# New Zealand Law Society

## LEGAL ASSISTANCE (SUSTAINABILITY) AMENDMENT BILL

### Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Legal Assistance (Sustainability) Amendment Bill (Bill).

2. The submission is structured as follows:
   (i) General comments;
   (ii) Extension of legal aid regime to Court-appointed lawyers;
   (iii) Recovery of costs of Court-appointed lawyers;
   (iv) Eligibility for legal aid, and the user charge;
   (v) Administrative matters; and
   (vi) A clause by clause analysis of the remaining clauses on which the Law Society wishes to comment.

### General Comments

***Considerations other than fiscal imperatives***

3. The Law Society recognises that one of the main objects of the Bill is to ensure the fiscal sustainability of New Zealand's legal aid system.

4. However, in order to be sustainable a legal aid system must also:
   (i) Ensure that access to justice is available to all, including those who cannot afford to pay for legal services themselves;
   (ii) Protect vulnerable people, including all children who find themselves the subject of family disputes and/or Family Court proceedings; and
   (iii) Ensure the retention of quality lawyers providing high quality legal services, whether in their role of providing services to parties to proceedings, or to children in their role as lawyer for children and/or lawyer to assist the Court, and in their role as other Court-appointed counsel.

***Impact of review of Family Court***

5. The Family Court is under review. A consultation paper was released on 20 September 2011. It is likely that reforms which flow from the review will have a fiscal impact on the Family Court system, and on the cost of legal aid. It is important to ensure that any reforms or

amendments form part of an overarching strategy rather than a piecemeal approach in response to fiscal imperatives.

6. Some of the costs savings which the Bill seeks to achieve could be achieved in other ways such as consideration of the timing of appointment of lawyer for the child, and refinement of the role of lawyer for the child.

7. The Bill also appears to seek to deter parents from resorting to the Family Court in circumstances which may not be in accordance with the principles enunciated in sections 4 and 5 of the Care of Children Act 2004. Where parents are separated, it is often not realistic to expect consultation and co-operation, particularly in the early stages of a separation. It is in the interests of the children that there is recourse to the Courts if agreement cannot be reached.

8. The Minister has publicly expressed a commitment to ensure that any reforms do not adversely impact upon "vulnerable people". No change has been made to the provisions relating to recovery of costs for lawyers appointed under the Children, Young Persons, and Their Families Act 1989 on the basis (presumably) that the appointment of such lawyers is mandatory under that legislation and on the basis that children in the public law arena (as covered by the Children, Young Persons, and Their Families Act) fall squarely within the Government's definition of "vulnerable children". It is not clear why children caught up in proceedings under the Care of Children Act or in family breakdowns are not similarly perceived as "vulnerable children".

***Recommendation***

9. The Law Society recommends that any decisions as to the manner in which lawyers for children are funded, or would otherwise be affected by the Bill, and in particular the proposed changes in Part 2 of the Bill, be deferred until after the Family Court review has been completed.

***Introduction of changes by Order in Council***

10. Clause 9 provides for a new section 13A which enables amendment to Schedules 1A or 2 by Order in Council. The Law Society opposes placing the proceedings for which civil legal aid is available in a schedule, which may be amended by Order in Council. Legal aid is paid for by funds voted by Parliament, and it is for Parliament, not the government of the day, to determine what proceedings will be funded by legal aid. It would be possible (but constitutionally wrong) for the government to exclude proceedings against itself by removing the availability of legal aid through an Order in Council.

***Recommendation***

11. The Law Society recommends that clause 9 is deleted and that the existing section 13A is retained.

**Extension of legal aid regime to Court-appointed lawyers**

***Extension of legal aid to cover lawyer for child, lawyer to assist Court and youth advocates***

12. The Bill brings appointments for lawyer for child, lawyer to assist the Court (whether under child legislation or under the Protection of Personal and Property Rights Act 1988), and youth advocates under the umbrella of legal aid. This raises the following issues:
    (i) The importance of the independence and separate role of Court-appointed lawyers, in contrast with lawyers acting for private clients (albeit where those services are paid for by the state).
    (ii) Extending legal aid to cover Court-appointed lawyers will mean that such lawyers must have a contract with the Ministry of Justice Legal Aid Services (LAS) and, presumably, therefore be subject to an LAS quality assurance framework such as has been implemented for legal aid providers.

***Need for separation of role of Court-appointed lawyers***

13. Lawyers appointed by the Court are independent of any parties to the proceedings. This is essential for justice to be done and to be seen to be done.

14. Currently lawyers appointed by the Court are paid by the government. But the current system where payment is administered by the Ministry of Justice as the department responsible for the Courts – rather than through LAS – provides a measure of independence and separation.

15. For example, lawyers acting for children in either Care of Children Act 2004 or Children, Young Persons, and Their Families Act 1989 proceedings often advocate a position that is not palatable to the parties to the proceedings (being, in most cases, the parents of the children). It is important in these circumstances that parties to the proceedings can be assured that the lawyers who represent their children are independent of the agency which may be funding one party to the proceedings.

***Proposal that Court-appointed lawyers be approved by the Secretary for Justice under section 77***

16. Part 2 of the Bill amends the various statutes which deal with the appointment of lawyers to act for children, to assist the Court, or as youth advocates. Clauses 25(2), 33, 38(4), 42(2), 46 and

51 propose that lawyers who are appointed to these positions be approved by the Secretary for Justice under section 77 of the Legal Services Act 2011.

17. The Law Society opposes the proposal that lawyers for children, lawyers to assist the Court and youth advocates be approved by the Secretary for Justice. The proposal fails to understand the role of these lawyers. Their role is to assist the Court to ensure:
    (i) In the case of lawyers for children, that the children's views are made known to the Court, and the children are represented in any proceedings.
    (ii) In the case of lawyers to assist the Court, that the Court is fully appraised of the matters on which the lawyer to assist is appointed.
    (iii) In the case of youth advocates, that children facing proceedings in the Youth Court are properly represented.

18. As all such appointments are made by the Court, in order to assist the Court, the criteria for appointment must be fixed by the Court. It would be an unconstitutional fetter on the jurisdiction of the Courts for the Ministry of Justice to determine the lawyers whom the Court may appoint either as lawyers for children, lawyers to assist the Court, or youth advocates.

19. If Parliament considers the criteria for appointment of lawyers for children, lawyers to assist the Court and youth advocates need to be fixed by legislation or regulation, that is a matter for Parliament. However, whether a lawyer satisfies the criteria or not must remain for determination by the Court, and not the Secretary for Justice.

***Extension of legal aid to cover Youth Advocates***

20. New Zealand is subject to a number of international conventions which make special provision for the representation of young persons in the criminal justice system. First and foremost, New Zealand is subject to the United Nations Convention on the Rights of the Child (CRC). Article 37 of the CRC provides that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. Article 40 requires that a child alleged as, or accused of, having infringed the criminal law must have legal or other appropriate assistance in the preparation and presentation of his or her defence. Article 40 also endorses the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.

21. The fundamental principles in the CRC are emphasised in the UN Standard Minimal Rules on the Administration of Juvenile Justice 1985 (the Beijing Rules) and the UN Rules for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines).

22. The Riyadh Guidelines, at paragraph 9, require specialised personnel at all levels in the youth justice system. Paragraph 58 also recommends that personnel be trained to respond to the special needs of young persons and should be familiar with programmes and referral possibilities for the diversion of young people from the justice system.

23. Rule 1.6 of the Beijing Rules requires that juvenile justice services must be systematically developed and coordinated with a view to developing and sustaining the competence of personnel involved in the services, including methods, approaches and attitudes. Rule 22 of the Beijing Rules also recommends that: *"Professional education, in-service training, refresher courses and other appropriate notice of instructions"* be utilised to *"establish and maintain the necessary professional competence of all personnel dealing with juvenile cases"*. The accompanying commentary recommends that a minimum training in law, sociology, psychology, criminology and behavioural science is required.

24. The specialist role of youth advocates is recognised in the youth justice provisions of the Children, Young Persons, and Their Families Act 1999. In particular, section 323(2) recognises that a youth advocate should be a person who is, "*by reasons of personality, cultural background, training and experience, suitability qualified to represent [a] child or young person*".

25. Since 1999, there has been a protocol in place which has governed appointment and review procedures for youth advocates. The protocol was first issued in April 1999 as a result of agreement between the New Zealand Law Society and the then Principal Youth Court Judge, Judge David Carruthers. A revised protocol, which came into force on 1 February 2007, was developed after consultation during 2006 between the Principal Youth Court Judge, the Administrative Youth Court Judges and the New Zealand Law Society.

26. The protocol sets out the procedure for appointment of youth advocates to a youth advocate list which is to be maintained by each Youth Court. In recognition of the specialist jurisdiction of the Youth Court, the panel consists of a senior youth advocate from the local Youth Court, a senior youth advocate not from the Youth Court from which the appointments are to be made and, wherever practicable, a community representative from an agency or organisation from within the area dealing with youth offenders, and the Registrar of the Court. The panel is required to consult closely with a local senior representative of Child, Youth and Family and also with a local representative from the Youth Aid section of the New Zealand Police. The recommendations of the panel are reviewed by the relevant Administrative Youth Court Judge and it is that Judge who makes the final decision as to inclusion on the list.

***Recommendation***

27. The Law Society recommends that any decisions as to the manner in which youth advocates are appointed, or would otherwise be affected by the Bill, be deferred until after the Ministry of Justice has consulted with the profession.

***Management by LAS***

28. Currently, appointments of Court-appointed counsel are managed solely by the Court. The appointment is made in each case by a Judge. The brief for the Court-appointed counsel is set by the Judge. Payment for services is managed by the Registry staff who manage the case itself and therefore have a working knowledge of the file.

29. Taking this role away from the Registry staff creates a risk that necessary attendances will not be paid for, or worse, not carried out. Without active involvement in a file it is often difficult to gauge when attendances were necessary. From time to time, the lawyer for child must attend to matters which it is not immediately apparent are necessary. This may be a result of the manner in which the parties (neither of whom may be legally aided) are driving the proceedings. It may be as a result of a judgement call by the lawyer as to what is needed in order to fulfil their role and best represent the child or children. Attendances can also be driven by the child or children themselves, who have particular issues that they need to have progressed on their behalf, even if they are not part of the pleadings issued by their parents.

30. It would not be in the interests of justice, nor the welfare and best interests of the children represented by lawyers, if lawyers have to justify to an external agency with no active involvement in a file why they completed various attendances, or why anticipated attendances are necessary.

31. The possibility that lawyer for child appointments may be subject to guideline fees also raises concerns. Lawyers for children have very little (if any) control over how a proceeding will be run by a parent. Lawyers for children cannot manage attendances to the same degree that counsel for a party may be able to. Guideline fees will simply result in numerous applications for extensions, which will be time-consuming and inefficient.

32. The current system, whereby requests for further funding are made to the Case Officer at the Registry, is a preferable process.

33. The cause of the significant increase in the costs of lawyer for the child in Care of Children Act cases is a separate and complex issue which will be considered in the Family Court Review.

The Law Society's Family Law Section has made a number of recommendations on a combination of legislative and administrative changes to address this concern to Ministry of Justice officials during the preparation stage of the Review. The recommended changes are expected to result in significant savings in the costs of lawyer for child. Importantly, the savings will be achieved without compromising the professionalism and effectiveness of the lawyer for child role, and without increasing the vulnerability of the children represented in these cases.

34. A large number of experienced and highly skilled lawyers for children, lawyers for subject people under the Protection of Personal and Property Rights Act 1988, and other Court-appointed counsel such as youth advocates, have chosen not to hold contracts to provide legal aid services. They have done so for reasons that do not reflect adversely on their competency, including policies of some of the firms for which these lawyers work and the fiscal demands on these lawyers' own practices.

35. It would be a disservice to the Family Court, the Youth Court and the justice system in general if these people were excluded from continuing to practice in their Court-appointed roles as a result of not holding contracts with the LAS.

***Quality assurance framework***

36. The Law Society supports a quality assurance framework for the appointment of lawyers for children, lawyers to assist the Court and youth advocates. However, there are already quality controls in place for Court-appointed counsel. The Law Society considers these are working satisfactorily and do not need to be changed. It also noted that a significant portion of the new quality assurance framework for legal aid providers has been based on the procedures already in place for Court-appointed counsel. All lawyers who are entitled to accept appointments from the Court have already been approved by both the New Zealand Law Society and the Ministry of Justice to accept the appointments.

37. For example, in order to be eligible to accept lawyer for child appointments, lawyers must have no less than five years' experience and must have completed the lawyer for child course. They are interviewed by a panel and deemed to be suitable or not. Such appointments are reviewed every three years.

38. Given that Court-appointed lawyers are already subject to regular review, the government can be assured that those currently on the list are only those whom the Courts have already deemed

to be appropriate appointments. There is therefore no need for these people to have to go through a re-approval process.

39. Extending the legal aid provisions and therefore also a quality assurance framework to Court-appointed lawyers is unnecessary and would act as a disincentive to skilled and experienced lawyers continuing in the role.

***Recommendations***

40. The Law Society recommends that:

(i) The legal aid regime not apply to Court-appointed lawyers, and that clauses 25(2), 33, 38(4), 42(2), 46 and 51 (and the transitional provisions contained in clauses 29, 35, 40, 43, 47 and 52) should be deleted.

(ii) Alternatively, if the recommendation that the legal aid regime not apply to Court-appointed lawyers is not accepted, it is recommended that there is a separate (and basic) contract for Court-appointed lawyers and that the legal aid quality assurance framework does not apply to these lawyers.

(iii) Lawyers who are available to take appointments from the Court are not required to be lead providers for legal aid.

**Recovery of Costs of Court-Appointed Counsel**

41. Clauses 26-27, 33 and 46 deal with the issue of contribution to the costs of Court-appointed counsel. The discussion below focuses on clauses 26-27.

42. Clause 26 amends section 131 of the Care of Children Act 2004 which provides for costs of Court-appointed counsel. This is a response to concerns that:

(i) The current discretion in section 131 is being too generously applied so that there is little or minimal recovery of costs incurred by the Crown.

(ii) There has been an exponential rise in costs of lawyers appointed to represent children (from $7.362m in the 2005/06 financial year to $23.172m in the 2009/10 year).

43. The Law Society supports the new requirement that the Court consider (in all cases) the appropriateness of parties contributing to the costs incurred by the Crown. (The present provision gives the Court discretion whether to consider contributions to costs in any case: section 131(4)).

44. There appears to be no reason why orders should not be able to be made against the Crown (as is proposed by clause 26(6)), if they are able to be made against private parties. There are cases

(including Children, Young Persons, and Their Families Act matters) where costs awards against the Crown are justified (and such costs awards have been made). There should also be consideration in these cases as to whether or not the Crown should make a contribution to lawyer for child's costs.

45. It would be desirable to provide for awards that have been made (but not paid) when fresh applications are brought, to be taken into account and for the Court to have the power to make an order for payment of security for costs. Consideration needs to be given to the extent to which the making of inter-party costs awards will be factored into decisions on whether the parties are also to be required to contribute to lawyer for the child costs (whether equally or unequally).

46. The definitions in proposed section 131A(6) (clause 27) raise the following issues:
    (a) The definition of "dependent child" fails to take into account the reality of shared care and may lead to arguments as to whether or not a child is "primarily the responsibility of the party". It may also protract disputes that may otherwise be able to be resolved on a shared care basis. The proposed reform of the Child Support legislation which alters the definition of shared care as from 2013 should be taken into account.
    (b) The focus of "serious hardship" on a party or dependent child does not take into account the fact that other people may be dependent on the party (for example spouses or partners, parents and adult disabled children). Dependency of other people should also be able to be taken into account in considering whether to decline an order under section 131A(1).

***Recommendations***

47. The Law Society recommends:
    (i) Clause 26(6) (which prevents orders being made against the Crown) be deleted.
    (ii) A subclause be added to clause 26 requiring the Court to take into account awards that have been made (but not paid) when fresh applications are brought.
    (iii) A subclause be added to clause 26 giving the Court the power to order payment of security for costs.
    (iv) A subclause be added to clause 26 addressing the extent to which inter-party costs awards will be factored into decisions on whether the parties are also to be required to contribute to lawyer for the child costs.
    (v) The proposed section 131A(6) definition of "dependent child" (clause 27) be amended to take into account shared care arrangements so that it reads: "(a) Whose care is substantially the responsibility of the party."

(vi) The proposed section 131A(6) definition of "serious hardship" (clause 27) be amended to take into account other people who may be dependent on the party so that it reads "Serious hardship, in relation to a party, a dependent child of a party, or any other person who is dependent on the party."

(vii) So far as relevant the same changes be made to clauses 33 and 46.

## Eligibility For Legal Aid And The User Charge

### *Effect of limiting legal aid in Family Court context*

48. Children, caregivers of children, parents, extended family members and all those who find themselves in the Family Court are entitled to the best advice and legal representation.

49. Many of these people will struggle to afford legal assistance as a result of the Bill. This increases the likelihood that children will be left vulnerable and in unsafe situations. For example, many Family Court proceedings regarding children involve applications by extended family (including grandparents, aunts and uncles, and extended whanau) who have had to take steps due to the children's parents being unable to provide adequate care. Many, if not most, of these people cannot afford legal services, but the applications they are making are necessary for the protection of children.

50. The Law Society opposes the repeal of section 10(6)(c) of the principal Act (clause 7(2)). At present the Commissioner must have regard to "the interests and welfare of any other person who may be affected by the outcome of the proceedings", in determining whether a grant of legal aid is justified. In family law matters, the interests of children are one of the primary reasons for bringing or defending proceedings. The repeal of this provision will mean that the Commissioner is not required to have regard to the interests of children.

51. In family law matters, a person often has no choice but to bring or defend proceedings. If one of the effects of the Bill will be to increase the number of self-represented litigants, then attention should be given to simplifying procedures in the Family Court, before restricting the availability of legal aid by increasing the means threshold.

### *Recommendations*

52. The Law Society recommends:

(i) that section 10(6)(c) not be repealed, or be amended so as to apply only in family law matters (clause 7(2)); and

(ii) that consideration be given to the consequences for the Family Court of an increased number of litigants in person.

***User charges***

53. The Law Society is not opposed in principle to the imposition of a user charge. However:

(i) The imposition of a $100 user charge for legal aid is too onerous, and will unduly restrict access to legal aid, and thus to justice for those who, potentially, need it most. The figure should be set at a lower level – $50 is considered to be a reasonable charge.

(ii) More consideration should be given to the proceedings which will attract a user charge. The proposed new section 18A(3)(a) (clause 10), which provides that a provider may decline to provide services until the user charge is paid, is unworkable where a provider is asked to issue urgent proceedings and the applications which are exempt from the user charge (proposed section 18A(4)) are not sufficiently broad. There are many urgent applications other than applications for protection orders, for example without notice applications for orders preventing the removal of a child from New Zealand. Without notice applications should be exempt from the requirement to pay a charge.

(iii) It appears from proposed section 18A(4)(c) (clause 10) that it is only applicants for protection orders who are applying for legal aid who will be exempt from paying the user charge. There is no reason why the exemption should only apply to the applicant, and not also to the respondent.

(iv) The Law Society is opposed to the charge being collected by, and paid to, the lead provider. In the event that there is a failure to pay the user charge, then that cost is met by the lead provider (the amount of the user charge is deducted from the lead provider's claim for payment). Under the Legal Services Act 2011 all repayments are payable to the Commissioner. This would provide an exception to that. As a matter of principle, all monies owed to the Crown should be collected by, and paid to, the Crown. Repayment of legal aid has always been a debt between the aided person and the Crown. There is no justification for the profession being involved as well. The responsibility for collecting contributions to a government-administered scheme must, it is submitted, rest on the government.

***Recommendations***

54. The Law Society recommends that:

(i) If a user charge is to be imposed, it should be no more than $50.

(ii) All without notice applications should be exempt from the user charge.

(iii) Responsibility for collecting the user charge should rest with the Ministry, not with lawyers.

(iv) In the event that the user charge is not paid, that should be a debt recoverable by the Ministry, rather than deducted from the lawyer's fees.

**Administrative Matters**

55. In light of the purposes of the Bill, and in particular its concern with the sustainability of the legal aid system, consideration should be given to ways in which the onus on lawyers acting on legal aid instructions can be minimised so as to incentivise lawyers to continue to provide legal services. For example, the Bill proposes that lawyers will be required to obtain income details from Work & Income New Zealand. That is an extra attendance to gather information which should readily be available to the Ministry of Justice by accessing the information from another government department. Lawyers will also be required to confirm financial details and other details provided by applicants for legal aid in their applications. It would be more efficient for Ministry officials to liaise directly with the applicant for legal aid in this regard, rather than through the lawyer. In circumstances where legal aid is ultimately declined, the lawyer may have spent a substantial amount of time on trying to obtain information from an applicant, time for which they will never be paid.

56. It is important for the sustainability of the legal aid system that lawyers not be deterred from continuing to provide legal services. Disincentives such as the administrative burden on lawyers should be removed so far as possible.

***Recommendation***

57. The Law Society recommends that the Bill provide for administrative work which can more efficiently be done by the Ministry of Justice, such as obtaining income details from Work & Income New Zealand and confirming financial details and other details provided by applicants for legal aid in their applications, to be made the responsibility of the Ministry.

**CLAUSE BY CLAUSE ANALYSIS**

**Clause 6: new section 8 – When legal aid may be granted: criminal matters**

***Previous convictions***

58. Proposed section 8(1)(2)(a)(i) states that: "When considering whether the interests of justice require that the applicant be granted legal aid, the Commissioner must have regard to whether the applicant has any previous conviction."

59. The relevance of previous convictions to the Commissioner's decision is not clear. It is not clear whether a previous conviction points to an applicant being refused legal aid or being granted legal aid (because previous convictions may lead to a greater chance of imprisonment).

***Recommendation***

60. The Law Society recommends that proposed section 8(1)(2)(a)(i) be amended to read: "When considering whether the interests of justice require that the applicant be granted legal aid, the Commissioner must have regard to whether the applicant has any previous conviction, the existence of which may lead to a greater chance of imprisonment."

***'Three strikes' offence***

61. In the case of a 'three strikes' offence there should be a presumption that an applicant will get legal aid.

***Recommendation***

62. The Law Society recommends that a sub-section be added to proposed section 8(1)(2)(a), requiring the Commissioner to have regard to whether an applicant has been charged with an offence under the Sentencing and Parole Reform Act 2010.

**Clause 6: new section 8A – Means of applicant for legal aid in criminal matters**

63. Proposed section 8A carries forward the eligibility criteria for criminal legal aid contained in section 8 of the principal Act, except that the current means test is modified in the case of offences that are not punishable by a maximum term of imprisonment above three years.

64. For those offences – which include injuring by an unlawful act, aggravated assault, assault with intent to injure, assault on a child and male against female under the Crimes Act 1961 (ss 190, 192, 193 and 194) – the Legal Services Commissioner must refuse to grant legal aid:
    (i) if the applicant's income or the applicant's disposable capital (as set out in Schedule 1) exceeds the relevant thresholds prescribed in regulations,
    (ii) unless satisfied that there are special circumstances, having regard to the likely cost of the proceedings to the applicant and the applicant's ability to fund the proceedings if legal aid is not granted.

65. This is the current test in respect of civil matters (which the Bill proposes to repeal).

66. The rationale for limiting eligibility for legal aid in the case of these offences is not clear and an arbitrary line appears to have been drawn at three years' imprisonment. This also has the potential to cause delay in some cases, where Judges are likely to defer proceedings because of inadequate representation.

67. The rationale for modifying the means test may be that the Criminal Procedure (Reform and Simplification) Bill originally proposed to increase the penalty threshold for jury trials to three

years' imprisonment. The Criminal Procedure (Reform and Modernisation) Bill at second reading proposes to amend the definitions of category 2 and category 3 offences, with the effect that the jury trial threshold will be reduced from three to two years. Clause 429 of that Bill, which amends the provision in the New Zealand Bill of Rights Act 1990 concerning the right to a trial by jury, will also be amended. The effect of the amendment will be to provide that a defendant has the right to a trial by jury if the penalty for the offence is or includes imprisonment for two years or more.

***Recommendation***

68. That proposed section 8A be redrafted to read that "An application for legal aid that relates to proceedings for an offence punishable by a maximum term of imprisonment of more than two years meets the requirements of this subsection…".

**Clause 7: When legal aid may be granted – civil matters**

69. Clause 7(1) alters the grounds upon which applicants whose income or capital exceeds the relevant threshold may be granted legal aid. Previously the Commissioner was able to grant aid if one of the two criteria set out in section 10(2) of the Legal Services Act 2011 was satisfied. As a result of clause 7(1), that will only be the case in care and protection, domestic violence, and asylum proceedings. In all other cases, both criteria will need to be satisfied.

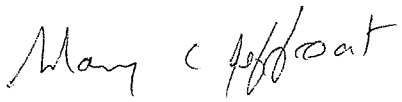
70. It is not clear whether the reference to domestic violence applications in section 10(2)(a) means only an application in which the applicant for legal aid is the applicant for the protection order, or whether it covers respondents as well.

***Recommendation***

71. The Law Society recommends that section 10(2) be amended to clarify that it applies to both applicants and respondents in the applications specified in that subsection.

**Conclusion**

72. The Society wishes to appear in support of this submission.



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30.9.11