processes. The fee schedules should support criminal procedure legislation and incentivise efficient practices by lawyers.
54. The Commissioner's review has identified that this is not the case with the current fee schedules. For example, several activities required to be performed multiple times by the Criminal Procedure Act 2011 are only included once in fee schedules.

There are risks with not providing funding to enable the Commissioner to revise fee schedules

55. There are risks associated with deciding not to provide funding, or to only provide partial funding, to enable the Commissioner to revise criminal fee schedules.

56. [9(2)(h)]

57. [9(2)(g)(i)]

⁸ This effective reduction incorporates the 10% reduction in fees paid to lawyers which was implemented through the fee schedules, and the effects of inflation since 1996.

I propose to increase funding to enable the Commissioner to revise fee schedules

58. I propose that legal aid funding be increased to enable the Commissioner to revise fee schedules. I have considered seeking funding as part of Budget 2016, however, my preference is to seek funding now to enable the Commissioner to update the legal profession.
59. As noted above, the previous Commissioner undertook to advise the legal profession on the outcome of the review by March 2015, and to implement any revisions by July 2015. The Commissioner sought the Secretary's guidance on the overarching financial parameters for legal aid expenditure, to inform her independent decision.
60. Certainty of funding is required in order to respond to the Commissioner; so that Commissioner can update the legal profession.
- 60.1. A Cabinet decision, taken now, to increase funding to enable the Commissioner to revise fee schedules from 2016/2017 would provide certainty and enable the Commissioner to update the legal profession.
- 60.2. A decision to consider the fee schedules revisions as part of Budget 2016 will not provide the Commissioner sufficient certainty to inform the legal profession of the review's outcomes.
61. [9(2)(g)(i)]
62. I have considered several options; more detail, including costs, is included in *Appendix 1: Options to provide funding to enable revision of criminal fee schedules*. I consider that allocating funding to enable the Commissioner to gradually revise the criminal fee schedules across 2016/17 to 2018/19 offers the best balance of minimising the cost to the taxpayer, while allowing the Commissioner to address the concerns identified above.
63. [9(2)(h)] [9(2)(g)(i)]
64. I note that whatever amount of funding Cabinet chooses to provide, if any, the Commissioner would independently decide what revisions to make each year with the funds Cabinet makes available. It is therefore difficult to assess the degree to which this proposal would address the concerns outlined above prior to 2018/19.
65. The estimated cost to Government of my proposed option is shown in the financial implications section below.

[Out of scope]

66.

67.

[Out of scope]

68.

Financial implications

69. There are costs associated with funding the Commissioner's revisions to the criminal fee schedules, which cannot be met within existing baselines.

70.

[Out of scope]

71.

72. My preference is to seek ongoing funding from the centre to increase Vote: Justice from 2016/17. This best balances the associated benefits of the proposals while minimising the cost to the taxpayer.

Table 4: Estimated cost to Government from 2016/17 to 2018/19 (\$ million)

	2015/16	2016/17	2017/18	2018/19	2019/20 and outyears
Fund gradual revision of criminal fee schedules	-	1.624	3.247	4.920	4.920

Consultation

74. The Minister of Justice has been consulted and agrees with the proposals.
75. The following Departments were consulted on this paper: the Crown Law Office, Department of Corrections, New Zealand Police, and the Treasury.
76. The Department of the Prime Minister and Cabinet was informed.

Human rights

77. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

78. The proposals in this paper have no legislative implications.

Regulatory impact analysis

79. No regulatory impact analysis is required as this paper contains no legislative proposals.

Gender implications

80. The proposals in this paper have no substantive gender implications.

Publicity

81. Revising criminal fee schedules is likely to attract public comment from the criminal bar.
82. The Legal Services Commissioner is expected to make a statement on her intended revision of criminal fee schedules.

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Recommendations

83. The Associate Minister of Justice recommends that the Committee:

1. **note** that the administration of legal aid requires a careful balance between ensuring access to justice and the Government's duty to use public funds responsibly;
2. **note** that between 2010 and 2013 the Government undertook legal aid reforms aimed at ensuring an effective, sustainable legal aid system;
3. [Out of scope]
4. **note** the intention to look at options to increase civil eligibility thresholds and seek funding for any increase through Budget 2016;

Proposal 1: Revising criminal fee schedules to increase lawyer remuneration

5. **note** that in response to the Court of Appeal's 2013 finding that the Secretary's setting of criminal fee schedules was unlawful, the Commissioner undertook a review of fee schedules;
 6. **note** that having completed the review, the current Commissioner has indicated she wishes to revise the fee schedules at an additional cost of \$4.92 million per year;
 7. **note** that the Commissioner has sought the guidance of the Secretary for Justice on the overarching financial parameters for legal aid expenditure, to inform her independent decision to revise the fee schedules;
 8. **note** that a decision, taken now, to increase funding to enable the Commissioner to revise fee schedules from 2016/2017 would provide certainty and enable the Commissioner to update the legal profession;
 9. **agree** to increase funding for legal aid to increase criminal lawyer remuneration;
 10. **agree** that a gradual increase of funding from 2016/17 to 2018/19 offers the best balance of minimising the cost to the taxpayer while allowing the Commissioner to address concerns relating to the equity of compensation criminal lawyers receive, and the degree to which the fee schedules support the Justice pipeline;
 11. **note** that whatever amount of funding Cabinet chooses to provide, if any, the Commissioner would independently decide what revisions to make to fee schedules with the funds made available;
- [Out of scope]
12. [Out of scope]

[Out of scope]

13.

Financial implications

14. **note** the costs associated with these proposals cannot be met within existing baselines;
15. **approve** the following changes to appropriations to give effect to the policy decision in recommendation 8 above, with a corresponding impact on the operating balance:

Vote Justice Minister of Justice	\$ million – increase/(decrease)				
	2015/16	2016/17	2017/18	2018/19	2019/20 & Outyears
Non-departmental Output Expense: Legal Aid		1.624	3.247	4.920	4.920

16. **agree** that that the expenses incurred under recommendation 14 above be a charge against the between-Budget operating contingency, established as part of Budget 2015.

Hon Simon Bridges
Associate Minister of Justice

Appendix 1: Options to provide funding to enable revision of criminal fee schedules

1. Options 2 and 3 involve investing stable amounts of funding to enable the Commissioner to revise the criminal fee schedules:
 - 1.1. Option 1 Fund no revision: Allocate no additional funding to enable the Commissioner to revise criminal fee schedules. Compensation lawyers receive and the degree to which the fee schedules support the Justice pipeline would remain unchanged. [9(2)(h)] [9(2)(g)(i)]
 - 1.2. Option 2 Fund partial revision: Allocate approximately half the funding the Commissioner has indicated is necessary to enable her to revise criminal fee schedules. The Commissioner would independently decide what revisions to make with the funds Cabinet makes available. It is therefore difficult to assess the degree to which this would address the concerns outlined above. [9(2)(h)] [9(2)(g)(i)]
 - 1.3. Option 3 Fund full revision: Allocate the funding the Commissioner has indicated is necessary to enable her to revise criminal fee schedules. This would enable the Commissioner to make the intended revisions to the fee schedules, addressing the concerns outlined above. [9(2)(h)] [9(2)(g)(i)]
 - 1.4. Option 4 Fund gradual revision: Allocate funding to enable the Commissioner to gradually revise the criminal fee schedules gradually. The Commissioner would independently decide what revisions to make each year with the funds Cabinet makes available. It is therefore difficult to assess the degree to which this would address the concerns outlined above prior to 2018/19. [9(2)(h)] [9(2)(g)(i)]
2. Option 4 is more technically complex, likely requiring system changes to implement. However it would minimise the cost to the taxpayer while enabling the Commissioner to revise the criminal fee schedules from 2016/17 to 2018/19.
3. The estimated cost to Government of each option is shown in Table 7 below.

Table 7: Cost to Government from 2016/17 to 2018/19

	2015/16	2016/17	2017/18	2018/19 and outyears
Option 1: Fund no revision	-	-	-	-
Option 2: Fund partial revision	-	2.500	2.500	2.500
Option 3: Fund full revision	-	4.920	4.920	4.920
Option 4: Fund gradual revision	-	1.624	3.247	4.920