



## Part 4 – Eligibility for civil and family legal aid

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# Eligibility for civil and family legal aid

## Introduction

There are four key decisions for establishing eligibility for civil and family legal aid:

- Is there an eligible proceeding?
- Is this person an eligible applicant?
- Is the applicant financially eligible?
- Does the application have sufficient merit?

The criteria for each key decision derive from the Legal Services Act 2000 and Agency policy. The criteria guide the Grants Officer through the decision-making process on eligibility for legal aid.

## Determine whether the matter is an eligible proceeding

### When this procedure is used

This procedure is used by the Grants Officer to determine whether the matter or proceeding is one for which aid may be granted.

### Legislation

The key sections of the Legal Services Act 2000, as amended by the Legal Services Amendment Act 2006 are:

- s4: Interpretation: civil proceedings, criminal proceedings, legal services (amended by the Legal Services Amendment Act 2006)
- s7: Proceedings for which legal aid may be granted: civil matters (amended by the Legal Services Amendment Act 2006).
- s9(4)(c): Proceedings might reasonably be brought in a jurisdiction other than New Zealand (amended by the Legal Services Amendment Act 2006)

### Summary of steps

To establish whether there is an eligible proceeding the following assessments are made:

- whether the matter has already been disposed of or not by a court, tribunal or by any other means
- is it always an eligible proceeding under s 7(1)(a) to (d) or (f) to (o)?
- is it a proceeding which may be eligible if it meets requirements of s 7(1)(e)?
- is it a proceeding to do with the status of marriage which may be eligible if it meets the requirements of s 7(3)?
- is it a proceeding for which legal aid is not available?
- is it a proceeding which might reasonably be heard in an overseas jurisdiction?
- there is no proceeding but there is a legal dispute requiring a lawyer to provide a legal service and which would meet one of the above criteria if it were to go to a court or other forum

## Determine whether the matter has been disposed of

### Legislation

The key sections of the Legal Services Act 2000, as amended by s 8 of the Legal Services Amendment Act 2006, are:

- Section 12(1)(c) requires that an application for legal aid *must, subject to subsection 2, be made before the final disposition*
- Subsection 12(2) allows the Agency to exercise discretion to accept an application after the matter has been disposed of, but only under certain conditions.

### Policy

The day that the Agency receives an application is the date that the application is made.

The day that a matter is finally disposed of is the date on which it is concluded or finished in some way by a court or other forum.

## Determining whether to accept an application after a matter has been disposed of

### Summary

After the Grants Officer has established the date on which the matter was finally disposed of, they will determine:

- when the legal aid application was made
- whether the application was received within 15 working days of the date of the final disposition
- what circumstances caused the delay
- were reasonable steps taken to apply before the final disposition?



Step 1. The Grants Officer determines when the legal aid application was made

| If...  | then....  |
|--|---|
| the application was received at any time on the same day as the matter was finally disposed of   | the application has been received before the proceedings were disposed of.<br>Go to step 5 (eligible proceeding). |
| the application was received after close of business at the Legal Aid Office (eg: faxed or hand delivered) on the same day (any time up to midnight) | the application has been received before the proceedings were disposed of.<br>Go to step 5 (eligible proceeding). |
| the application is for an appeal   | this is a new application and the restrictions of s 12 do not apply.<br>Go to step 5 (eligible proceeding)        |
| the application was received after the day on which the matter was disposed of,  | the Grants Officer will determine whether the application was received within 15 working days.<br>Go to step 2.   |

Step 2. The Grants Officer determines whether the application was received within 15 working days.


| If....   | then...   |
|--|---|
| the application was received between: <ul style="list-style-type: none"> <li>• the first working day being the day after the date of final disposition and</li> <li>• the final day being by the end of the 15<sup>th</sup> day</li> </ul> | the requirement to submit the application within 15 working days of the date of final disposition has been met.<br>Go to step 3.  |
| the application was received after the 15 day time limit,  | the Grants Officer must reject the application under s 12 (2), as amended by the Legal Services Amendment Act 2006.<br><br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br><br>End of process. |

Step 3. The Grants Officer determines what circumstances caused the delay.

| If...  | then....  |
|--|---|
| the Grants Officer is satisfied that the application was delayed because of circumstances beyond the control of the applicant and listed provider<br><br> Examples of circumstances beyond the control of the provider include: <ul style="list-style-type: none"> <li>▪ the matter is unexpectedly finalised by the court</li> <li>▪ the provider was unexpectedly indisposed or injured and was a sole practitioner.</li> </ul><br> Examples of circumstances beyond the control of the applicant include: <ul style="list-style-type: none"> <li>▪ another person withheld or delayed providing information needed for the application</li> <li>▪ the applicant has been unable to fully complete the legal aid application because of unexpected illness or injury.</li> </ul> | the application has met the 'circumstances beyond control' test.<br><br>Go to step 4. |
| the provider:  | the application has failed the  |

| If...   | then....   |
|---|--|
| <ul style="list-style-type: none"> <li>▪ forgot,</li> <li>▪ gave other work priority,</li> <li>▪ was otherwise too busy,</li> <li>▪ was on holiday, or</li> <li>▪ was indisposed and his/her work was not allocated to another member of the law firm.</li> </ul> | <p>'circumstances beyond control' test.</p> <p>The Grants Officer must refuse aid under s 12 (2), as amended by the Legal Services Amendment Act 2006.</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process.</p> |

Step 4. The Grants Officer determines whether reasonable steps were taken to submit the application on time.

| If...   | then....  |
|---|---|
| <p>the Grants Officer is satisfied that the applicant and provider took reasonable steps to apply before final disposition,</p> <p> For example, the provider attempted to email or fax an application to the Legal Aid office on the day of being notified that the matter was to be finalised.</p> | <p>the Grants Officer can accept the application and continue processing.</p> <p>Go to step 5 (eligible proceeding)</p>   |
| <p>the provider took no additional steps to contact the Agency</p>  | <p>the application has failed the 'reasonable steps' test.</p> <p>The Grants Officer must refuse aid under s 12 (2), as amended by the Legal Services Amendment Act 2006.</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process.</p> |

## Proceeding that are always eligible



Section 7 of the Legal Services Act 2000 lists the proceedings for which legal aid is always available

Step 5. The Grants Officer determines whether the type of proceeding is always eligible.

| If the proceeding is...   | then....   |
|---|--|
| to be heard before: <ul style="list-style-type: none"> <li>• a District Court</li> <li>• a Family Court</li> <li>• the High Court</li> <li>• the Court of Appeal</li> <li>• the Supreme Court</li> </ul>  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| an appeal to the Judicial Committee of the Privy Council in civil proceedings, if the grant of aid is approved by the Attorney-General or the Minister  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| begun by an application in a <b>Youth Court</b> under Part 7 of the Children, Young Persons, and Their Families Act 1989, (child or young person in care of the chief executive of a social or cultural service agency) or for the review of a determination or order made by a Youth Court in proceedings of that type | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| a claim to be heard by the Waitangi Tribunal  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| before the Social Security Appeal Authority<br>before the Tenancy Tribunal<br>before a body established under section 63(1)(a)(i) of the Housing Restructuring Act 1992 to hear appeals under section 62 of that Act  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| before the Refugee Status Appeals Authority in respect of any claim for refugee status made before 1 April 1999 or any other matter relating to refugee status that arose before that date<br>involves the processing under Part 6A of the Immigration Act 1987 of any claim for  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |

| If the proceeding is...  | then....   |
|--|--|
| refugee status first made on or after 1 April 1999, including any appeal relating to such a claim, and the processing of any other matter under s 129L or 129R of that Act that first arose on after that date<br>any judicial review of decisions or proceedings referred to in the previous two points<br>an application under s 114I of the Immigration Act 1987 for a review, by the Inspector-General of Intelligence and Security, of a decision of the Director of Security to make a security risk certificate |  |
| an application, submission or appeal under the Resource Management Act 1991 or to the Environment Court<br>an application, submission, or appeal to any Council or body where an appeal in relation to its decision lies to the Environment Court  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| before an adjudicator under the Weathertight Homes Resolution Services Act 2002  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| before a tribunal in relation to one or more victims' claims under Part 2, Subpart 2 of the Prisoners and Victims Claims' Act 2005.  | it is always an eligible proceeding, subject to an assessment of the merits of the particular case. Go to step 19 (is the person an eligible applicant). |
| not heard in the above forums,   | Go to step 6 (eligible proceeding under s7(1)(e))  |

### Proceedings which may be eligible under s7(1)(e)



A decision about an eligible proceeding under s 7(1)(e) requires the exercise of discretion and has three steps, namely, establishing that:

- it is an eligible forum (as listed in that section), and
- it is a case that 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.

Step 6. The Grants Officer determines whether the proceedings will be heard in an eligible forum under s 7(1)(e).

| If the proceeding is...   | then....   |
|---|--|
| <p>to be heard in:</p> <ul style="list-style-type: none"> <li>• the Maori Land Court</li> <li>• the Maori Appellate Court</li> <li>• the Employment Court</li> <li>• the Employment Relations Authority, or</li> <li>• the following administrative tribunals or judicial authorities               <ul style="list-style-type: none"> <li>– Coroner’s Court</li> <li>– Mental Health Review Tribunal</li> <li>– Legal Aid Review Panel.</li> </ul> </li> </ul> | <p>the forum is eligible under s 7 (1)(e).<br/>Go to step 7 (requires legal representation).</p>   |
| <p>an appeal from a decision of:</p> <ul style="list-style-type: none"> <li>• the Waitangi Tribunal</li> <li>• the Social Security Appeal Authority</li> <li>• the Tenancy Tribunal</li> <li>• a body established under s 63(1)(a)(i) of the Housing Restructuring Act 1992 for appeals under s 62 of that Act, or</li> <li>• the Refugees Status Appeals Authority</li> </ul>  | <p>legal aid is <b>not</b> available, as s 7(1)(e)(v) does not allow the granting of aid for appeals from these tribunals and authorities.<br/>The Grants Officer may stop processing and refuse aid under s 7(1)(e)(v).<br/>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br/>End of process</p>                |
| <p>to be heard in:</p> <ul style="list-style-type: none"> <li>• United Nations Human Rights Committee</li> <li>• Arbitration proceedings</li> <li>• CYFS planning meetings</li> <li>• Disputes Tribunal</li> <li>• District Law Society costs Revision Committees</li> <li>• Medical Council</li> <li>• Police Complaints Authority</li> <li>• Psychologists Complaints Committee.</li> </ul>   | <p>legal aid is <b>not</b> available, as these forums are not regarded as administrative tribunals or judicial authorities for the purposes of legal aid.<br/>The Grants Officer may stop processing and refuse aid under s 7(1)(e)(v).<br/>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br/>End of process</p> |

| If the proceeding is...  | then....  |
|--|---|
| <p>to be heard by the Parole Board or a court and involves:</p> <ul style="list-style-type: none"> <li>▪ Conditions on release at statutory release date (ss 17–19 Parole Board Act 2002)</li> <li>▪ Parole (ss 20-26, 28-32 Parole Act 2002)</li> <li>▪ Residential Restrictions (ss 33-40 Parole Act 2002)</li> <li>▪ Compassionate release (s 41 Parole Act 2002)</li> <li>▪ Review of decision on type of hearing (s 46 Parole Act 2002)</li> <li>▪ Variation or discharge of conditions (ss 56-58 Parole Act 2002)</li> <li>▪ Review of certain decisions (ss 67, 107S Parole Act 2002)</li> <li>▪ Review of pre-sentence detention record (s 92(2) Parole Act 2002)</li> <li>▪ Appeal from review of pre-sentence detention record (s 92(4) Parole Act 2002)</li> <li>▪ Variation or discharge of non-association order (s 100(3) Parole Act 2002)</li> <li>▪ Conditions on release at final release date (s 104 Parole Act 2002)</li> <li>▪ Special conditions on extended supervision order (s 107K Parole Act 2002)</li> </ul> <p>Variation or discharge of conditions on extended supervision order (s 107O Parole Act 2002)</p> | <p>the forum is eligible under s7(1)(e)(v).<br/>Go to Appendix 2 – civil proceedings, <i>Legal aid for parole proceedings</i></p> |
| <p>to be heard in a forum not listed above</p>   | <p>the Grants Officer will request a recommendation from a specialist adviser.</p>  |

Step 7. The Grants Officer determines whether the proceedings require legal representation

| If...  | then....   |
|--|--|
| <p>the nature of the proceedings require:</p> <ul style="list-style-type: none"> <li>• legal representation and argument, or</li> <li>• a specific process to be followed at the hearing;</li> </ul> | <p>the 'legal representation' test will have been met.<br/>Go to step 8 (substantial hardship)</p> |

| If...  | then....  |
|--|---|
| and<br>the applicant is personally involved in the matters that are the focus of the proceedings, (ie. they may have but do not necessarily need to have a legal interest)<br>and<br>a successful resolution of these matters for the applicant would have a real impact on them |   |
| one or more of the above criteria are not met  | the Grants Officer may refuse aid under s 7(1)(e)(v).<br><br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br><br>End of process. |

### Substantial hardship - guidance

Substantial hardship is something more than hardship. Hardship:

- refers to the presence of factors which by themselves or together will cause suffering or create a situation that is difficult for the applicant to endure, and
- which will be partially or fully mitigated by a grant of aid to undertake legal proceedings
- requires an assessment of all the circumstances contributing to the applicant’s current situation. This includes personal factors such as medical conditions, disability, and social considerations such as family arrangements and employment. hardship would usually:
  - put the applicant under considerable strain, and
  - have a long-term impact on the applicant
  - be caused directly by not granting legal aid.

The Grants Officer will:

- identify the consequences for the applicant if aid were not granted, and
- be reasonably certain that the consequences would be a major setback for the applicant. This could include their inability to continue to work or maintain important aspects of their life.

Step 8. The Grants Officer determines whether the applicant would suffer substantial hardship if legal aid were not granted for the proceedings.

| If... | then.... |
|-------|----------|
|       |          |

| If...  | then....   |
|--|--|
| <p>the applicant is unable to pay other specific and necessary expenses, costs and debts if they have to pay for their own legal representation; and a refusal of aid would:</p> <ul style="list-style-type: none"> <li>• put the applicant under considerable strain and</li> <li>• have a long term impact and</li> <li>• would result in lack of access to legal advice and representation; and</li> <li>• this lack of access would adversely affect the outcome of any proceedings for the applicant</li> </ul> | <p>the applicant may suffer substantial hardship if aid is not granted.<br/>Go to step 19 (person an eligible applicant)</p> |
| <p>one or more of the above criteria are not met</p>   | <p>legal aid is not available under s 7(1)(e)(v).<br/>Go to step 9 (eligible under s 7(3))</p>                               |

### Proceedings which may be eligible under s7(3)



Section 7(3) requires the Grants Officer to exercise discretion. Legal aid is not available for proceedings under Part 4 of the Family Proceedings Act 1980 (relating to status of marriage) unless the Grants Officer is satisfied that:

- the unusual complexity of the case requires that the applicant be legally represented, or
- the applicant would suffer substantial hardship if aid were not granted.



Note: s 7(4)(e) of the Act states that legal aid is not available for proceedings under s 37 of the Family Proceedings Act 1980. Section 37 is in Part 4 of that Act. Section 7(4)(e) of the takes precedence over section 7(3) so aid may not be granted under any circumstances for proceedings under s 37 of the Family Proceedings Act 1980.

The Grants Officer may grant legal aid for other matters under Part 4 provided that they meet the 'unusual complexity' and 'substantial hardship' tests.

Step 9. The Grants Officer determines whether the proceedings are unusually complex.

| If...   | then....  |
|---|---|
| <p>the case involves any of the following factors:</p> <ul style="list-style-type: none"> <li>• non-Agency specialist reports</li> <li>• referral to Agency specialist advisers</li> <li>• a large amount of research is</li> </ul> | <p>this may indicate that the case is unusually complex.<br/>Go to step 10 (substantial hardship)</p> |

| If...  | then....   |
|--|--|
| <p>required</p> <ul style="list-style-type: none"> <li>• a number of different proceedings</li> <li>• a consideration of the application of overseas law</li> <li>• issues of law that are novel or different.</li> </ul>  |  |
| <p>if the applicant has difficulties , for example:</p> <ul style="list-style-type: none"> <li>• English is not their first language or because</li> <li>• they lack knowledge of the New Zealand legal system.</li> </ul> | <p>the case is not unusually complex on these grounds alone. The Grants Officer may stop processing and refuse aid under s 7(3).</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process.</p> |
| <p>the Grants Officer is unsure about this test</p>  | <p>the Grants Officer is may request a recommendation from a specialist adviser.</p>   |


Step 10. The Grants Officer determines whether the applicant would suffer substantial hardship if legal aid were not granted for the proceedings – see step 8 above.

### Proceedings for which legal aid is not available



Section 7(4)(a-g) lists the proceedings for which legal aid is not available.

Step 11. The Grants Officer determines if the proceeding is one for which legal aid is not available.

| If...  | then....  |
|--|---|
| <p>the proceedings involve:</p> <ul style="list-style-type: none"> <li>▪ realtor actions, in which the Attorney-General is a party, to: <ul style="list-style-type: none"> <li>– restrain an interference with a public right</li> <li>– compel the performance of a public duty</li> <li>– stop a public nuisance.</li> </ul> </li> <li>▪ election petitions under the Electoral Act 1993 (and incidental proceedings)</li> <li>▪ petitions for inquiry under the Local Electoral Act 2001 (and incidental</li> </ul> | <p>legal aid is not available.</p> <p> Before making the decision to refuse aid, the Grants Officer may check with the provider about</p> <ul style="list-style-type: none"> <li>▪ the section of the relevant Act</li> <li>▪ the section of the Legal Services Act under which the proceedings will be filed.</li> </ul> <p>The Grants Officer <b>must</b> refuse aid under the relevant subsection of s 7(4)(a-g).</p> <p>The Grants Officer advises the</p> |

| If...  | then....  |
|--|---|
| proceedings) <ul style="list-style-type: none"> <li>▪ proceedings under section 37 of the Family Proceedings Act 1980 (relating to dissolution of marriage) or appeals under that section</li> <li>▪ appeals to the Residence Review Board under section 18C of the Immigration Act 1987</li> <li>▪ appeals to the Removal Review Authority under Part 2 of the Immigration Act 1987</li> <li>▪ proceedings before a Commission of Inquiry under the Commission of Inquiry Act 1908, except one established or appointed under another Act but deemed to be one under the Commissions of Inquiry Act.</li> </ul> | applicant and provider of their decision and the reasons for it.<br>End of process. |
| the Grants Officer is unsure   | the Grants Officer may request a recommendation from a specialist adviser.          |

### Proceedings that might reasonably be brought in an overseas jurisdiction



Section 9(4)(c) allows the Agency to refuse aid if the applicant is not in New Zealand and they believe that the proceedings might reasonably be brought in a jurisdiction other than New Zealand.

Step 12. The Grants Officer determines whether the proceeding could be reasonably brought in an overseas jurisdiction.

| If...  | then....   |
|--|--|
| the applicant is overseas and the Grants Officer is unsure whether it is reasonable to require the applicant to bring proceedings in an overseas jurisdiction  | the Grants Officer may request a recommendation from a specialist adviser.<br><br>See also the section in this manual on <i>Eligible Person</i> in relation to an application from a person not resident in New Zealand.<br><br>Go to step 19. |
| <ul style="list-style-type: none"> <li>▪ the applicant's lawyer is approved as a lead provider in New Zealand and</li> <li>▪ the proceedings cannot be reasonably brought in the overseas</li> </ul> | legal aid is available to an applicant residing outside New Zealand. However, the proceedings must be heard in the New Zealand court system.<br><br>Go to step 19.   |

| If...   | then.... |
|---|----------|
| jurisdiction and <ul style="list-style-type: none"> <li>▪ all other eligibility criteria are met, giving particular attention to:               <ul style="list-style-type: none"> <li>– the cost of proceedings in relation to the applicant’s interest in them</li> <li>– financial eligibility (overseas assets valued in New Zealand currency)</li> </ul> </li> </ul> |          |



See also steps 23 and 24 (the applicant is not resident in New Zealand or the matter involves certain immigration decisions).

### If there is no proceeding but there is a legal dispute

Step 13. The Grants Officer determines if there is no proceeding but there is a legal dispute.

| If...  | then....  |
|--|---|
| proceedings have been filed, drafted or contemplated,  | this is sufficient to satisfy the requirement that there is a legal dispute for which legal aid may be available.<br><br>Go to step 19 (eligible applicant) |
| no proceedings have been filed, drafted or contemplated, but a lawyer is required to provide a legal service | legal aid may be available<br><br>Go to step 14 ‘Proceedings not filed, drafted or contemplated).   |

### Guidance – if proceedings have not been filed, drafted or contemplated

Where an application for legal aid does not include a copy of proceedings or draft proceedings, there are two stages to determining whether the application is one for which aid may be granted.

- The first is to establish whether the application for aid falls within the eligible proceedings set out in section 7.
- The second is to determine whether the application is eligible for legal aid in terms of the financial and “merits” tests set out in section 9.

The test used to determine whether a dispute between parties is one that falls within the list of eligible proceedings is:

*Whether, if a consensual resolution of the dispute were not achieved, and if the claimant were to pursue the legal remedies available for resolution, there is a **real likelihood that the forum for resolution would be one of the prescribed forms of proceeding***

This test consists of three stages:

- (i) The applicant must show that there is a matter in dispute; and

- (ii) That the dispute can be resolved using legal services as defined in section 4 of the Act; and
- (iii) That, if the dispute can't be resolved by alternative approaches such as mediation, there is a "real likelihood" that the matter would be resolved in one of the "forums for resolution" as defined in section 7.

Step 14. The Grants Officer determines whether there is a matter in dispute.


| If...  | then....  |
|--|---|
| the applicant can provide documentary evidence such as: <ul style="list-style-type: none"> <li>• relevant correspondence</li> <li>• records of any previous attempt to resolve the issue,</li> </ul> | the applicant has demonstrated that there is a matter in dispute.<br>Go to step 15  |
| no documentary evidence is available, for example, where the matter involves a new dispute,  | a written explanation of the matter(s) in dispute is required.  |
| a satisfactory written explanation of the matter(s) in dispute is provided   | the applicant has demonstrated that there is a matter in dispute.<br>Go to step 15  |
| evidence or explanation are not provided, or,  | request evidence or explanation be provided.  |
| if the evidence or explanation are unsatisfactory  | the applicant has not demonstrated that there is a matter in dispute.<br>The Grants Officer may stop processing and refuse aid on the grounds that there is no real likelihood that the matter would be resolved in one of the forums for resolution as defined in section 7.<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process. |

Step 15. The Grants Officer determines whether the work being proposed by the provider is a legal service under s 4 of the Act.

| If...   | then....  |
|---|---|
| the proposed work involves legal advice and representation including assistance: <ul style="list-style-type: none"> <li>▪ with resolving disputes other than by legal proceedings; and</li> <li>▪ with taking steps preliminary or</li> </ul> | the provider has demonstrated that the proposed work is a legal service under s 4 for which legal aid can be granted.<br>Go to step 16. |

| If...  | then....  |
|--|---|
| incidental to any proceedings; and <ul style="list-style-type: none"> <li>▪ in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings.</li> </ul> |   |
| the proposed work is not a legal service under s 4   | this is not a matter for which legal aid can be granted.<br>The Grants Officer may stop processing and refuse aid on the grounds that the proposed work is not a legal service under s 4.<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process. |

Step 16. The Grants Officer determines that if matters did not settle, there is a real likelihood that proceedings could occur in one of the forums listed in section 7.

| If...   | then....  |
|---|---|
| the Grants Officer can confirm from the application form: <ul style="list-style-type: none"> <li>▪ that if matters were not settled there will be proceedings, and</li> <li>▪ the s7 forum where proceedings could occur</li> </ul> | the 'real likelihood' test has been satisfied.<br>Go to step 17.  |
| this can not be determined from the application form,   | the Grants Officer will ask the applicant or provider:<br>"What happens if you don't reach a settlement?"<br> Note: a provider does not need to prove proceedings are drafted, intended or even contemplated.<br>A provider must show that if a dispute were to require litigation there is a real likelihood it would occur in one of the forums (court or tribunal) listed in section 7. |
| the provider can show which s 7 forum that proceedings will take place in if the matter is not settled,   | the 'real likelihood' test has been satisfied.<br>Go to step 17.  |

| If...  | then....   |
|--|--|
| it cannot be determined which s 7 forum in which proceedings may occur if the matter is not settled, | <p>this application has failed the 'real likelihood' test.</p> <p>The Grants Officer may stop processing and refuse aid on the grounds that there is no real likelihood that the matter would be resolved in one of the forums for resolution as defined in section 7.</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process.</p> |


Step 17. The Grants Officer assess application against eligibility criteria in s 9(3)-(4)(a)-(c).



When assessing the application against s 9(3)-(4)(a)-(c), keep in mind that:

- It is not the proposed settlement that should be assessed under section 9(3)-(4)(a)-(c); rather it is whether the grounds for possible proceedings will satisfy the criteria in section 9.
- The Grants Officer does not need to get evidence of any intention or contemplation of issuing proceedings; and
- As there are no "original proceedings" at this stage, the test involving "prospects of success" set out in section 9(4)(d) does not apply.

| If...  | then....   |
|--|--|
| the applicant or provider can demonstrate that, if proceedings were issued, these proceedings would satisfy the merits tests set out in section 9(3)-(4)(a)-(c), and | <p>the application passes the s 9 merits test.</p> <p>The Grants Officer may grant aid for a pre-proceeding settlement, subject to</p> |

| If...   | then....   |
|---|--|
| <p>the provider has:</p> <ul style="list-style-type: none"> <li>▪ summarised the relevant facts,</li> <li>▪ indicated whether there will be any difficulty in establishing reasonable grounds and</li> <li>▪ discussed the application of the relevant legal principles in terms of section 9(3)-9(4)(a)-(c).</li> </ul> <p> A simple statement by the provider declaring that the applicant has “reasonable grounds” if proceedings were to be pursued is not sufficient.</p> |  |
| <p>the provider or applicant cannot demonstrate to the Grants Officer’s satisfaction that if proceedings were issued, they would satisfy the merits tests set out in section 9(3)-(4)(a)-(c),</p>   | <p>this application has failed the s 9 merits test.</p> <p>The Grants Officer may stop processing and refuse aid under the relevant part of s 9(3)-(4)(a)-(c).</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process.</p> |

Step 18. The Grants Officer determines the amount of aid to be granted.

| <i>Legal aid for pre-proceeding settlement matters</i>   | <i>Maximum Guideline Rate</i>                              |
|--|--|
| <b>Listed provider</b>   |  |
| <p>Preparation time for <i>pre-proceeding settlement matters</i></p> <ul style="list-style-type: none"> <li>• taking of instructions,</li> <li>• investigation of the issues,</li> <li>• liaising with the other party to consider whether they are agreeable to settlement negotiations</li> <li>• conducting negotiations and</li> <li>• where possible, reaching a settlement.</li> </ul> | <p>Preparation time of up to<br/><b>6</b><br/>hr @ GHR</p> |
| <p>The provider must give the Agency evidence of meaningful attempts to negotiate and settle the issues in dispute.</p>  |  |
| <p>Where the matter has not been resolved by a pre-proceeding settlement and the applicant or the provider advise that they intend to pursue litigation, it may be appropriate to reduce the grant for step one.</p>   |  |

## Determine whether the person is an eligible applicant

### When this procedure is used

The Grants Officer uses this procedure to determine whether they can accept an application for legal aid from a particular person.

### Legislation

The key sections of the Legal Services Act 2000 covering 'eligible person' are:

- s 9; *When legal aid may be granted: civil matters*, as amended by the Legal Services Amendment Act 2006,
- s 10; *Other situations when legal aid refused or limited: civil matters*, as amended by the Legal Services Amendment Act 2006,
- s 13; *Special provisions relating to minors and mentally disordered persons*, as amended by the Legal Services Amendment Act 2006.

Key regulations in the Legal Services Regulations 2006 covering 'eligible person' are:

- Regulation 16 *Application by minors*
- Regulation 17 *Application by persons incapable of completing application because of mental or physical infirmity*
- Regulation 18 *Application by non-residents*

### Summary of Steps

To determine whether the applicant is a person to whom legal aid may be granted, the following assessments must be made:

- is the applicant is a natural person
- is the application is on behalf of another person
- does the application involves a group (body) of people
- eligibility if the applicant is not resident in New Zealand or the matter involves certain immigration decisions.

### Is the applicant a 'natural person'?

The Grants Officer can assume that:

- the aid is for the applicant
- the applicant is an individual natural (living) person and
- the applicant is an involved and interested party in the legal matter.

The Grants Officer does not have to take any particular action to confirm this assumption unless information on the application form indicates otherwise.

Step 19. The Grants Officer determines the status of an application or grant when the person is no longer living.

| If information indicates that the applicant ...   | then....  |
|---|---|
| is a prospective applicant who has died before signing the application (even if the lawyer received instruction before the applicant's death) | <p>the applicant is not eligible to apply. The Grants Officer rejects the application, and returns it to the provider.</p> <p>End of process.</p>   |
| has died after completing and signing the application before a decision has been made on the application,                                     | <p>the applicant may be an eligible person. The Grants Officer accepts the application (subject to the provisions of s 12 – see steps 1-4 above) and assess the remaining eligibility criteria.</p> <p>Go to step 20</p>  |
| has died after a grant of aid has been made   | <p>the applicant will no longer be an eligible person.</p> <p>The Grants Officer should then withdraw aid unless it is reasonable for the estate of the person to continue to be party to the proceedings.</p> <ul style="list-style-type: none"> <li>▪ In this situation, amend the grant under s 26(2)(a) and</li> <li>▪ Assess whether the applicants are acting in a representative, fiduciary or official capacity.</li> <li>▪ The Grants Officer must obtain a recommendation from a specialist adviser.</li> </ul> |



A legal aid applicant must be an individual person. The legal aid grant will be approved and managed in this person’s name, regardless of whether or not the application was made by a representative of that person. The Grants Officer must therefore identify the applicant.

Step 20. The Grants Officer identifies the applicant.

| Identify the applicant...           | using....   |
|-------------------------------------|---|
| at the initial application stage by | the primary identifiers: <ul style="list-style-type: none"> <li>▪ name (including variations, aliases)</li> <li>▪ date of birth</li> <li>▪ gender</li> </ul> When the Grants Officer has identified the applicant, go to step 21.   |
|                                     | the secondary identifiers: <ul style="list-style-type: none"> <li>▪ residential address</li> <li>▪ ethnicity.</li> </ul> When the Grants Officer has identified the applicant, go to step 21.   |
| during the life of a grant by,      | LAO identifiers - LAO automatically allocates a unique identifying number to <ul style="list-style-type: none"> <li>▪ each individual applicant (the client number) and this is only ever allocated once, and</li> <li>▪ each grant of aid (the file number) and an applicant may have several grants of aid.</li> </ul> When the Grants Officer has identified the applicant, go to step 21. |



Communication from the Agency will be to the person who is the legally aided person and their provider. The exceptions to this are situations where an application is made on behalf of another person, in which case communication will be with the representative.

## If the application is on behalf of another person

In most cases, the Grants Officer can assume that a grant of aid is intended for the person making the application.

## Where the application has been made by a trustee or corporation



Section 9 (1)(a)(ii) (and s9(7)) requires the Agency to grant aid, subject to the remaining eligibility criteria, to a trustee corporation.

The Grants Officer needs to confirm that the trustee corporation meets the following requirements:

- It is one able to be defined by s 2(1) of the Administration Act 1969. These include, but are not limited to:
  - Public Trust
  - Maori Trustee
  - Tower Trust Ltd
  - AMP Perpetual Trustee Company New Zealand Ltd
  - PGG Trust LTD
  - New Zealand Permanent Trustees Ltd
  - New Zealand Guardian Trust Co. Ltd.
- It is concerned in the proceeding in a representative, fiduciary<sup>1</sup> or official capacity

The Trustee Corporation is not assessed for financial eligibility or repayment but the resources of the subject-person may be taken into account (see Schedule 1 cl 6).

The Trustee Corporation agent fills out the form but the grant will be in the client's name. That is the name of the subject-person who is likely to be the subject of the proceeding or beneficially interested in the proceeding.

The grant is in the name of the subject-person but communication will be with the Trustee Corporation. The name of the agent is recorded in LAO. All letters must include the name of the subject-person.

Step 21. The Grants Officer identifies who lodged the application of behalf on another person.




The Grants Officer will first identify:

- who made the application
- who will be the applicant for aid and
- the status of the person who is the representative.




This information is relevant to deciding whose resources will be taken into account in assessing financial eligibility and the requirement to repay





---

<sup>1</sup> 'Fiduciary' refers to the relationship between a trustee and a beneficiary.



| If information indicates that the application...  | then....   |
|---|--|
| has been made by a trustee corporation on behalf of another person who has appointed the corporation to manage his or her affairs                       | aid may be granted, subject to the remaining eligibility criteria being met.<br>Go to step 23.   |
| is from someone acting in a representative, fiduciary <sup>2</sup> or official capacity but does not meet the tests for a trustee corporation/applicant | <p>aid must be refused under s10(3) unless:</p> <ul style="list-style-type: none"> <li>• if proceedings were brought, the Court would be likely to order the cost of the proceedings to be paid out of any property, estate or fund, and</li> <li>• if that happened, the property, estate or fund would be diminished or extinguished by the order and any person who is beneficially interested would suffer hardship because of this.</li> </ul> <p>Go to step 23.</p> <p> This application will most likely be a civil rather than family matter. The Grants Officer may require the assistance of a specialist advisor to determine:</p> <ul style="list-style-type: none"> <li>• the test of s 10(3) and</li> <li>• the resources that will be taken into account for eligibility and repayment decisions.</li> </ul> |
| is for a Waitangi Tribunal matter   | <p>the Grants Officer must forward the application to the Wellington office.<br/>End of process.</p> <p>When the application is received at the Wellington office, the Grants Officer needs to confirm that:</p> <ul style="list-style-type: none"> <li>• the applicant is a Maori, and</li> <li>• the claim in question is or will be submitted for the benefit of a group of Maori of which the applicant is a member (see part 16 for more information).</li> </ul>   |

<sup>2</sup> This indicates a relationship between a trustee and a beneficiary.

| If information indicates that the application... | then....   |
|--|--|
| is on behalf of a minor aged under 16 years      | <p>S 13 and Reg 16 apply, the Grants Officer must confirm that the person making the application:</p> <ul style="list-style-type: none"> <li>• is a natural person of full age (20 years and over) and capacity (not mentally disordered) and is</li> <li>• the person's parents or guardian or person who has the role of providing day-to-day care for or custody of the person, or is</li> <li>• a next friend or guardian ad litem (or person intending to act in that capacity) if that is what the rules of the court require for the proceeding (which the person acting in that capacity must demonstrate to the Agency).</li> </ul> <p>Go to step 23.</p> <p> The Grants Officer may waive any of these requirements if the applicant presents a reasonable case.</p> <p> If the proceedings are in the name of the representative, the grant will be in this person's name. The minor's name must also be recorded and appear in letters to the representative.</p> <p>If the proceedings are in the name of the minor, the grant will be made in the name of the minor. However, all communication will be with the representative whose name is also recorded. The name of the minor must be included in all letters to the representative and the provider.</p> <p> The Grants Officer will determine whose financial means are assessed for decisions on financial eligibility and repayment – see the section on Financial Assessments.</p> |

| If information indicates that the application...   | then....   |
|--|--|
| is on behalf of a minor aged over 16 years   | <p>they may apply for legal aid in a civil matter in their own right.</p> <p>Go to step 23.</p> <p> Note the conditions outlined in s13 in regard to repayments and court ordered costs for a minor 16 years or older.</p>  |
| has been made under s13 for a person who is mentally disordered <sup>3</sup>                     | <p>the Grants Officer must confirm that the person making the application is:</p> <ul style="list-style-type: none"> <li>• a natural person of full age (20 years or older) and capacity and is</li> <li>• a next friend or guardian ad litem (or person intending to act in that capacity) if that is what the rules of the court require for the proceeding, which the person in that capacity must demonstrate to the Agency.</li> </ul> <p>Go to step 23.</p> <p> The Grants officer may waive any of these requirements if the applicant presents a reasonable case.</p> <p> The grant will be made in the name of the mentally disordered person. However, all communication will be with the representative whose name is also recorded. The name of the mentally disordered person must be included in all letters to the representative and provider.</p> <p> The Grants Officer also needs to consider the requirements of s 13 about:</p> <p>assessing the financial resources of the representative/applicant and that this person may be liable to make repayments on the grant unless the Grants Officer decides to waive this condition.</p> |
| form has been filled out on behalf of a person incapable because of mental or physical infirmity | the Grants Officer may grant legal aid subject to the remaining eligibility criteria being met.  |

<sup>3</sup> As defined in s2(1) Mental Health (Compulsory Assessment and Treatment) Act 1992.

| If information indicates that the application... | then....  |
|--|---|
|  | <p>Go to step 23.</p> <p> Under Reg.17 <i>any responsible</i> person (including a District Public Trustee) with sufficient knowledge of the applicant's affairs may fill out the application form if the applicant is incapable because of mental or physical infirmity.</p> <p> The grant will be made in the name of the infirm person. However, all communication will be with the representative whose name is also recorded. The name of the infirm person must be included in all letters to the representative and provider.</p> |

## Applications involving a group (body) of people

### Legislation

Section 9(7) legal aid is not available if the application is for a *body of persons whether corporate or unincorporated body of persons* unless the application is from a trustee corporation or a Maori claimant group for proceedings before the Waitangi Tribunal.

Sections 10(3) to (6) if the application is on behalf of another kind of group of people not covered by the previous definitions or if there are numerous persons with the same interest, or if the applicant has the right to be joined with other as plaintiffs, the Agency will apply additional tests before a decision can be made.

### Guidance

A body of persons is an organised group. If the applicant is part of a group, the Grants Officer will determine whether the applicant has brought the proceeding:

- on his/her own behalf; or
- on behalf of the group.

To do this the Grants Officer will identify:

- who filled out the application form
- who the aid is for
- who has an interest in the proceeding
- the relationship between these.




Also use this information to decide whose resources will be taken into account in assessing financial eligibility and the requirement to repay.

The Grants Officer needs to work out whether the group of people is 'a body of persons whether corporate or incorporate'. A key feature of a body of persons is that they are organised in a way that there is a structure in their group by which they can be recognised as a collective entity.

If this is present then the Grants Officer must then establish whether the applicant has brought the proceeding on behalf of this group or not.

If it is established that the applicant has a direct and personal interest over and above any direct collective interest of the group, the applicant has not brought the proceeding on behalf of the group

Step 22. The Grants Officer determines if the application is from a group of people or if the proceedings involve a group of people.

| If ...  | then....   |
|---|--|
| <p>the Grants Officer has established:</p> <ul style="list-style-type: none"> <li>• that the application and the proceedings involve a group of people, and</li> <li>• the applicant does not have a direct and personal interest in the proceedings over and above the interest of the group as a whole</li> </ul> | <p>aid is refused under s 9(7),</p> <p> Unless one of the exceptions under s 9(7) applies – Trustee Corporation and a group of people making a Waitangi Tribunal claim.</p> <p>The Grants Officer will advise the applicant and provider of their decision and the reasons for it – legal aid is not available if the application is for a body of persons whether corporate or unincorporated body of persons.</p> <p>End of process</p>                               |
| <p>the applicant has a direct and personal interest over and above the interest of the group,</p>   | <p>then the applicant has brought the application on their own behalf.</p> <p>The Grants Officer may grant aid subject to the remaining eligibility criteria being met</p> <p>Go to Step 23</p>  |
| <p>the application is on behalf of another kind of group of people not covered by the previous definitions or</p> <p>there are numerous persons with the same interest or</p> <p>the applicant has the right to be joined with other as plaintiffs</p>  | <p>under s 10(3) to (6), additional tests must be applied to such applications.</p> <p>The Grants Officer must obtain the recommendation of a specialist advisor before a decision can be made.</p> <p>On receipt of the recommendation, the Grants Officer may:</p> <ul style="list-style-type: none"> <li>• grant aid subject to the remaining eligibility criteria being met - go to step 23</li> <li>• refuse aid. The Grants Officer advises the applicant and provider of their decision and the reasons for it.</li> </ul> <p>End of process.</p> |

## Determine if the applicant is a resident in New Zealand



The applicant does not have to be resident in New Zealand when making the application. See s 9(1)(a) as amended by s 6 of the Legal Services amendment Act 2006.

Step 23. The Grants Officer determines whether to grant or refuse aid due to the applicant's residency status.

| If ...   | then....   |
|--|--|
| the applicant is in New Zealand  | <p>the Grants Officer may grant legal aid subject to the remaining eligibility criteria being met.</p> <p>Go to Step 24.</p>   |
| <p>the applicant is overseas<br/>(see regulation 18)</p>                                   | <ul style="list-style-type: none"> <li>▪ the applicant's lawyer or other person authorised by the applicant may make the application</li> <li>▪ the person making the application must state that the form is not signed because the applicant is not resident in New Zealand</li> <li>▪ the applicant must personally complete the statement of financial means (unless they are a minor or incapable of making the application – see section above for an application on behalf of a person)</li> </ul> <p>Note the statement of financial means has been incorporated into the Agency's general application form</p> <ul style="list-style-type: none"> <li>▪ the Grants Officer may grant aid subject to the remaining eligibility criteria being met.</li> </ul> <p>Go to step 24</p> |
| <p>the applicant is overseas and the proceedings could be brought in an overseas court</p> | <p>the Grants Officer may refuse aid under s 9(4)(c) as amended by the Legal Services amendment Act 2006.</p> <p>See step 12.</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process.</p>  |

## Matters involving certain immigration decisions



The overseas person becomes the legally-aided person, not the person filling out the form.



In certain situations legal aid is not available for proceedings about a decision or matter under the Immigration Act 1987. See s10(1) the Legal Services Amendment Act 2006.

### Guidance

The Grants Officer will first confirm the applicant's:

- visa (if overseas),
- permit (if in New Zealand),
- current country of residence
- citizenship

Step 24. The Grants Officer determines whether the matter is an immigration decision for which legal aid is not available.

| If ...   | then....  |
|--|---|
| <p>the proceedings are about a decision or matter under the Immigration Act 1987 and the person:</p> <p>(a) is unlawfully in New Zealand in terms of the Immigration Act 1987 or</p> <p>(b) is lawfully in New Zealand because they hold a temporary permit or limited purpose permit, or</p> <p>(c) is not in New Zealand and either –</p> <ul style="list-style-type: none"> <li>- is not a New Zealand citizen, or</li> <li>- does not hold a current returning residents visa under section 14C of the Immigration Act.</li> </ul> | <p>the Grants Officer may refuse legal aid under:</p> <ul style="list-style-type: none"> <li>▪ s 10(1)(a)</li> <li>▪ s 10(1)(b)</li> <li>▪ s 10(1)(c)</li> </ul> <p style="text-align: right;">} As amended by the Legal Services Amendment Act 2006</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>End of process</p> |
| <p>the person was granted aid for proceedings under the Immigration Act 1987 before 1 October 1999,</p>  | <p>the Grants Officer may grant aid if they not are restricted by the (a) to (c) situation above, subject to the remaining eligibility criteria being met</p> <p>Go to step 25</p>  |
| <p>the proceedings involve refugee status hearings or security risk certificates</p>   |   |

## Determine whether the applicant is financially eligible

### When these procedures are used

The Grants Officer uses these procedures for determining whether the applicant is eligible on financial grounds for civil or family legal aid

### Legislation

The relevant sections of the Act are:

- Section 9, *When legal aid may be granted: civil matters*, as amended by the Legal Services Amendment Act 2006
- Section 11, *Legal aid not available to insured or indemnified persons*, Legal Services Act 2000.
- Schedule 1, *Definition of income and disposable capital*, as amended by Schedule 1 of the Legal Services Amendment Act 2006

The relevant regulations in the Legal Services Regulations 2006 are:

- Regulation 5, *Legal aid for civil matters: maximum levels of income*
- Regulation 6, *Legal aid for civil matters: maximum levels of disposable capital*
- Regulation 7, *Determining disposable capital: home equity allowance*
- Regulation 8, *Determining capital and disposable capital: valuation of assets*
- Regulation 9, *Resources that have been disposed of*

### Policy

| If ...  | then....  |
|---|---|
| the applicant's income or disposable capital exceeds the thresholds set out in the regulations,   | the Grants Officer must refuse legal aid under section 9(2) as amended by the Legal Services Amendment Act 2006, unless there are special circumstances.  |
| there are special circumstances demonstrated after having taken into account: <ul style="list-style-type: none"> <li>▪ the likely cost of the proceedings; or</li> <li>▪ the applicant's ability to fund the proceedings if legal aid is not granted</li> </ul> | the Grants Officer may use their discretion to grant legal aid  |
| the matter involves Waitangi Tribunal proceedings   | the Grants Officer does not have to assess the individual applicant's income or disposable capital against the thresholds set out in the regulations. The financial test in this situation is that the group of Maori (making a claim) would suffer substantial hardship if aid is not granted. |
| the matter involves Victim's Claims   | the Grants Officer does not have to assess  |

| If ...   | then....  |
|--|---|
| proceedings  | the applicant's income or disposable capital against the thresholds set out in the regulations, until an application for an amendment to the grant is made.<br><br>At this point, the income and capital tests are applied – see s 24(3). |
| the applicant has insurance or is indemnified available for legal proceedings, | the Grants Officer must refuse legal aid under section 11 of the 2000 Act until the applicant has used all their insurance or indemnification.  |

### Summary of Steps

The following steps are involved in determining whether the applicant is financially eligible:

- the applicant's gross annual income
- the applicant's disposable capital
- the applicant's family size and composition
- the relevant maximum thresholds that applies
- whether there are any special circumstances
- whether insurance or indemnity funding is available
- whether other considerations on financial matters apply to the application.

### Assess the applicant's gross annual income

Step 25. The Grants Officer assess the applicant's gross annual income.

- Refer to **Part 6 Financial assessment** in this manual for the procedure.
- When the Grants Officer has completed this assessment, go to step 26

### Assess the applicant's disposable capital

Step 26. The Grants Officer assess the applicant's disposable capital.

- Refer to **Part 6 - Financial assessment** in this manual for the procedure.
- When the Grants Officer has completed this assessment, go to step 27.

### The size and composition of the applicant's family



The maximum thresholds for financial eligibility vary with the size and composition of the family. This includes the applicant's spouse or partner and their dependent children. Dependent relatives other than children are not included.

Dependent children do not have to live in the same home as the rest of the family. However, the applicant or their partner must be making regular payments towards the maintenance of the children.

The dependent children do not have to be the applicant’s children. The children of the partner may be included provided they are financially dependant on the combined income of the applicant and partner.


### Guidance

Note that:

- Dependent children are not defined in the Act
- There is no specific dollar value to establish financial dependency.
- There is no upper age limit for dependent children but the Grants Officer should enquire further into the nature of the financial dependency if the young person is 18 years or older

This means that the Grants Officer will have to establish whether or not a child is financially dependant based the fact and circumstances of each case.

Step 27. The Grants Officer determines whether a child is financially dependent on the applicant, their partner or both (that is, the dependent on the combined household income)

| If ...   | then....  |
|--|---|
| information given on the application form indicates that a child is fully or partly financially supported from the applicant’s and partner’s combined income | this should be considered sufficient to establish that the child is financially dependent.<br><br>Go to step 28.  |
| the applicant indicates that the child has been removed by CYFS,   | the child will be regarded as financially dependent until such time as the court makes a declaration of care and protection.<br><br>At that point, Work and Income will change the benefit taking into account the child is no longer in the applicant's care. This amounts to updated financial circumstances and may also be a reason to seek deferral/write off.<br><br>Go to Step 28. |
| a young person is accessing, or is eligible to access, an income in his/her own right (such as an income support benefit or student allowance)               | the young person would not be counted as a financial dependent.<br><br> This applies even if the applicant or the applicant’s partner choose to supplement the young person’s income<br><br>Go to step 28.   |

### Apply the relevant maximum thresholds

Step 28. The Grants Officer applies the relevant income threshold

Regulation 5 sets the maximum thresholds for income.

| <b>If the applicant...</b>  | <b>then the maximum level of gross annual income is</b>   |
|---|---|
| is single   | \$22,366<br>Go to step 29.  |
| has <ul style="list-style-type: none"> <li>• a spouse/partner, or</li> <li>• 1 dependent child</li> </ul>   | \$35,420<br>Go to step 29.  |
| has <ul style="list-style-type: none"> <li>• a spouse/partner and 1 dependent child, or</li> <li>• two dependent children</li> </ul>                      | \$50,934<br>Go to step 29.  |
| has <ul style="list-style-type: none"> <li>• a spouse/partner and 2 dependent children, or</li> <li>• 3 dependent children</li> </ul>                     | \$57,880<br>Go to step 29.  |
| has <ul style="list-style-type: none"> <li>• a partner/spouse and 3 dependent children, or</li> <li>• 4 dependent children</li> </ul>                     | \$64,678<br>Go to step 29.  |
| has <ul style="list-style-type: none"> <li>• a spouse/partner and 4 dependent children, or</li> <li>• 5 dependent children</li> </ul>                     | \$72,302<br>Go to step 29.  |
| has <ul style="list-style-type: none"> <li>• a spouse/partner and more than 4 dependent children, or</li> <li>• more than 5 dependent children</li> </ul> | \$72,302 (as for 5 dependent children)<br><b>PLUS</b> \$6,689 for each additional child<br>Go to step 29. |

Step 29. The Grants Officer determines the relevant capital threshold

| <b>If the applicant...</b>                              | <b>then their maximum level is<sup>4</sup></b>  |
|---|---|
| is single   | \$3,500 of disposable capital<br>Go to step 30. |
| has a spouse or partner or 1 or more dependent children | \$5,000 of disposable capital<br>Go to step 30. |


<sup>4</sup> The capital value of items listed in Schedule 1 (3) are not included in the disposable capital assessment – *Income and Capital Assessment* in this manual.

| <b>If the applicant...</b>   | <b>then their maximum level is<sup>4</sup></b>  |
|--|---|
| has equity in a home   | \$80,000 equity allowance<br>Go to step 30.<br>Note – the value of equity above \$80,000 counts as disposable capital.  |
| <ul style="list-style-type: none"> <li>the applicant is likely to be refused aid because they appear to have marginally more than \$80,000 equity in the family home, and</li> <li>the house value has been self-assessed and</li> <li>the applicant has a very low income,</li> </ul> | <p>The Grants Officer may recheck and request a confirmation of the rating and/or market value.</p> <p>This will ensure an applicant is not refused aid because a self-assessed house value was inaccurate.</p> |

Step 30. The Grants Officer determines whether to apply the thresholds.

| <b>If the matter involves...</b> | <b>then....</b>  |
|----------------------------------|--|
| Waitangi Tribunal proceedings    | the Grants Officer does not have to assess the applicant's income or disposable capital against the thresholds set out in the regulations.<br>Go to Part 16 in this manual.  |
| victim's claims proceedings      | the Grants Officer does not have to assess the applicant's income or disposable capital against the thresholds set out in the regulations, until an application for an amendment to the grant is made.<br>At that point, the income and capital tests are applied – see s 24(3). |

Step 31. The Grants Officer determines financial eligibility

| <b>If ...</b>   | <b>then....</b>   |
|---|---|
| either: <ul style="list-style-type: none"> <li>the annual gross income or</li> <li>the disposable capital exceeds the relevant thresholds and there are no special circumstances shown,</li> </ul>  See 'Are there special circumstances?' below for guidance. | the Grants Officer must refuse aid under section 9(2) as amended by s 6 of the Legal Services Amendment Act 2006<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>.<br>End of process. |
| either <ul style="list-style-type: none"> <li>income thresholds are exceeded or</li> <li>capital thresholds are exceeded and there are special circumstances shown</li> </ul>   | the Grants Officer may use their discretion to grant legal aid subject to the remaining eligibility criteria being satisfied.<br>Go to step 32.   |

| If ...   | then....   |
|--|--|
| neither the gross income nor the disposable capital exceeds the relevant thresholds, | then the applicant is financially eligible.<br>The Grants Officer may grant legal aid subject to the remaining eligibility criteria being satisfied.<br>Go to step 35. |

### When the thresholds are updated

The financial thresholds in the regulations are updated at intervals. When a new threshold is introduced, the old threshold continues to apply:

- to any application received before the effective date for the new threshold.
- even if not the application is not determined until after the effective date.
- even if the decision is later reconsidered or reviewed.

See the Agency's transition policy in part 2 of this manual for more information.

### If financial eligibility is reassessed

If the gross annual income and disposable capital are reassessed for eligibility during the life of a grant, the Grants Officer will apply:

- the financial thresholds that are current at the time of the reassessment,
- not the thresholds used at the time of the original application.



The exception here is where the financial eligibility is reassessed following an application for reconsideration or outcome of a LARP review. In this case, the thresholds that were current at the time of the original decision are used.

### Determine if there are special circumstances



If either of the relevant gross annual income or disposable capital thresholds has been exceeded the Grants Officer must refuse the application unless there are special circumstances.

When assessing special circumstances, s 9(2) as amended by the Legal Services Amendment Act 2006 requires the Grants Officer to consider:

- The likely cost of proceedings to the applicant or
- The applicant's ability to fund the proceedings if legal aid is not granted.




**Note** - special circumstances must be connected with the financial situation of the applicant. It is up to the applicant to demonstrate that *special circumstances* exist.

Step 32. The Grants Officer assesses the likely cost of proceedings to the applicant:

| Consider...  | to determine....                                 |
|--|--|
| the information about the cost of the case submitted by the provider | the likely cost of proceedings to the applicant. |

| Consider...   | to determine.... |
|---|------------------|
| the average likely cost of similar cases or the range of costs of if a case were privately funded, if this is available                                   |                  |
| the likely cost of a legal aid case as assessed by the Agency based on the cost of comparable cases (see the table for Interim Repayments in this manual) |                  |
| the applicant's disposable income (for example, the applicant's MAPI – see the section on Repayments in this manual).                                     |                  |

## Step 33. (a) Applicant's ability to fund proceedings from house equity

| If the applicant owns a home and ...   | then ...   |
|--|--|
| <p>the applicant</p> <ul style="list-style-type: none"> <li>▪ has annual gross income within the eligibility threshold and</li> <li>▪ has disposable capital above the eligibility threshold because of equity in the family home</li> </ul>   | the applicant may be financially eligible because of special circumstances.                    |
| <p>the applicant</p> <ul style="list-style-type: none"> <li>▪ has a MAPI of zero or \$1,300, or</li> <li>▪ has a letter from the bank saying the bank would not approve a loan, or</li> <li>▪ has a letter from the bank saying a loan would be approved but the applicant demonstrates that the repayments would cause hardship (refer to the guidance in the Hardship policy in Part 11 of this manual or the sufficient means guidance in Part 5 of this manual, Steps 25 to 29)</li> </ul> | <p>the applicant will generally have difficulty funding proceedings.</p> <p>Go to Step 34.</p> |
| the applicant indicates other financial factors mean they cannot afford to pay for their own legal services  | Go to Step 33 (b)  |
| <p> Before refusing aid because an applicant is over the disposable capital threshold, the Grants Officer will contact the provider to see if they wish to submit additional information.</p>   |  |

Step 33. (b) The Grants Officer assesses the applicant's ability to fund proceedings because of other financial factors

| If there are additional factors ...  | then....  |
|--|---|
| <p>making demands on the applicant's financial resources, for example:</p> <ul style="list-style-type: none"> <li>▪ additional costs of a disability, illness or injury</li> <li>▪ which are not being met by Income Support or ACC</li> </ul> <p><b>Or</b></p> <p>impacting on the applicant's ability to access the resources, for example:</p> <ul style="list-style-type: none"> <li>▪ applicant for a protection order is unable to access funds controlled by their partner, and</li> <li>▪ they are beyond those of other applicants in similar financial situations, and</li> <li>▪ they will impact on the applicant's ability to fund the proceedings themselves if legal aid is not granted,</li> </ul> | <p>the applicant will generally have difficulty in funding proceedings.</p> <p>Go to step 34.</p> <p>Refer to the guidance in the Hardship policy in Part 11 of this manual or the <i>sufficient means</i> guidance in Part 5 of this manual, Steps 25 to 29. Grants Officers may also consult with DMG if it is a difficult situation to assess.</p> |

### Guidance

Grants Officers may take into account future financial commitments, such as:

- the applicant has a *contingent liability*, that is a future but contingent expense that may become payable within six months of the application (refer to the section *Financial Assessment* for a definition of a contingent liability)
- the applicant is just over the financial thresholds, is unable to borrow money and the estimated cost of services is clearly beyond the future means of an applicant
- the applicant has some limited funds which are not large and have been set aside for a essential purchase in the near future (eg: money put aside to purchase required school uniforms)

The Grants Officer determines if the special circumstances test has been satisfied.

| If ...  | then....  |
|---|---|
| either of the relevant income or capital maximum thresholds has been exceeded and there are special circumstances related to: <ul style="list-style-type: none"> <li>• the likely cost of proceedings or</li> <li>• the applicant’s ability to fund the proceedings if legal aid is not granted and</li> <li>• the special circumstances mean that he applicant will not be able to pay for legal services</li> </ul> | the Grants Officer may grant aid, subject to the remaining eligibility criteria being met, under s 9(2)(a) or (b), as amended by the Legal Services Amendment Act 2006.<br>Go to step 35. |

### Insurance or indemnification



Under s11, an applicant who has indemnification or insurance for the legal cost of bringing or defending any proceedings is not entitled to legal aid.

The applicant may be entitled to legal aid if the benefits available under the insurance or indemnification have been exhausted.



Insurance or indemnification is unlikely to be available in criminal or family cases.



Form 6, Civil/Family Application, requires the applicant to confirm that they have no insurance or indemnification available to cover some or all of their legal costs. Check that the “I confirm that” section has been signed and that the insurance and indemnification clause has not been struck out. If the applicant advises that they do have insurance or indemnification, follow the process below.

The Grants Officer will ask the applicant to provide the following information:

- whether the insurer/indemnifier accepts the matter is covered by its policy
- whether the benefits of the policy are personally available to the applicant to use for legal representation
- what matters or services the insurer/indemnifier would not fund
- when the insurer/indemnifier would stop funding
- whether the applicant has accessed any benefits.

Step 34. The Grants Officer determines whether to refuse aid because the applicant has insurance or is indemnified against legal costs.

| If ...  | then....   |
|---|--|
| the insurer/indemnifier does not accept that the matter is covered by its policy                              | the Grants Officer may use their discretion to grant aid, subject to the remaining eligibility criteria being met.<br>Go to step 36  |
| the benefits of the policy are not personally available to the applicant to use for legal representation      | the Grants Officer may use their discretion to grant aid, subject to the remaining eligibility criteria being met.<br>Go to step 36  |
| the insurer/indemnifier does not fund this particular matter or service                                       | the Grants Officer may use their discretion to grant aid, subject to the remaining eligibility criteria being met.<br>Go to step 36  |
| the insurer/indemnifier does fund this particular matter or service, but will stop funding at a certain point | refuse aid under s 11.<br>The Grants Officer advises the applicant and provider: <ul style="list-style-type: none"> <li>• of their decision and the reasons for it.</li> <li>• that the applicant may apply again when the funding has been stopped.</li> </ul> End of process |
| there are benefits available but the applicant has not accessed any benefits                                  | refuse aid under s 11.<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process  |
| this information is not provided  | refuse aid under s 9(4)(a), as amended by the Legal Services Amendment Act 2006.<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process  |

## Further grounds to refuse aid related to financial circumstances

There are some further grounds related to the financial circumstances of the applicant on which the Agency may refuse civil/family legal aid. This is not the same as refusing an application because of financial eligibility, but they do rely on information about the financial circumstances.


### Insufficient information



Under s9(4)(a) the Grants Officer may refuse to grant legal aid if they are *unable to obtain full information concerning the applicant's financial affairs because of the default or failure of the applicant.*

Step 35. The Grants Officer determines whether to refuse aid due to insufficient information.

| If ...   | then....   |
|--|--|
| the matter involves Waitangi Tribunal or victim's claims proceedings | the Grants Officer does not have the discretion to refuse aid under s 9(4)(a), as amended by the Legal Services Amendment Act 2006. The Grants Officer must continue to seek further information until they have sufficient information on which they can make a decision.<br><br>Go to step 42. |
| information the Grants Officer needs is not provided                 | the Grants Officer advises the applicant and provider that they require certain items of information.<br><br>The Grants Officer must give the applicant and provider the opportunity to provide the information. Allow at least 15 working days.   |

| If ...  | then....   |
|---|--|
| no response is received within 15 working days, | <p>the Grants Officer may:</p> <ul style="list-style-type: none"> <li>▪ grant aid on an interim basis under s 14(1)(b). Go to step 37.</li> </ul> <p style="text-align: center;"><b>or</b></p> <p>refuse aid under s 9(4)(a), as amended by the Legal Services Amendment Act 2006. The Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <ul style="list-style-type: none"> <li>▪</li> </ul> <p> The Grants Officer may grant aid on an interim basis if:</p> <ul style="list-style-type: none"> <li>▪ they believe that that further information may still be provided, or</li> <li>▪ information has been provided but is still insufficient for a full decision and further information has been again requested.</li> </ul> |

**If the repayment amount is greater than the likely cost of proceedings**



Under s 9(4)(b) as amended by the Legal Services Amendment Act 2006, the Grants Officer may refuse aid if the *prescribed repayment amount for the applicant will exceed the likely cost of the proceedings*. The likely cost of proceedings means the likely cost of services.

Step 36. The Grants Officer assesses the likely cost of proceedings

| Consider...   | to determine....                                 |
|---|--|
| the information about the cost of the case submitted by the provider  | the likely cost of proceedings to the applicant. |
| the average likely cost of similar cases or the range of costs of if a case were privately funded, if this is available                                   |  |
| the likely cost of a legal aid case as assessed by the Agency based on the cost of comparable cases (see the table for Interim Repayments in this manual) |  |

Step 37. The Grants Officer considers whether the applicant’s disposable income (for example, the level of the prescribed repayment amount) could be used to meet the likely cost of proceedings by establishing the prescribed repayment amount – see the repayments section in this manual.

Step 38. The Grants Officer decides whether to refuse aid because the repayment amount will be greater than the likely cost of proceedings.

| If ...   | then....  |
|--|---|
| the repayment amount will not be greater than the likely cost of proceedings   | the Grants Officer may grant aid subject to the other eligibility criteria being met.<br>Go to step 40.   |
| the matter involves victim’s claims proceedings  | the Grants Officer does not have the discretion to refuse aid under s 9(4)(b) (as amended by the Legal Services Amendment Act 2006).<br>Go to step 42.  |
| the prescribed repayment amount for the applicant exceeds the likely cost of the proceedings, and<br>the issues for resolution are few and the cost of legal services is likely to be small, and<br>the applicant has a relatively high gross income (e.g.: a MAPI of \$10,000 or more) or significant capital (e.g.: a MAPC of \$1,270) or both, <sup>5</sup> | refuse aid under s 9(4)(b), as amended by the Legal Services Amendment Act 2006.<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process |

**Other factors related to financial circumstances**






Under s9(4)(d)(iii) the Grants Officer may refuse to grant aid if it appears unreasonable or undesirable that the applicant should receive legal aid in the particular circumstances of the case

---

<sup>5</sup> The prescribed repayment amount will often exceed the likely cost of services. The Grants Officer may apply this section of the Act to refuse aid when these 3 factors are present.

Step 39. The Grants Officer assesses other financially related factors.

| If ...  | then....   |
|---|--|
| <p>there are other forums available for dispute resolution with alternative funding,</p> <p> For example, Health and Disability Commissioner inquiries.</p>  | <p>the Grants Officer may ask the provider to justify the decision not to pursue resolution in other forums.</p> <p> Keep in mind that there is no requirement for a person to use alternative dispute resolution channels rather than legal action through courts.</p> |
| <p>there are other agencies with funding available for the proceedings,</p> <p> For example, if the applicant is a member of a mutual benefit organisation such as a union.</p> <p>This option should be investigated where the application is for:</p> <ul style="list-style-type: none"> <li>▪ an employment matter or</li> <li>▪ a Hague Convention matter if the child is overseas. In this case the Central Authority makes the application.</li> </ul> | <p>the proceedings may be able to be funded by a different agency – the Grants Officer will check this with the provider in employment proceedings.</p>  |

Step 40. The Grants Officer determines whether to refuse aid due to other financial circumstances.

| If the Grants Officer   | then....   |
|---|--|
| <p>refuses aid under s 9(4)(d)(iii), as amended by the Legal Services Amendment Act 2006:</p> | <p>the Grants Officer advises the applicant and provider of their decision and the reasons for it.</p> <p>This is the end of the process</p> |
| <p>does not intend to refuse aid</p>  | <p>go to step 42 (reasonable grounds).</p>   |

## **Determine whether the application has sufficient merit**

### **When this procedure is used**

The Grants Officer uses this procedure to determine whether a case has sufficient merit to approve a grant of civil or family legal aid.

### **Legislation**

The relevant sections of the Act and the Regulations are:

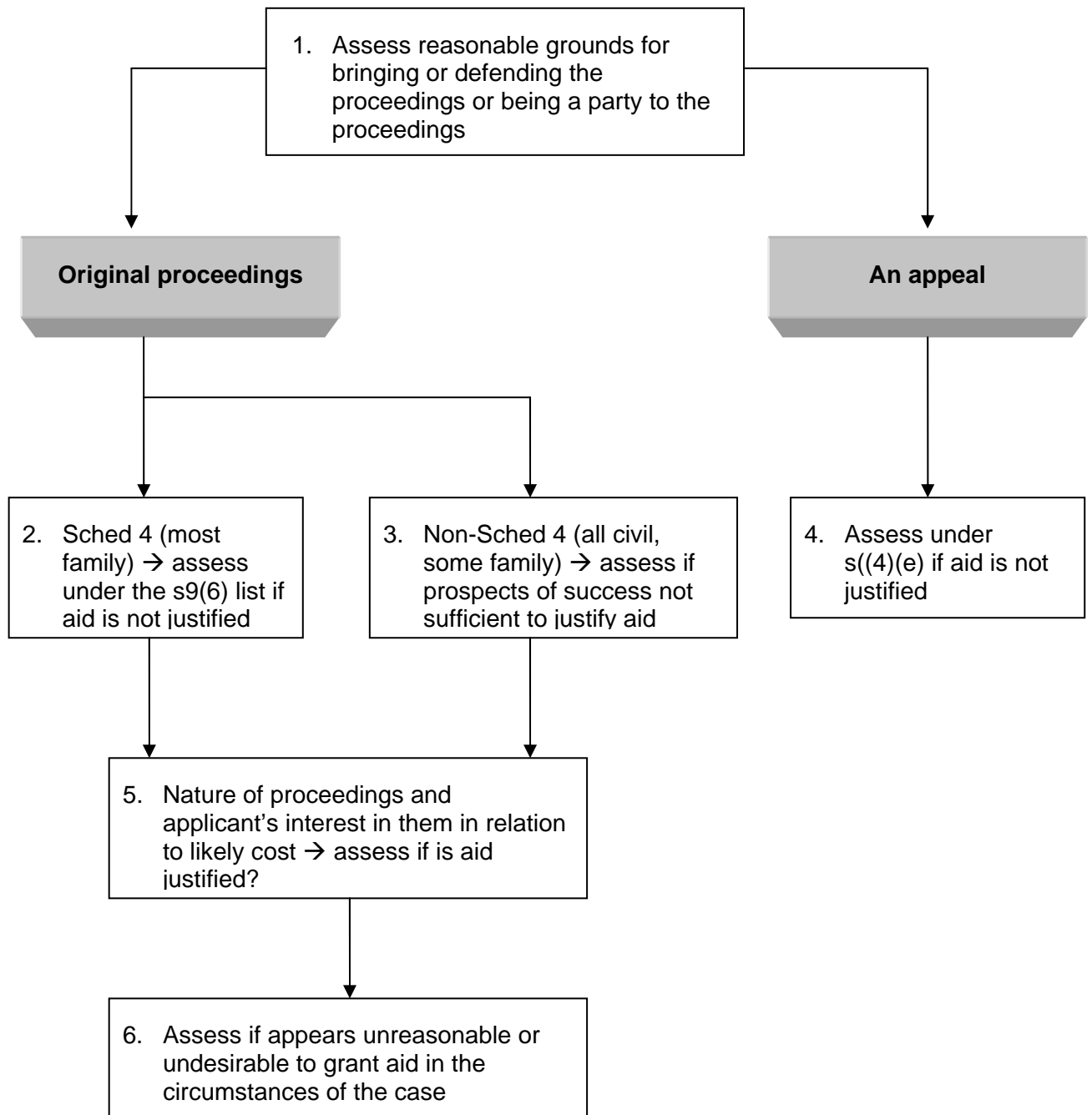
- Section 7(1)(e) Proceedings for which legal aid may be granted: civil matters.
- Section 9 When legal aid may be granted: civil matters as amended by the Legal Services Act 2006
- Schedule 4 Specified enactments as amended by the Legal Services Act 2006

### **Summary of steps**

The following steps are involved in determining whether the applicant is financially eligible:

- whether there are reasonable grounds
- is it an appeal or an original proceeding
- which part of section 9 applies
- whether aid for a Schedule 4 proceeding is justified
- whether non-Schedule 4 proceedings have sufficient prospects of success
- whether other grounds exist on which the Agency may refuse legal aid

## Civil/Family legal aid merits assessment – summary flowchart



## Reasonable grounds




Section 9(3), as amended the Legal Services Amendment Act 2006, requires the Agency to refuse legal aid if the applicant cannot show that they have reasonable grounds:


- for taking or defending the proceedings or
- for being a party to the proceedings.



In most situations in civil/family matters, the grounds will be clearly reasonable.

Step 41. The Grants Officer determines if there are reasonable grounds

| If ...  | then....  |
|---|---|
| <p>the applicant has a significant personal interest in the outcome of the proceedings sufficient to justify pursuing the matter,</p> <p> 'Significant personal interest' could also be an interest in preserving a party's right to natural justice.</p> <p>This applies whether the applicant has initiated the proceeding or not.</p> | <p>the reasonable grounds test will generally have been satisfied – continue with the merit assessment.</p> <p>Go to step 43.</p>   |
| <p>the proceedings involve domestic violence or children (guardianship, day to day care or contact)</p>   | <p>there are reasonable grounds – continue with the merit assessment.</p> <p>Go to step 43.</p>   |
| <p>the proceedings involve mental health,</p>   | <p>there are reasonable grounds – continue with the merit assessment.</p> <p>Go to step 43.</p>   |
| <p>there are factors such as several unsuccessful previous applications in a family case</p>  | <p>reasonable grounds may not exist despite the applicant having a significant personal interest in the outcome.</p> <p>The Grants Officer may:</p> <ul style="list-style-type: none"> <li>▪ refuse aid under s 9(3), as amended by the Legal Services Amendment Act 2006. Advise the applicant and provider of the Grants Officer decision and the reasons for it. End of process.</li> <li>▪ decide that these factors do not show a lack of reasonable grounds.</li> </ul> |

| If ... | then....   |
|--------|--|
|        | <p>Go to step 43.</p> <p> See the judgment in <i>LSA v M</i> <sup>6</sup>. This confirmed even in a family case other factors could indicate that there were not reasonable grounds for granting aid in a family case, although the applicant clearly had an interest in the outcome.</p> |

## Appeals



An application for aid for an appeal is subject to a test that is not part of the eligibility assessment for an original proceeding. Under s 9(4)(e), the Agency has the discretion to refuse aid if *the Agency considers that for any reason the grant of legal aid or further legal aid is not justified.* .

Previously, the Agency regarded the test under s9(4)(e) as an additional and more stringent test over and above the tests applied to original proceedings.

However, in *Legal Services Agency v MA*<sup>7</sup>, the High Court held that the test for appellate aid under s 9(4)(e) is not a more stringent test for a grant of legal aid than in the case of original proceedings. In 076/09, LARP required the Agency to reconsider a decision to refuse appellate aid based on the courts ruling in *LSA v MA*.

Step 42. The Grants Officer considers the merits of the appeal..

| Consider                  | Guidance  |
|---------------------------|---|
| The merits of the appeal. | <p>Factors to consider include, but are not limited to:</p> <ul style="list-style-type: none"> <li>▪ the nature of the proceedings</li> <li>▪ the decision being appealed</li> <li>▪ the grounds for an appeal</li> <li>▪ the cost of the case and the likely cost of the appeal</li> <li>▪ any other issues raised or relevant.</li> </ul> <p>▪ You are not being asked to 'second guess' the court or to pre-judge the outcome of the appeal.</p> <p>▪ Rather, you need to consider each case on its own particular facts to establish whether or not there is a reasonable likelihood that the errors in law and fact would be overturned on appeal.</p> |

Step 42(a). The Grants Officer determines whether aid should be granted for an appeal.

<sup>6</sup> Legal Services Agency vs M (5 August 2002) HC Dunedin, (A6/02) John Hanson J

<sup>7</sup> High Court, Auckland, CIV 2008-404-001838, 4 July 2008, Wylie J

| If...  | then...   |
|--|---|
| after considering these factors the Grants Officer's assessment is that a grant legal aid for the appeal is justified, | the Grants Officer may approve aid for the appeal, subject to the remaining eligibility criteria. |
| after considering these factors, the Grants Officer's assessment is that a grant of aid is not justified,              | the Grants Officer may use their discretion to refuse aid under s 9(4)(e).                        |
| the Grants Officer needs advice to make a decision,  | The Grants Officer may request a recommendation from a specialist adviser.                        |


### Which part of s 9(4) applies



All civil and family applications are subject to the merits assessments under s9(4)(d).

Which part of s9 applies depends on whether or not the application is for a proceeding listed in Schedule 4.

Step 43. The Grants Officer determines which part of s 9(4) applies.

| If ...  | then....  |
|---|---|
| <p>the application is for a proceeding under one of the following acts:</p> <ul style="list-style-type: none"> <li>▪ Adoption Act 1955</li> <li>▪ Adult Adoption Information Act 1985</li> <li>▪ Alcoholism and Drug Addiction Act 1966</li> <li>▪ Care of Children Act 2004</li> <li>▪ Child Support Act 1991</li> <li>▪ Children, Young Persons, and their Families Act 1989 (other than Parts 4 and 5 and sections 351 to 360)</li> <li>▪ Domestic Violence Act 1995</li> <li>▪ Family Proceedings Act 1980 (other than Parts 6 to 8)</li> <li>▪ Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003</li> <li>▪ Mental Health (Compulsory Assessment and Treatment) Act 1992</li> <li>▪ Protection of Personal and Property Rights Act 1988</li> </ul> | <p>the application is for a Schedule 4 proceeding.</p> <p>Go to step 45 (aid for schedule 4 justified)</p> <p> Note that most family proceedings covered by the Family Steps are covered by Acts listed in Schedule 4 except.</p> <ul style="list-style-type: none"> <li>▪ relationship property matters</li> <li>▪ spouse/de facto partner maintenance matters</li> </ul> |

| <b>If ...</b>  | <b>then....</b>   |
|--|---|
| the application is for a proceeding under any other Act (i.e., non-schedule 4 proceedings) | Go to step 47 (prospects of success for non-schedule 4) |

## Aid for a Schedule 4 proceeding



Section 9(5) requires the Grants Officer to exercise discretion: *The Agency may refuse to grant legal aid ...if the Agency considers that a grant of aid is not justified.* In making this decision the Grants Officer will consider the criteria listed in s 9(6).


Step 44. The Grants Officer considers s 9(6) criteria.



The provider is responsible for providing the Grants Officer with sufficient information and explanation on each or any factor that applies to the case.


| Consider...   | Guidance....   |
|---|--|
| <p><i>S 9(6)(a): any previous proceedings in the matter to which the applications relates</i></p>   | <p>It doesn't matter if the previous proceedings have not been funded by legal aid. The existence of previous proceedings could support a decision to refuse or to approve a grant.</p> <p>For example, previous proceedings:</p> <ul style="list-style-type: none"> <li>▪ may indicate that the matter has been extensively canvassed so that a grant is not justified under this criterion</li> <li>▪ in a related matter may indicate the application is justified (e.g.: previous proceedings that dealt with guardianship, may justify a current proceeding on care and contact).</li> </ul> <p>The Grants Officer will identify:</p> <ul style="list-style-type: none"> <li>▪ the history of the dispute; when previous matters arose and the duration of those matters</li> <li>▪ the issues in dispute</li> <li>▪ the outcome of any proceedings</li> <li>▪ what could be achieved by further legal services or litigation (if planned).</li> </ul> <p>In view of the above, is it likely that further legal services would resolve the dispute? If not, aid would not be justified.</p> |
| <p><i>S 9(6)(b): any personal protection issues such as (without limitation) orders relating to domestic violence, protection of personal property rights, compulsory treatment or compulsory care.</i></p> | <p>It is only the protection of the applicant for aid, or of his or her dependants that is relevant here. It will not be relevant under this provision that the applicant for aid is, for example, a respondent in domestic violence proceedings.</p> <p>The reference to <i>orders</i> includes both existing orders and application for orders</p> <p>Personal protection issues will generally be considered a strong justification for a grant and may apply to emotional or physical welfare.</p>   |

| Consider...  | Guidance....   |
|--|--|
| <p><i>S 9(6)(c): the interests and welfare of any other person who may be affected by the outcome of the proceedings.</i></p>        | <p>This can include, for example, family members, dependants and minors for whom there is an identifiable consequence of the proceedings or dispute.</p> <p>Wider interest and welfare issues may be a strong justification for a grant, especially where, for example, there could be an impact on rights or wellbeing.</p> <p><i>Interest</i> means something that affects the person directly in some way and will involve an assessment of the impact of the outcome on the other person.</p> <p>The respondent is not included in this consideration.</p>   |
| <p><i>S 9(6)(d): whether there are any complex factual legal or evidential matters that require the determination of a court</i></p> | <p>The Grants Officer will identify whether there are matters that require the determination of the Court and if so, whether they are complex.</p> <p>Legal complexity may include (but would not be limited to):</p> <ul style="list-style-type: none"> <li>▪ interpreting a provision of an Act, which has not been considered by the Courts before, or</li> <li>▪ the interplay of legal provisions under different statutes.</li> </ul> <p>Evidential complexity may include (but would not be limited to):</p> <ul style="list-style-type: none"> <li>▪ admissibility of evidence, or</li> <li>▪ amount of evidence.</li> </ul> |
| <p><i>S 9(6)(e) whether it is in the public interest that legal aid be granted.</i></p>  | <p>The Grants Officer will identify whether the outcome could have a wider effect on the public such as a test case on a particular question of law.</p> <p>Public interest does not mean something that is simply high profile.</p> <p>It is not expected that this provision will be relied upon very often.</p>   |
| <p>each criterion before making a decision.</p>  | <p>The exercise of discretion will involve deciding whether on the balance of all the facts and assessments, a grant is justified or not.</p> <p>Justification may be found on the basis of only one of the above grounds or on the basis of more than one. An individual assessment is required for each factor, taking into account the specific and identifiable reasons for a grant of aid.</p>  |

| Consider...   | Guidance.... |
|---|--------------|
|  There may be some situations where some criteria are given greater weight in reaching a decision in any particular case - particularly personal protection issues or the welfare of another person. |              |

Step 45. The Grants Officer determines whether a grant is justified

| If ...   | then....  |
|--|---|
| on the balance of all the facts and assessments, a grant is justified            | the Grants Officer may use their discretion to grant aid, subject to the remaining eligibility criteria being met.<br>Go to step 51 (other refusal reasons).                        |
| on the balance of all the facts and assessments, a grant is <b>not</b> justified | the Grants Officer may refuse aid under section 9(5).<br><br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br><br>End of process. |

 After the assessment required under s9(5) and (6), the merit of a Schedule 4 proceeding must still be further assessed under the criteria of s9(4)(d)(ii) and (iii) – see steps 51 and 52.

### Prospects of success for non schedule 4 proceeding



The key merit test specific to non-Schedule 4 proceedings is whether the applicant has sufficient prospects of success in the proceedings they are taking or defending. See s 9(4)(d)(i) the Agency may refuse legal aid to an applicant if: - *the applicant's prospects of success are not sufficient to justify the grant of aid.*

### Guidance

Prospects of success

- refer to the possibility of the legally aided person achieving a successful outcome.
- need to be assessed in a pragmatic way and on a case by case basis.
- involves assessing the likely benefits against the likely costs.

Sufficient prospects of success:

- does not mean an absolute guarantee of success,
- do require that there is a possibility of a successful outcome.

The Grants Officer will consider prospects of success in each case. An assessment is required from the provider identifying the key argument or arguments in the case. The Grants Officer will take this into account in making a decision. The Grants Officer may seek additional advice as needed to make a decision.

## Possibility of a successful outcome


Step 46. The Grants Officer assesses the possibility of a successful outcome. 8

| Consider...  | Guidance  |
|--|---|
| the likely costs compared to the possible benefits for the applicant for legal aid | <p>The prospects of achieving a successful outcome will involve weighing up the likely costs against likely benefits.</p> <p>The costs and/or benefits</p> <ul style="list-style-type: none"> <li>▪ may be financial or non-financial</li> <li>▪ may differ depending on whether the aid applicant is the claimant (plaintiff) or the defendant (respondent)</li> </ul>                     |
| the likely financial and non-financial costs or benefits                           | <p>A successful outcome can often be assessed in purely financial terms. However, this is not always the case.</p> <p>Other non-financial factors or potentially beneficial outcomes arising from the proceedings also need to be considered.</p> <p>For example:</p> <ul style="list-style-type: none"> <li>▪ securing care and contact arrangements with the applicant's child</li> </ul> |
| what would be a successful outcome for the claimant/plaintiff                      | <p>For the claimant/plaintiff, a successful outcome is the one most likely to provide maximized benefits against the likely costs.</p> <p>The test is:</p> <ul style="list-style-type: none"> <li>▪ What legal action would the claimant/plaintiff take in the circumstances if they were paying their own legal costs?</li> </ul>  |
| what would be a successful outcome for the defendant/respondent                    | <p>For the defendant/respondent, a successful outcome is one that would minimize their damage or loss.</p> <p>For the defendant/respondent, the issue is:</p> <ul style="list-style-type: none"> <li>▪ How best can I get out of this?</li> </ul>   |
|  | <p>For the Agency, the test when assessing prospects of success is:</p> <ul style="list-style-type: none"> <li>▪ What legal action would the applicant take in the circumstances if they were paying the costs of their own defence?</li> </ul> <p>Go to step 48.</p>   |


<sup>8</sup> This approach is based on guidance in *Timmins vs LARP* (2004) 1 NZLR 708.

## Insufficient prospects of success

Step 47. The Grants Officer assesses whether prospects of success may not be sufficient

| If ...  | then....  |
|---|---|
| the case would be unlikely to succeed, even if undefended   | <p>prospects of success are insufficient.</p> <p> However, it is possible that cases falling within these categories may satisfy the prospects of success test if there are exceptional or novel aspects. Exceptional or novel means something extraordinary in the circumstances, which were not expected</p> <p>Go to step 49.</p> |
| directly relevant case law has established that success is unlikely   |   |
| the actions of the applicant in connection with the case mean that it is unlikely that the case will succeed                                |   |
| the applicant's allegations in the case are speculative or fanciful   |   |
| the applicant has made unsuccessful applications previously for the same matters and no new arguments are proposed that could be successful |   |
| the applicant's previously unsuccessfully for the same matters indicate a vexatious or frivolous approach.                                  |   |

Step 48. The Grants Officer determines whether there are strong reasonable grounds even though prospects of success are low.

| If ...  | then....  |
|---|---|
| there are very strong grounds for taking or defending an action, but the prospects of success may be lower than normal. | <p>the Grants Officer may use their discretion to grant aid</p> <p> It could be a breach of natural justice (under s27(1) of the New Zealand Bill of Rights Act 1990) if the applicant is not granted legal aid for representation in court.</p> <p>Go to step 50.</p> |

Step 49. The Grants Officer determines whether prospects of success are sufficient or insufficient

| If ...   | then....  |
|--|---|
| there is a reasonable possibility of success in the proceedings being taken or defended by the applicant | the Grants Officer may grant legal aid.<br>End of process.  |
| there are no previous or concurrent proceedings casting doubt on the possibility of a successful outcome |   |
| prospects of success have been assessed as sufficient  |   |
| there are insufficient prospects of success but strong reasonable grounds                                |   |
| there is little or no possibility of success in the proceedings being taken or defended by the applicant | the Grants Officer may refuse legal aid under s 9(4)(d)(i).<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process. |
| there are previous or concurrent proceedings casting doubt on the possibility of a successful outcome    |   |
| prospects of success have been assessed as insufficient and there are no exceptional circumstances       |   |
| there are insufficient prospects of success and weak reasonable grounds                                  |   |

## Other refusal reasons

### Refusal under section 9(4)(d)(ii)



The Grants Officer may refuse legal aid if the grant is not justified because of

- the proceedings and the applicant's interest in them (financial or otherwise), compared with
- the likely cost of the proceedings.

To make a decision on whether to refuse aid under s 9(4)(d)(ii), the Grants Officer will assess the likely benefits against the likely costs of the proceedings.

Step 50. The Grants Officer determines whether to refuse aid under s 9(4)(d)(ii).



The Grants Officer needs to consider the facts of the case. The examples below are included here for guidance. They do not represent an exhaustive list.

| Consider   | Guidance   |
|--|--|
| If the Grants Officer considers that the cost of taking the proceedings is likely to be more than the value of property/resources recovered                  | Then the Grants Officer may refuse aid under s 9(4)(d)(ii).<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process |
| Any non-financial factors, such as the psychological benefits of resolving a dispute through Court proceedings as opposed to leaving the dispute unresolved. | The Grants Officer may use their discretion to grant aid, subject to the preceding eligibility criteria being met.   |
| If there are no grounds for refusing aid under s 9(4)(d)(ii).  | Go to step 52.   |

### Refusal under section 9(4)(d)(iii)



The Grants Officer may refuse legal aid for any other cause where it appears unreasonable or undesirable that the applicant should receive legal aid or further legal aid in the particular circumstances of the case.

Step 51. The Grants Officer determines if there are circumstances in which they may exercise discretion to refuse aid.



The Grants Officer needs to consider the facts of the case. The examples below are included here for guidance. They do not represent an exhaustive list.

| Consider   | Guidance  |
|--|---|
| Whether proceedings have been clearly prolonged, repeated or duplicated.                                   | The Grants Officer may use their discretion to refuse aid under s 9(4)(d)(iii).<br>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br>End of process.   |
| Whether it would be possible for the applicant to obtain the desired result by other means than litigation | If necessary, ask the applicant/provider to justify their choice of action.<br>If the applicant/provider is unable to justify their choice, the Grants Officer may use their discretion to refuse aid under s 9(4)(d)(iii).<br>The Grants Officer advises the applicant and |

| <b>Consider</b>  | <b>Guidance</b>   |
|--|---|
|  | <p>provider of their decision and the reasons for it.<br/>End of process.</p>   |
| <p>Whether there are significant matters beyond the case at hand</p> | <p>Assess the impact of these on the case – the Grants Officer may use their discretion to refuse aid under s 9(4)(d)(iii) if they believe that aid is not justified in the circumstances.</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br/>End of process.</p> |
| <p>Any special circumstances.</p>                                    | <p>If there are no circumstances, the Grants Officer may exercise discretion to refuse aid under s 9(4)(d)(iii).</p> <p>The Grants Officer advises the applicant and provider of their decision and the reasons for it.<br/>End of process..</p>  |

# Appendix – civil proceedings

## Private Mediation Policy

### When this procedure is used



This procedure is used by the Grants Officer to determine whether legal aid will be available to fund private mediation.

### Legislation

Section 23A – Private Mediation

- (1) In this section, private mediation means any mediation other than mediation that is –
  - (a) ordered by a Court; or
  - (b) part of a court process or proceeding; or
  - (c) part of a dispute resolution process under any enactment
  
- (2) The Agency may fund legal services related to private mediation in respect of any matter for which legal aid may be granted under section 7 if the Agency is satisfied that –
  - (a) the matter is suitable for private mediation, and
  - (b) there is a reasonable likelihood that private mediation will resolve the dispute or part of the dispute

### Definition

| Private mediation is...  | Private mediation is NOT...   |
|--|---|
| <ul style="list-style-type: none"> <li>▪ a facilitated process to resolve a dispute</li> <li>▪ led by a trained mediator. The mediator may be a lawyer</li> <li>▪ voluntarily entered into by all parties, and</li> <li>▪ entered into in good faith, and</li> <li>▪ requested by either party or their representative</li> </ul> <p> Lawyers may be involved to ensure their clients' interests are observed.</p> <p> Mediation would be expected to result in a written agreement between the parties.</p> | <ul style="list-style-type: none"> <li>▪ ordered by a Court, and/or</li> <li>▪ part of a court process or proceeding, and/or</li> <li>▪ part of a dispute resolution process under any enactment. As noted in section 23(1)(c), some legislation requires alternative dispute resolution processes involving mediation. These situations are not covered in this policy.</li> </ul> <p>For decisions on non-private mediation, refer to the section in this manual on <i>Maximum Grant</i> and the <i>Proceedings Steps</i></p> |


## Policy

If it can be demonstrated that the matter is suitable for private mediation, the Agency will consider an application for an amendment to fund services directly associated with a private mediation.

The Agency must also be satisfied that there is a reasonable likelihood that the dispute, or part of the dispute, will be resolved by the private mediation.

## Procedure

Step 1. The Grants Officer determines if the matter is suitable for private mediation.

| If ...  | then....   |
|---|--|
| <ul style="list-style-type: none"> <li>▪ the matter involves</li> <li>▪ civil matters</li> <li>▪ family matters where the court has not ordered mediation</li> <li>▪ situations where there is a reasonable chance of success (this will depend on the facts of the case).</li> </ul>   | <p>the matter <b>is</b> suitable for private mediation.</p>  |
| <p>the provider confirms that private mediation:</p> <ul style="list-style-type: none"> <li>▪ is a suitable process for resolving the dispute</li> <li>▪ will be led by a trained mediator</li> <li>▪ is voluntarily entered into by all parties,</li> <li>▪ is entered into in good faith, and</li> <li>▪ is requested by the aided person and/or the other party</li> </ul> | <p>the process is suitable for a grant of legal aid.<br/>Go to Step 2</p>  |
| <p>the matter involves</p> <ul style="list-style-type: none"> <li>▪ criminal matters</li> <li>▪ youth related matters</li> <li>▪ parties that are unwilling to mediate</li> <li>▪ court ordered family matters</li> <li>▪ Harassment Act matters</li> <li>▪ domestic violence.</li> </ul>   | <p>it is generally <b>not</b> suitable for mediation.</p> <p> If aid is sought for matters on this list, Grants Officers have the discretion to grant aid if the provider can demonstrate why the matter is suitable for mediation.</p> |
| <p>the provider <b>cannot</b> demonstrate why the matter is suitable for mediation,</p>   | <p>the Grants Officer will refuse aid under s 23A(2)(a) <i>Private Mediation</i> and s7(1) <i>Proceedings ... civil matters</i>.<br/>End of process</p>  |

Step 2. The Grants Officer determines if there is a reasonable likelihood that the dispute, or part of the dispute, will be resolved by the private mediation.



The Grants Officer must be able to identify what aspect of the dispute makes it reasonably likely to be resolved by mediation.

| <b>If ...</b>  | <b>then....</b>   |
|--|---|
| the provider can demonstrate that it is reasonable to expect that all or part of the dispute will be resolved by the private mediation | the 'reasonable likelihood' test in s23(2)(b) will have been satisfied.<br><br>The Grants Officer will grant aid subject to the remaining eligibility criteria being met. |
| there are some issues that are not likely to be resolved by mediation  | the Grants Officer will assess the impact of this on the overall likelihood of resolution of part or all of the dispute.  |

Step 3. Where the issue has not been resolved by mediation.

| <b>If ...</b>   | <b>then....</b>  |
|---|--|
| the matter is not resolved by private mediation   | the legally aided person may instruct the provider to seek to amend their grant to pursue other resolution options   |
| the provider requests an amendment  | the Grants Officer will need: <ul style="list-style-type: none"> <li>▪ details of the outcome of the mediation</li> <li>▪ details of any offers that were made at the mediation and the reasons why these were not accepted</li> </ul> |
| the provider can demonstrate that: <ul style="list-style-type: none"> <li>▪ no offers were made to resolve the issue or</li> <li>▪ they had reasonable grounds for rejecting any offers that were made</li> </ul> | the Grants Officer may grant the amendment to pursue other resolution options.   |

Step 4. When an invoice is received.

| <b>If ...</b>                            | <b>then....</b>  |
|--|--|
| the provider submits a claim for payment | the provider will need to send: <ul style="list-style-type: none"> <li>▪ an outline of the outcome of the mediation</li> </ul> <p><b>OR</b></p> <ul style="list-style-type: none"> <li>▪ a copy of any agreement, or agreed statement or principles from the mediation</li> </ul> <p>End of process.</p> |

# Policy on Legal Aid Entitlement for Inmates at Disciplinary Hearings

## Introduction

The Court of Appeal has ruled in favour of a case that enables inmates to be represented by a lawyer at prison disciplinary hearing. The purpose of this policy is to establish guidelines that provide direction to staff in assessing the criteria for eligibility and payment details for legal aid

## Procedures

### Criteria for eligibility

1. The criteria for assessing whether an inmate is eligible for civil legal aid are:
  - determined by section 9 of the Act
  - determined by section 7 (1)(e)(v) that provides for any case where the Agency considers that the case is one that requires legal representation (having regard to the nature of the proceedings and to the applicant's personal interest) and considers that the applicant would suffer substantial hardship if aid were not granted

### Distinction between penalties imposed by Superintendent and Visiting Judge

2. The penalties that can be charged under the Penal Institutions Act are as follows:

| Penalty   | By Superintendent      | By Visiting Judge                               |
|---|------------------------|---|
| Forfeiture or postponement of any privilege for up to | 28 days                | 3 months  |
| Forfeiture of earnings for up to                      | 7 days                 | 3 months  |
| Confinement in a cell for up to                       | 7 days                 | 15 days   |
| Forfeiture of an unauthorised item                    | no authority to impose | if the visiting Judge is a District Court Judge |

**Note:** the Sentencing Act 2002 has removed the ability of Superintendents and Visiting Judges to postpone prisoners' final release date.

### Granting Aid

3. Consideration will need to be given to whether:
  - the inmate has the capacity to represent him/herself
  - any points of law are likely to arise
  - any procedural issues that might arise in the course of the hearing
  - the inmate will suffer substantial hardship if aid is not granted.
4. Substantial hardship should be taken to mean that the penalty represents a serious disadvantage or causes serious deprivation. A penalty of postponement of release date will qualify under the substantial hardship test.

5. In all other cases the inmate will need to make an argument that the imposition of any other penalty would cause them to suffer substantial hardship.
6. The Grants Officer must weigh up the reasons set out in the accompanying lawyer's letter about the potential impact of the penalty and any other details provided about procedural issues, such as the complicated nature of evidence and points of law.

### **Payment Details**

7. Legal aid is to be paid at the Guideline Hourly Rate for Proceedings Category One.
8. Consideration may be given to additional travelling time if the prison is outside the lawyer's usual district.
9. If a specialist report is required the lawyer will need to seek approval from the Agency.

| <b>Action by Listed Provider</b>                              | <b>Standard Rate</b> |
|---|----------------------|
| Preparation, including visits to prison and all disbursements | up to 2 hours @ GHR  |
| Hearing time, including the visit to prison                   | up to 1 hour @ GHR   |

# Legal Aid for Prisoners' and Victims' Claims Proceedings

## Introduction

1. The Prisoners' and Victims' Claims Act 2005 ("the PVC Act") came into force on 4 June 2005. It regulates the awarding of compensation to prisoners for breaches of their rights.
2. The PVC Act also provides a regime whereby victims of compensated prisoners can claim for damages, payment of which would come out of the prisoners' compensation awarded.

## Eligibility

### Proceedings Type

1. The list of civil proceedings in s7 for which legal aid may be granted has been amended to include victims' claims proceedings. See s7(1)(q) of the Legal Services Act 2000.
2. The Tribunal referred to in s7(1)(q) is a Victims' Special Claims Tribunal, which for legal aid purposes is an FC1 forum.
3. Parties to such proceedings may include the offender who has been awarded prisoners' compensation as well as the victim(s) who are claiming damages against the offender.
4. The proceedings will be determined on the papers, that is by written submissions only, unless the Tribunal is satisfied that there are exceptional circumstances and orders a hearing.

### Financial Eligibility

1. The effect of s9(8) of the Act is that initial aid applications in respect of victims' claims proceedings are exempted from the following financial eligibility tests:
  - The s9(2) 'income and disposable capital' test;
  - The s9(4)(a) 'full financial disclosure' test; and
  - The s9(4)(b) 'prescribed repayment amount exceeds likely cost' test.
2. This means that the applicants for legal aid are not required to fill in the Financial Statement in Form 6.

### Other Eligibility Criteria

1. The following eligibility criteria remain in force and should be applied as described above in this part of the manual:
  - The applicant is a natural person or a trustee corporation that applies for legal aid as a representative - s 9(1);
  - The applicant has reasonable grounds for taking or defending the proceedings or being a party to the proceedings - s 9(3);
  - The prospects of success are sufficient to justify the grant of aid - s 9(4)(d)(i);
  - The grant is justified with regards to the nature of the proceedings and the applicants' interest in them in relation to the likely cost of proceedings - s 9(4)(d)(ii);

- There are no other factors making a grant of aid unreasonable or undesirable - s 9(4)(d)(iii);
- The applicant is not involved in a representative, fiduciary, or official capacity - s 10(3); and
- The applicant does not have indemnification or insurance in respect of the legal costs of bringing the proceedings - s 11.

## Conditions on the Grant

1. The effect of s15(5)(a) of the Act is that the following grant conditions **cannot** be imposed on an initial grant of aid for victims' claims proceedings:
  - An interim repayment (under s15(1)); and
  - A charge to secure an interim repayment, final repayment or both (under s15(3))
  - Registration of a caveat (under s 15(4)).
2. This does **not** apply to repayment from proceeds of proceedings under s15(2).

## Setting the Maximum Grant

1. All grants are to be maximum grants under s20 – see part 7 **Set Maximum Grant** in this manual.
2. Regulation 15 of the Legal Services Regulations 2000 prescribes the amount of legal aid to be granted for victims' claims proceedings.
3. The effect of s 20(4) and reg 15 is that the initial maximum grant of aid for victims' claims proceedings **must** be:
  - Four hours @ GHR for written submissions; and
  - Two hours' preparation plus actual hearing time if the Tribunal agrees to hear oral submissions.

## Amendment to Maximum Grant

1. Section 24 of the Legal Services Act incorporates specific provisions for amending maximum grants for victims' claims proceedings.
2. The effect of s 24(4) is that:
  - The s 9(2) 'income and disposable capital' tests are reinstated at the amendment stage; and
  - An amendment can only be approved if this test is satisfied.
3. The effect of s 24(5) is that:
  - The s 9(4)(a) 'full financial disclosure' and s 9(4)(b) 'the prescribed repayment amount exceeds likely cost' tests are reinstated at the amendment stage; and
  - An amendment may be declined if the applicant fails either test.
4. Note that an amendment application in respect of victims' claims proceedings may be assessed against other relevant criteria as normal, eg prospects of success in terms of s 9(4)(d)(i), timing of the amendment application in terms of s 24(1) and (2) etc.
5. Since s 20(4) and reg 15 say that "every grant of legal aid" in respect of victims' claims proceedings must be a maximum grant in the prescribed amount, any amendments to such a grant will have to be in that amount as well. See 'Setting the Maximum Grant

above for the prescribed amount. Note that while the amendment amount is prescribed, there is no limit on the number of amendments that may be requested.

### **Conditions on amendment to maximum grant**

1. The effect of s 15(5)(b) is that the full range of grant conditions may be considered in respect of any amendment to a grant of aid for victims' claims proceedings. This includes:
  - a s 15(1) interim repayment
  - a s 15(3) charge as security
  - a s 15(4) registration of a caveat.

### **Appeals**

1. Parties to victims' claim proceedings may appeal to the High Court on questions of law. Such appeals do not qualify as victims' claims proceedings for legal aid purposes, as they are not "proceedings before a [Victims' Special Claims] Tribunal" as specified in s 7(1)(q).
2. Any aid applications concerning such appeals should be assessed against the usual criteria for appellate aid, not the special statutory provisions that apply to victims' claims proceedings – see s9(4)(e) of the Act.

### **Legal aid for LARP reviews**

Civil legal aid is available for a review by the Legal Aid Review Pane (LARP). Please refer to 'Legal aid for LARP reviews' in **Part 18 Reconsideration and review**.

# Civil Appeals to the Supreme Court

## Introduction

This is an interim policy which will be reviewed once the practice of the Supreme Court is established. A final policy will be confirmed when this review has been completed.

## Background

1. The Supreme Court Act 2003 abolishes the right of appeal to the Judicial Committee of the Privy Council and establishes a final court of appeal in New Zealand. The Court will sit from 1 July 2004, hearing appeals of cases finalised in the Court Of Appeal from 1 January 2004.
2. Appeals to the Supreme Court will only be heard with the Court's leave and only decisions of the Court of Appeal can be appealed unless there are exceptional circumstances.
3. Under the Supreme Court Act, the Agency assumes full responsibility for granting legal aid for appeals to the Supreme Court. Previously the Attorney General made the initial decision as to whether legal aid should be granted for cases going to the Privy Council and the Agency assessed financial eligibility and how much should be paid.

## Procedures

### Application for Leave to Appeal

1. Applications for Supreme Court family/civil legal aid are to be made at the Wellington Legal Aid Office. Applications received at other Legal Aid Offices will be forwarded to the Wellington Legal Aid Office.
2. A new application for legal aid is to be made at the time an appellant or counsel applies for leave to appeal to the Supreme Court. The application must be on Form 6 *Application Civil/Family Legal Aid* outlining the grounds of the appeal.
3. If the forms are returned incomplete or without sufficient information regarding the grounds for the appeal, the provider will be informed in writing that additional information is required in order to assess the application.
4. On receipt of the completed forms, the Grants Officer will assess the application against the relevant statutory criteria set out in section 9 of the Legal Services Act 2000. Refer to **Eligibility for civil and family legal aid** above.
5. Section 9(4)(d)(i) covering prospects of success does not apply to appeals. However, section 9(4)(e) allows the Agency to refuse legal aid if it considers that for any reason the grant of aid or further aid is not justified. This involves a consideration of the wider merits of the case. For example, although there may be reasonable grounds for taking or defending the action, the applicant's interest in the matter may not justify the likely cost of the proceedings.
6. The Grants Officer will assess the applicant's disposable income and disposable capital according to the regulations to the Act. See **Determine whether the applicant is financially eligible** above for the correct procedure.
7. When evaluating the application against the statutory criteria, the decision of the Court of Appeal will be considered. In the case of appeals from other courts, the information

in the trial file may be reviewed. Note that the Supreme Court must be satisfied that there are exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court before leave to appeal from courts other than the Court of Appeal will be granted.

8. Given that this is an interim process, the Agency will adopt a cautious approach to declining aid for leave to appeal until such time as guidelines can be established on the basis of the Supreme Court's decisions on leave. Therefore, Grants Officers intending to decline legal aid for the preparation for leave to appeal must consult a specialist adviser for a recommendation.
9. If the specialist adviser recommends that the application be declined, the Grants Officer will advise the applicant and the provider in writing of the reasons for the decision and of the options for reconsideration or review.
10. Subject to the eligibility criteria being met, aid is to be granted to cover the preparation of the Notice of Application for Leave to Appeal and the written submissions in support of the application.

### **Confirm provider**

In general, assignment will be to the preferred counsel nominated by the applicant in Form 6. However, the provider must be listed with the Agency and have the appropriate level of experience. That is, providers may only represent legally aided persons in matters for which they hold a current listing approval and be litigation level 2 or above (i.e. have 4 years or more litigation experience).

### **Further aid for substantive appeal**

1. If the Supreme Court grants leave to appeal, the grant will be amended to cover the substantive appeal.
2. The provider is to submit a Form 9 *Application for Amendment to Grant* seeking approval for further preparation, an appearance and any disbursements. The application must also include a description of the nature of the preparation to be carried out. This form is to be returned with the Form 4 *Tax Invoice* for the preparation of the notice of application.
3. If more than the standard rate for preparation is requested, (see maximum guideline rates for proceedings type) the provider is also required to submit a covering letter advising of the reasons for the estimate in excess of the guideline rates.

### **Legal aid for opposing an application**

1. Supreme Court procedure requires that the applicant for leave to appeal file written submissions in support of the application. On receipt of the applicant's submissions, the respondent in the proposed appeal is required to file written submissions of 5 pages maximum in opposition to the applicant's submissions.
2. The respondent's submissions must include the grounds for opposing the appeal as well as notice of any proposed cross-appeal and the points to be raised in such a cross-appeal.
3. The respondent may apply for legal aid to prepare the submissions in opposition and any cross-appeal. A new application must be made at the Wellington office on Form 6 *Application Civil/Family Legal Aid* outlining the points in opposition and the grounds of any cross-appeal. The respondent's application is then to be processed and evaluated as outlined above and in proceedings step 2.

## Legal aid for parole proceedings

### Policy

The Agency will grant civil legal aid for Parole Board matters excluded under section 6 of the Legal Services Act 2000.

### Legislation

A decision about whether a parole proceeding is eligible under s 7(1)(e)(v) requires the exercise of discretion and has three steps. The Grants Officer needs to establish whether:

- it is an eligible matter in an eligible forum, and
- it is a case that 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.

### Steps

Step 1. The Grants Officer determines if the parole matter is eligible for civil legal aid.

| If...   | then...   |
|---|---|
| <p>the parole matter is to be heard by the Board or a court, and involves:</p> <ul style="list-style-type: none"> <li>▪ Conditions on release at statutory release date (ss 17–19 Parole Board Act 2002)</li> <li>▪ Parole (ss 20-26, 28-32 Parole Act 2002)</li> <li>▪ Residential Restrictions (ss 33-40 Parole Act 2002)</li> <li>▪ Compassionate release (s 41 Parole Act 2002)</li> <li>▪ Review of decision on type of hearing (s 46 Parole Act 2002)</li> <li>▪ Variation or discharge of conditions (ss 56-58 Parole Act 2002)</li> <li>▪ Review of certain decisions (ss 67, 107S Parole Act 2002)</li> <li>▪ Review of pre-sentence detention record (s 92(2) Parole Act 2002)</li> <li>▪ Appeal from review of pre-sentence detention record (s 92(4) Parole Act 2002)</li> <li>▪ Variation or discharge of non-association order (s 100(3) Parole Act 2002)</li> <li>▪ Conditions on release at final release date (s 104 Parole Act 2002)</li> <li>▪ Special conditions on extended supervision order (s 107K Parole Act 2002)</li> <li>▪ Variation or discharge of conditions on extended supervision order (s 107O Parole Act 2002)</li> </ul> | <p>civil legal aid is available subject to the remaining eligibility criteria being met.</p> <p>Go to Step 2 <i>Requires representation</i></p> |

| If...   | then...   |
|---|---|
| <p>the matter is to be heard by the Parole Board and is a:</p> <ul style="list-style-type: none"> <li>▪ Postponement order (s 27 Parole Act 2002)</li> <li>▪ Recall (breach of parole) (ss 59-66A Parole Act 2002)</li> <li>▪ Non-release order (s 107 Parole Act 2002).</li> </ul>   | <p><i>criminal</i> legal aid is available under s 6(c) of the Act.</p> <p>Go to Part 5 <i>Is it a proceeding under the Parole Act 2002?</i></p> |
| <p>the parole matter is to be heard in the High Court or the Court of Appeal and is:</p> <ul style="list-style-type: none"> <li>▪ an application for an extended supervision order under ss 107F-107I, 107M, 107N of the Parole Act 2002.</li> <li>▪ an appeal from certain decisions of the Parole Board under ss 68-70 of the Parole Act 2002.</li> <li>▪ an appeal from the sentencing Court re extended supervision under s 107R of the Parole Act 2002.</li> </ul> |   |
| <p>the parole matter is not listed above,</p>   | <p>the Grants Officer may request a recommendation from a Specialist Adviser.</p>   |

Step 2. The Grants Officer determines whether the nature of the parole proceedings requires legal representation



In determining this, the Grants Officer takes into account:

- the nature of the proceedings, and
- the applicant's personal interest in the proceedings.


| Consider  | Guidance   |
|---|--|
| <p>Whether the nature of the proceedings:</p> <ul style="list-style-type: none"> <li>▪ involve the preparation and filing of a written application and supporting affidavits,</li> <li>▪ require the applicant to appear before the Parole Board in a formal hearing,</li> <li>▪ require the applicant to have the ability to access and marshal relevant information to prepare an application, affidavits and any other documents.</li> <li>▪ are relatively informal and the applicant is capable of self-representation.</li> </ul> | <p>Where one or a combination of these factors is present, the 'requires legal representation' ground will have been satisfied.</p> <p>If this ground can not be satisfied, the Grants Officer may refuse aid under s 7(1)(e)(v).</p> <p>The applicant and provider will be advised of the decision and the reasons for it.</p> <p>End of process.</p> |
| <p>Whether the Parole Act 2002 allows representation by counsel at an attended hearing – see ss 49(3)-(4) and 50A of the</p>  | <p>In view of the documentary requirements and the formal nature of these hearings, the 'requires legal representation' ground would</p>   |

| Consider   | Guidance  |
|--|---|
| <p>Parole Act.</p>   | <p>usually be satisfied. Such hearings include:</p> <ul style="list-style-type: none"> <li>▪ Conditions on release at statutory release date</li> <li>▪ Parole</li> <li>▪ Home detention</li> <li>▪ Conditions on release at final release date</li> </ul> <p>If this ground can not be satisfied, the Grants Officer may refuse aid under s 7(1)(e)(v).</p> <p>The applicant and provider will be advised of the decision and the reasons for it.</p> <p>End of process.</p> |
| <p>The ‘applicant’s personal interest’. Relevant factors here may include:</p> <ul style="list-style-type: none"> <li>▪ For Home Detention hearings: <ul style="list-style-type: none"> <li>– the nature and length of any alternative custodial sentence</li> <li>– in view of the custodial sentence, what would the potential consequences be if the applicant was not represented</li> </ul> </li> <li>▪ The potential impact on the applicant and the applicant’s family if for example, the Parole Board declines an application for compassionate release.</li> <li>▪ The possible consequences for the applicant of the Parole Board declining to review or vary a condition on release or a non-association order. For example, how would a condition on release would affect the applicant’s ability to obtain employment.</li> <li>▪ In general, where a successful resolution of the parole matter for the applicant would have a real impact on them</li> </ul> | <p>Where the Grants Officer has established that refusing aid would have a real impact on the applicant, the ‘applicant’s personal interest’ ground will have been satisfied.</p> <p>If this ground can not be satisfied, the Grants Officer may refuse aid under s 7(1)(e)(v).</p> <p>The applicant and provider will be advised of the decision and the reasons for it.</p> <p>End of process.</p>  |
| <p>If both the ‘nature of the proceedings’ and the ‘applicant’s personal interest’ grounds have been satisfied, go to step 3 <i>Substantial hardship</i></p>   |   |

Step 3. The Grants Officer determines whether the applicant would suffer substantial hardship if aid were not granted



See '*Substantial hardship – guidance*' above



| Consider  | Guidance  |
|---|---|
| <p>Whether or not the applicant can pay for other specific and necessary expenses, costs and debts if they have to pay for their own legal representation.</p> <p> Note that substantial hardship is not restricted to financial factors.</p>                        | <p>If the Grants Officer is considering a refusal of aid on financial grounds, they will:</p> <ul style="list-style-type: none"> <li>▪ assess the financial impact on the applicant of having to pay privately for representation at a civil Parole Board hearing.</li> <li>▪ Consider whether the applicant has already paid privately for representation at the original criminal proceedings.</li> </ul> |
| <p>Whether a refusal of aid would:</p> <ul style="list-style-type: none"> <li>▪ result in a long term and major setback for the applicant; and</li> <li>▪ would result in lack of access to legal advice and representation; and</li> <li>▪ this lack of access would adversely affect the outcome of parole proceedings for the applicant</li> </ul> | <p>For example, ongoing imprisonment as a result of decisions against the applicant in parole, home detention or compassionate release hearings and the consequent impact on the applicant and the applicant's family.</p>  |
| <p>If all the above factors are present, then the applicant may suffer substantial hardship if aid is not granted.</p> <p>Go to step 4 <i>Remaining mandatory eligibility criteria</i>.</p>   |   |

Step 4. Assess application against the remaining mandatory eligibility criteria in s 9 and s 11.

| Consider  | Guidance   |
|---|--|
| <p>The s 9(3) 'reasonable grounds' test under which the applicant must be able to show that they have reasonable grounds for:</p> <ul style="list-style-type: none"> <li>▪ taking or defending the proceedings or</li> <li>▪ being a party to the proceedings.</li> </ul> | <p>In parole hearings, the applicant will generally have a significant personal interest in the outcome of the proceedings sufficient to justify pursuing the matter.</p> <p>In general, this test will be satisfied.</p>                              |
| <p>The s 9(1)(a) 'natural person' and s 9(1)(b) 'trustee corporation' test.</p>   | <p>Grants Officers will assume that:</p> <ul style="list-style-type: none"> <li>▪ the aid is for the applicant</li> <li>▪ the applicant is an individual natural (living) person and</li> <li>▪ the applicant is an involved and interested</li> </ul> |

| Consider  | Guidance  |
|---|---|
|   | party in the legal matter.  |
| The s 11 'legal insurance or indemnification' test.   | See ' <i>Does the applicant have insurance or indemnification?</i> ' above. |
| The s 9(2) income and disposable capital tests  | See ' <i>Is the applicant financially eligible?</i> ' above.                |
| If the mandatory eligibility criteria have been satisfied, go to step 5 <i>Discretionary eligibility criteria</i> |   |

Step 5. The Grants Officer assesses the application against the discretionary eligibility criteria.

| Consider  | Guidance   |
|---|--|
| The s 9(4)(d)(i) <i>prospects of success</i> ' test under which the Agency determines whether the applicant has sufficient prospects of success in the proceedings they are taking or defending.  | See ' <i>Does the non schedule 4 proceeding have sufficient prospects of success?</i> ' above.<br> The Grants Officer will also consider whether it could be a breach of natural justice (under s 27(1) of the New Zealand Bill of Rights Act 1990) if the applicant is not granted legal aid for representation at a parole hearing. |
| The s 9(4)(d)(iii) 'unreasonable or undesirable' test.  | See ' <i>Refusal under section 9(4)(d)(iii)</i> ' above.   |
| The s 9(4)(b) 'prescribed repayment amount exceeds likely cost' test.   | See ' <i>Is the repayment amount greater than the likely cost of proceedings?</i> ' above.   |
| The s 9(4)(a) 'financial disclosure' test.  | See ' <i>Insufficient information</i> ' above.   |
|  When applying these discretionary tests, the Grants Officer will exercise their discretion in favour of the applicant where there is any doubt.<br>Go to step 6 <i>Determine whether to grant aid</i> |  |

Step 6. The Grants Officer decides whether to grant civil legal aid for the parole hearing

| If...   | then...  |
|---|--|
| the Grants Officer has established that: <ul style="list-style-type: none"> <li>▪ the parole matter is an eligible matter in an eligible forum; and</li> <li>▪ the parole matter is a case that requires legal representation (having regard to the nature of the proceedings and the applicant's personal interest);and</li> </ul> | aid will be granted under s 7(1)(e)(v).<br>End of process. |

| If...   | then...  |
|---|--|
| <ul style="list-style-type: none"> <li>▪ the applicant would suffer substantial hardship if aid were not granted; and</li> <li>▪ the application meets the mandatory eligibility criteria,</li> </ul> |  |
| the Grants Officer is considering refusing aid,   | <p>they will discuss this with their Team Leader.</p> <p>They may also request a recommendation from a Specialist Adviser.</p> |

## Assignment

Criminal providers must have a PC2 or higher categorisation to undertake civil parole matters. A separate civil listing is not required.

Civil providers must hold a Civil – general listing to undertake civil parole matters. Providers holding only a civil – general listing may not appear in *criminal* parole matters.

Civil parole matters come under the Forum One category for civil proceedings.

Providers holding other non-criminal listings (such as Family, Refugee, Waitangi or Mental Health) may not appear in civil parole hearings.

## Home detention – transitional arrangements

### Policy

From 1 October 2007, the following Acts will come into force:

- Sentencing Amendment Act 2007
- Parole Amendment Act 2007

The effect of these Acts is to establish a new court ordered regime for home detention applications. From the commencement date, home detention will become a new sentencing option under the Sentencing Amendment Act 2007. This means that applications for home detention will be treated as criminal proceedings.

However, there are exceptions as a result of the transitional arrangements between Parole Board directed home detention and court ordered home detention.

### Steps

Step 1. Determine which home detention regime applies

| If...   | then...   |
|---|---|
| an application for a grant of legal aid for home detention is received <b>on</b> or <b>after</b> the commencement date, | <p>the court ordered home detention regime established by the amendment Acts applies.</p> <p>Go to step 2 <i>Exceptions</i></p> |
| an application for a grant of legal aid for home detention is received <b>before</b> the                                | this will be treated as a civil proceeding under the pre-1 October Parole Board   |

| If...              | then...   |
|--------------------|---|
| commencement date, | directed home detention regime.<br>Go to step 2 <i>Exceptions</i> |

## Step 2. Determine if an exception applies.

| If...   | then...  |
|---|--|
| the Court sentences an offender to home detention where an offender is convicted of an offence committed <b>before</b> the commencement of the Sentencing Amendment Act 2007,   | the new court ordered home detention regime applies: <ul style="list-style-type: none"> <li>▪ a new application for legal aid is required</li> <li>▪ this application is to be treated as a criminal matter.</li> </ul> Go to part 5 ' <i>Is it a proceeding under the Sentencing Amendment Act 2007?</i> '<br>End of process. |
| the Parole Board directs that a sentence of imprisonment be served by way of home detention <b>after</b> the commencement of the Parole Amendment Act 2007 because an application under the previous regime was pending,  | any application for legal aid is to be treated as a civil proceeding under the pre-1 October Parole Board directed home detention regime.<br>Go to Step 1 of the ' <i>Legal aid for parole proceedings</i> ' policy above.<br>End of process.  |
| the Agency receives an application for legal aid for Parole Board directed home detention: <ul style="list-style-type: none"> <li>▪ <b>before</b> the commencement date, but</li> <li>▪ the application is processed <b>after</b> the commencement date,</li> </ul> | this is to be treated as a civil proceeding under the pre-1 October Parole Board directed home detention regime.<br>Go to Step 1 of the ' <i>Legal aid for parole proceedings</i> ' policy above.<br>End of process.   |