



Brave new world

2012: the year specialist family law practitioners are facing a fundamentally altered legal landscape.

Multiple intersecting reform processes are advancing rapidly. Current consultation on reform is so frequent and short notice that many comment on its “revolving door in perpetual spinning motion” quality.

The tripartite axis of reform (currently) is the Family Court Review, the centralisation of the Auckland regional courts, and fixed fees for legal aid (and associated reforms).

- ▶ **Family Court Review:** 2011 saw Family Files examine the Government’s proposed Family Court restructuring. Consultation was completed on 29 February 2012. We await the next stage.
- ▶ February 2012 saw the introduction of **centralisation (restructuring) of the Auckland regional courts**. Auckland practitioners have been and still are contending with that reform.
- ▶ **Family legal aid fixed fees:** July 2012 is the roll-out month. They are the hub of a host of other legal aid-related changes, which include “adjusting” eligibility for legal aid.

This triple-pronged reform promises, and is delivering, profound structural change on an expansive scale. Its substantive scope and minimal time frame are overwhelming for those of us at the coalface of family law practice.

This article will provide an ‘in a nutshell’ summary of one portion of this tripartite restructuring. It profiles changes to legal aid, given the rapid inexorable transition to fixed low fees – six months from public inception to execution in July 2012.

Back to the future: legal aid eligibility reviewed

The Government will be changing eligibility for family legal aid.

Eligibility is fiscally determined. Current family legal aid income thresholds are \$22,366 a year for a single adult and \$50,934 for an adult with two dependents (clause 5 of the *Legal Services Regulations* 2011 establishes the maximum income level eligibility; disposable capital also factors into eligibility where appropriate to the applicant).

The Government has signaled that eligibility will be “adjusted” to improve the affordability and sustainability of legal aid. It is unclear what “adjusting” means.

A sustainability stimulus for reform is the fiscal impact of higher thresholds of income eligibility for legal aid (increased in 2006) with “an increased legal aid eligibility from 750,000 to approximately 1.2 million (a 60 per cent increase) ... since 2005” (“Legal Services Agency needs major overhaul, says Law Society”, *NZLawyer*, issue 125, 13 November 2009). Given this increase, presumably a lower income threshold is being considered.



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May 2012 is when the Government had stated it would announce the "adjustment" to a presumably lower threshold of eligibility, reducing the demand for legal aid and its cost.

Even if ineligible for legal aid, families will continue to require the involvement of the Family Court to resolve what cannot be self-resolved, when their families are impacted by separation, violence, mental illness and incapacity, and care and protection concerns. Access to competent legal advice will be compromised. Access to justice will inevitably be affected.

A statutory core purpose of legal aid is to assist "people who have insufficient means to pay for legal services to nonetheless have access to them" (section 3 of the *Legal Services Act 2000*). This will inevitably be compromised, should this occur.

Fixed fees family legal aid

July 2012 is the roll-out date for fixed fees.

The concept of fixed fees for legal aid is now well understood.

It is a fiscal funding model, where capped periods of time are allocated to the stages of a family law dispute. The fixed fee is calculated at a new low rate of \$105 per hour for the 80 - 95 per cent of matters which are categorised as "fixed fee" or "fixed fee plus" (Auckland District Law Society Inc (ADLS Inc) submissions on fixed fees, March 2012). Less time is available, on a fixed low fee, for matters bulk funded as "not complex".

The bulk of the Family Court's jurisdiction is classified as "legally not complex", with the only matters non-fixed fee and "legally complex" as of right being Hague Convention and Intellectual Disability proceedings. These will be funded at \$134 per hour. Five to 15 per cent of proceedings are anticipated to be funded in this way.

The New Zealand Law Society Family Law Section (FLS) and ADLS Inc Family Law Committee submissions on fixed fees in March 2012 note across the board substantial reductions in funded time for undertaking family law instructions. They further note this will impact the capacity of lawyers to represent clients and meet professional, ethical, and statutory obligations.

The FLS predicts a "major exodus" of family lawyers prepared to take on legal aid briefs come July, as legal aid providers struggle to reconcile the new fixed-fee model with professional obligations and their own business models. Should this occur, from July, there will be a decrease in the supply of lawyers available to those still eligible for legal representation on legal aid. This will inevitably further impact on access to justice for families.

Readers are invited to read more about the problems with fixed fees for family legal aid on the FLS and ADLS Inc websites. *NZLawyer* profiled this in "The complexities of family life" (issue 182, 20 April 2012).

What has changed since submissions have informed the fixed-fee review process? (As noted in "An overview of the fixed fee proposal" (*The Family Law Advocate*, April 2012).)

- *Mental Health matters*: will not be added to fixed fee status in July (currently a hiatus for six months).
- *Relationship property briefs*: remain classified as not legally complex and subject to fixed fees. Fees have been 'revised' to a small degree to recognise the complexity of these proceedings. The fee for a review of relationship property hearing has increased from \$430 to \$490, and the fee for section 21 agreements has increased to \$320.
- *Fixed fee and fixed fee plus*: revision of some fees/time allocations in legal substantive areas. Where fixed fees prove inadequate, an amendment to grant may be sought/granted. The Ministry is developing the amendment to grant policy to provide greater clarity and better guidance for providers and grants staff.
- *Efficiencies*: fixed-fee reductions for efficiencies will apply to repeat proceedings for care of children, guardianship, and maintenance proceedings. Multiple proceedings under different Acts attract the full fixed fee, as there are no efficiencies.

- *Repeatable activities*: there has been some recognition that repeatable activities will need to be paid the full fixed-fee allocation (without deductions for 'efficiencies'). Repeatable activities include preparation and hearing times for judicial conferences, formal proof hearings, round table meetings, settlement conferences (*Property (Relationships) Act 1976* only), interlocutory hearings, defended hearings, review of case plans (CYPF only), and instructing agents.
- *Additional factors*: some recognition has been given to intrinsic factors such as mental health, disability, and multiple parties/agency involvements in proceedings (a non-exclusive list of "additional factors"), which are present throughout proceedings and do not go away and invariably greatly increase the time and expense of proceedings. The fixed fee for "additional factors" may be claimed at the end of each stage. Where there are multiple proceedings, the fixed fee can only be claimed for one proceeding.
- *Non-lawyer and agent fees*: the lead provider is eligible for a fee to instruct an agent and may continue to allocate a portion of the fixed fee to the agent for the relevant activity as agreed between the agent and lead provider. Non-lawyers fees are incorporated into the provider's fixed fee. If the fixed fee is inadequate, the lead provider can apply for an amendment to grant.
- *Reassignment*: a new provider may claim for activities completed from the point of reassignment. Reassignment policy development is ongoing by the Ministry.
- *Mediation conferences and round table meetings*: there is a small increase in fee for preparation and a new fee for round table meetings.
- *Hearing fees*: Unchanged, with the exception of relationship property, where the rate is set at the higher rate of \$60 per half hour, rather than \$53.

Family Court reforms 2012

Parallel to fixed fees, there's been a review of the legal aid disbursements policy, legal aid provider contracts are being reviewed and redrafted, and practice standards and a plethora of other associated legal aid matters are being reformed contemporaneously with fixed fees.

All this at the same time as centralisation and the Family Court Review.

These multiple reform processes, with short notice overlapping consultation deadlines, have the effect of leaving family law professionals struggling to make their voices heard as those who have the intimate knowledge of working at the coalface in family law. That may be an unintended impact of the reforms.

There is no doubt that the New Zealand Family Court is the focus of fast-paced simultaneous reform on multiple fronts at a core level. These multiple reforms appear to be a unique reform agenda in the justice context. The human costs of this have yet to be assessed. It is a 'new world' that the New Zealand Family Court will shortly face. ●



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