



## ANALYSIS

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2004, No. 15

An Act to establish a legal aid scheme intended to assist people who have insufficient means to pay for legal services in criminal matters.

(14 June 2004)

**BE IT ENACTED** by the Parliament of the Cook Islands in Session assembled, and by the authority of the same, as follows:

1. **Short Title** - This Act may be cited as the Legal Aid Act 2004.
2. **Interpretation** - (1) In this Act, unless the context otherwise requires, -
  - “aided person” means a person who is or has, at any time in the past taken the benefit of a grant of legal aid under this Act;
  - “appointed practitioner”, in relation to the provision of legal services under the scheme, means a practitioner whose name is shown on the legal aid list;
  - “Committee” means the Legal Aid Committee established under section 4;
  - “contribution” means the amount of money which an aided person may be required to pay to the Committee under section 13 as a condition of a grant of legal aid;
  - “cost of services” has the meaning ascribed by section 16;
  - “Court” means the High Court of the Cook Islands;
  - “disposable capital”, in relation to a person, means that person’s disposal capital as determined in accordance with the Schedule;
  - “disposable income”, in relation to a person, means that person’s disposal income as determined in accordance with the Schedule;
  - “grant of legal aid”, and any similar expression, means a grant of legal aid under this Act;
  - “Judge” means a Judge of the High Court of the Cook Islands;
  - “legal aid list” means the list of appointed practitioners from time to time approved by the Committee to provide legal aid services;
  - “maximum grant” means the maximum amount of any grant of legal aid which may be made pursuant to the terms of this Act;
  - “Ministry” means the Ministry of Justice;

“practitioner” means a person enrolled as a barrister or barrister and solicitor of the Court under the provisions of the Law Practitioners Act 1993-94;

“prescribed” means in the manner or form as prescribed by regulations, or in the absence of regulations, by the Committee;

“scheme” means the legal aid scheme established by this Act.

(2) In this Act, a reference to an application “by” a person, or a grant “to” a person includes a reference to an application made by one person on behalf of another, or a grant made in respect of a person other than the person to whom the grant is made.

(3) In this Act, and in any regulations made under it, every reference to a fee, charge, grant, rate, and similar is a reference to an amount or rate, which is inclusive of value added tax.

3. Approval of Legal Aid Committee required – Notwithstanding any provision in any other Act, no sum or award of or in the nature of legal aid made by any person after the coming into force of this Act shall be valid and of any effect unless it is a grant of legal aid.

4. Legal Aid Committee – For the purpose of this Act there shall be established a Legal Aid Committee which shall be the persons holding from time to time the office of Secretary of Justice, Director of Management of the Ministry and the Registrar of the High Court, any two of whom shall constitute a quorum.

5. Functions of the Legal Aid Committee – The functions of the Legal Aid Committee shall be to -

- (a) consider applications for approval as appointed practitioners;
- (b) keep and maintain the legal aid list;
- (c) keep and maintain a roster for all appointed practitioners;
- (d) subject to this Act, consider, approve or decline applications for the grant of legal aid;
- (e) report to the Minister from time to time and whenever required to do so by the Minister, on matters relating to legal aid;
- (f) carry out such other functions as may from time to time be prescribed by regulations.

6. Approval as appointed practitioner – (1) Every practitioner wishing to be appointed to the legal aid list shall apply in writing to the Committee for approval as an appointed practitioner, and upon receiving that application, the Committee shall make its own enquiries into the character, qualifications and experience of the practitioner and may require the production of testimonials and other evidence in respect of those enquiries.

(2) Upon the Committee being satisfied as to the suitability of the practitioner to carry out the duties of an appointed practitioner, the Committee shall approve the practitioner as an appointed practitioner.

(3) Where an application is refused by the Committee, the practitioner may apply to a Judge for a review of that application and the Judge after hearing from both the practitioner and the Committee may either dismiss the application for review or refer the matter to the Committee for reconsideration.

(4) Where the Committee is directed to reconsider the matter, the Committee, unless the Judge otherwise orders, shall reconsider the matter afresh.

7. Legal aid list - (1) The Committee shall keep and maintain the legal aid list, which shall be available to the public free of charge.

(2) The Committee shall remove from the legal aid list the name of an appointed practitioner if that practitioner -

- (a) dies;
- (b) resigns as an appointed practitioner;
- (c) permanently leaves the Cook Islands;
- (d) has been struck off the roll of barristers or barristers and solicitors of the Court pursuant to section 5 of the Law Practitioners Act 1993-94; or
- (e) has been penalized under section 20 of the Law Practitioners Act 1993-94 and a Judge recommends his or her removal.

8. Committee to roster appointed practitioners - (1) The Committee shall keep and maintain a roster of all appointed practitioners.

(2) Where an application for legal aid under section 11 is granted, the Committee shall thereupon assign an appointed practitioner according to the roster kept and maintained under subsection (1).

(3) Any aided person who is dissatisfied with the services rendered by the appointed practitioner assigned to that aided person by the Committee under subsection (2), may apply for an amendment to that grant of legal aid under section 21(2).

9. Proceedings for which legal aid may be granted - Legal aid may be granted in respect of the following proceedings -

- (a) criminal proceedings in the High Court;
- (b) appeals to the Court of Appeal in criminal proceedings, where the Solicitor-General certifies the grant of legal aid is desirable in the public interest;
- (c) appeals to the Judicial Committee of the Privy Council in criminal proceedings, where the Attorney-General certifies that a question of law of exceptional public importance is involved and that the grant of legal aid is desirable in the public interest;
- (d) proceedings before the Cook Islands Parole Board;
- (e) such other proceedings as may be prescribed.

10. When legal aid may be granted - (1) The Committee may grant legal aid to an applicant in respect of any proceeding to which section 9 applies if -

- (a) the applicant or the person on whose behalf an applicant makes application is a natural person charged with or convicted of a criminal offence; and
- (b) it appears to the Committee that the applicant does not have sufficient means to enable the applicant to obtain legal assistance (and in the case of an applicant who makes that application on behalf of another, the applicant has either a legal or a customary obligation to act for and on behalf of the person charged by reason of any legal or other disability); and
- (c) the Committee considers that the interests of justice require that the applicant be granted legal aid.

(2) When considering whether or not the interests of justice require that the applicant be granted legal aid, the Committee -

- (a) shall have regard to -
  - (i) the gravity of the offence to which the matter relates; and
  - (ii) the consequences for the applicant if legal aid is not granted; and
- (b) may have regard to -
  - (i) in respect of an appeal, the grounds of the appeal; and
  - (ii) any other circumstances that, in the opinion of the Committee, are relevant.

(3) When determining whether or not an applicant has sufficient means to obtain legal assistance, the Committee shall have regard to the applicant's disposable income and disposable capital.

11. Application for grant of legal aid - An application for a grant of legal aid -

- (a) shall be made in the prescribed manner to the Committee; and
- (b) shall include a statement of financial means in the prescribed form; and
- (c) may be made at any time before the matter to which the application relates is finally disposed of by the Court or, as the case may be, the Parole Board,

Provided however that where an application is made under paragraph (c) there must be attached to the application an affidavit sworn either by the aided person or by the proposed appointed practitioner setting out the date or dates, time or times and the nature of the work carried out by the proposed appointed practitioner prior to the making of the application.

12. Decision on application for legal aid - (1) On an application for legal aid, the Committee may, in respect of the whole or any part of the proceedings, -

- (a) grant legal aid to the applicant; or
  - (b) grant legal aid on an interim basis pending further consideration of the application; or
  - (c) request further information from the applicant, the proposed appointed practitioner, or both; or
  - (d) decline the application.
- (2) When granting legal aid, the Committee -
- (a) shall specify those conditions to which the grant is subject; and
  - (b) shall identify the appointed practitioner who may provide services under the grant; and
  - (c) may, subject to section 17, specify a maximum grant.

13. Conditions on grant of legal aid - (1) A grant of legal aid may be subject to a condition that the aided person will pay the Committee at such time and in such manner as the Committee may require, a contribution of a specified amount towards the cost of services of the appointed practitioner who is to provide or has provided services to that aided person.

(2) Every grant of legal aid may be subject to a condition that the aided person will repay to the Committee, an amount calculated in accordance with section 15.

(3) The Committee may make a grant of legal aid subject to such other terms and conditions (not being inconsistent with the terms of this Act or of any regulations) as it thinks reasonable in the circumstances of the applicant.

14. Amount of contribution payable - If a contribution under section 13(1) is payable under a grant of legal aid, the amount of contribution shall be determined in accordance with regulations made under this Act or, in the absence of such regulations, in accordance with a general policy statement endorsed by the Minister and published by the Committee.

15. Amount of repayment payable - The amount which may be repayable to the Committee is the difference between the cost of services less the aggregate of -

- (a) any contribution paid or payable by the aided person; and
- (b) any deductions allowed by the Committee in accordance with this Act or any regulations made under this Act; and
- (c) any write-offs allowed by the Committee under section 27.

16. Amount of cost of services - The "cost of services" is the sum of -

- (a) the fees of, or charges attributable to, the appointed practitioner who has acted in the proceedings, as approved for payment under section 32; and
- (b) the disbursements claimed by any such practitioner as approved for payment under section 31.

17. Maximum grant - (1) A grant of legal aid may specify a maximum grant, which, if specified, shall be the maximum amount of legal aid which is authorised under the grant.

(2) The Committee may determine and specify the extent of a maximum grant in any way and without in any way limiting that power, may determine and specify a maximum grant with reference to any one or more of the following -

- (a) a total monetary sum;
- (b) a maximum number of hours at a pre-determined hourly rate;
- (c) a period within which the aid must be provided.

(3) When determining the extent of a maximum grant, the Committee may take into account any delay on the part of the applicant in applying for legal aid and the reason for the delay.

(4) Nothing in this section shall preclude there being prescribed by regulations an amount in excess of which no grant of legal aid may be funded.

18. Aided person to notify Committee of change in circumstances - (1) An aided person and any person (whether an applicant or not) acting for an aided person shall notify the Committee of the following -

- (a) any increase in the disposable income or disposable capital of (or ascribed under this Act) to the aided person;
- (b) any change to the address of the aided person (and any person acting for the aided person, if applicable).

(2) Any person who, having previously been an aided person, who becomes aware, either -

- (a) that while an aided person, there occurred an increase in the disposable income or disposable capital of that person that was not previously made known to the Committee; or
- (b) at the time of making application to the Committee the disposable income or disposable capital of that person was understated,

must notify the Committee of that fact within 14 working days after becoming aware of that fact.

19. Committee to keep aided person informed - (1) The Committee shall give notice to an aided person of the conditions of that person's grant of legal aid -

- (a) when the grant is first made; and
- (b) whenever the aided person asks for such a notice; and
- (c) whenever any change is made to the conditions; and
- (d) when any contribution or repayment payable as defined in sections 14 or 15 is received by the Committee.

(2) No breach or failure by the Committee of its obligations under this section shall relieve the aided person of any obligation imposed under this Act or (once that person has actual notice of its terms) of any condition applying to any grant of legal aid

20. Application for amendment to grant of legal aid - (1) An application for amendment to a grant of legal aid may be made by either the aided person or that person's appointed practitioner, and -

- (a) shall be made in the prescribed manner to the Committee; and
- (b) may be made at any time before the proceeding to which the application or grant relates is finally disposed of by the Court or by the Parole Board.

(2) Following an application for amendment to a grant of legal aid, the Committee may either disallow the amendment or may confirm the grant as amended in any manner consistent with this Act and any regulations made under it.

21. Withdrawal of, or amendment to, grant of legal aid - (1) The Committee may at any time withdraw any grant of legal aid (or, in the discretion of the Committee, the then unexpended portion of such a grant) from an aided person if the Committee -

- (a) is satisfied that the aided person has sufficient means to enable the person to obtain legal assistance and representation; or
- (b) considers that the interests of justice no longer require that legal aid be afforded to the person; or
- (c) the aided person requests it; or
- (d) is satisfied that the grant was obtained by reason of a material misrepresentation in the application for legal aid.

(2) The Committee may at any time, either of its own motion or on the making of an application pursuant to section 20, amend a grant of legal aid in any manner (including the removal of an appointed practitioner and the appointment of a substitute) in any of the circumstances described in subsection (1), or if the Committee considers for any reason that the conditions of the grant of legal aid are no longer appropriate.

22. Consequences of withdrawing legal aid - (1) The withdrawal of a grant of legal aid does not affect, in respect of sums previously paid -

- (a) the aided person's obligations arising out of the conditions of the grant; or
- (b) the Committee's rights to enforce those obligations,

nor does it affect the Committee's obligations to pay for the services provided under the grant before the date of its withdrawal.

(2) If a grant of legal aid is withdrawn (either in whole or in part) from an aided person or is amended because that person's disposable income or disposable capital has increased, the Committee may, in its discretion, recover from the aided person any amount paid or payable by the Committee under the grant (less any contribution already paid by the person) in respect of the period between -

- (a) the date on which that increase occurred; and
- (b) the date of withdrawal or amendment of the grant.

(3) If legal aid is withdrawn from an aided person, any appointed practitioner who has provided services to that aided person shall have the right to recover from that aided person the difference between the amount paid or payable by the Committee under this Act and the full amount of that practitioner's fees and disbursements.

(4) The Committee shall not be obliged to pay for any services which have been provided by an appointed practitioner after the date on which the appointed practitioner has been given notice that legal aid is withdrawn to an aided person.

23. Application for review - (1) Any aided person or applicant for legal aid who is aggrieved by the decision of the Committee may apply in writing to a Judge for a review of that decision on the grounds that the decision is -

- (a) manifestly unreasonable; or
- (b) wrong in law.

(2) No application under subsection (1) shall be made more than 14 days after the date on which notice of the decision is given to the aided person or applicant unless a Judge, on an application to extend that time, allows.

24. Direction to reconsider - (1) The Judge after hearing from both the person seeking review and the Committee may either -

- (a) uphold the application and substitute his decision for that of the Committee;
- (b) dismiss the application; or
- (c) refer the matter, either in whole or in part, to the Committee for reconsideration.

(2) If the Judge directs the Committee to reconsider a decision, the Judge shall give reasons for the direction, and may set out matters that the Committee shall take into account in its reconsideration.

(3) If the Committee receives a direction to reconsider, it shall reconsider the decision, taking into account the reasons for the direction and any matters set out by the Judge.

25. Amounts payable under conditions of grant are debts due to the Ministry - Any amount payable to the Committee as a condition of a grant of legal aid (whether as contribution or repayment) shall be a debt due to the Ministry, and may be recovered in any Court of competent jurisdiction.

26. Agreements with aided person - The Committee may, by agreement with an aided person, make whatever arrangements it considers appropriate for the repayment by the aided person of any amount paid to that person pursuant to this Act, where the amount is repayable as a condition of a grant of legal aid.



27. Ministry may write off amounts payable - (1) The Ministry may with the prior written approval of the Financial Secretary, write off all or any part of a contribution or repayment payable to the Committee by an aided person -

- (a) where enforcement of the debt would, in the opinion of the Committee, cause hardship to the aided person or to any person having legal responsibility for the debts of the aided person;
- (b) where the cost of enforcing the debt is likely to exceed the amount of the debt;
- (c) where the Committee considers that justice and fairness would best be served by writing off the debt.

(2) When a debt has been written off under this section, the Committee shall give notice to the debtor of the write-off.

(3) When a debt is written off under this section, the debtor, from the date of the write-off, shall no longer be liable to pay the debt.

(4) The write-off of a debt shall not affect the Committee's obligation to pay any person who provided legal services under the relevant grant of legal aid.

28. Cost of services may be examined by Committee - Either upon the request of an aided person or of its own motion, the Committee may examine the cost of services under any grant of legal aid in order to determine whether the appointed practitioner -

- (a) has claimed, in respect of the grant, more time than was actually spent providing services under the grant; or
- (b) has claimed, in respect of the grant, disbursements which were not in fact incurred in providing those services; or
- (c) has charged fees at an hourly rate in excess of that approved by the Committee.

29. Committee to refund excess payments - The Committee shall refund any amount paid by an aided person to the Committee which is more than the cost of services, or if that person shall not have been required to pay the cost of services, any amount which is more than the aided person is or was required to pay as a condition of the grant of legal aid (whether by way of contribution or repayment).

30. Obligations relating to professional conduct - (1) The fact that an appointed practitioner may provide legal services under this Act shall not in any way affect -

- (a) his or her rights, obligations, responsibilities, or duties as a practitioner (whether arising as a matter of law or by reason of generally recognised professional practice); or
- (b) the relationship between, or the rights of, the practitioner and his or her client or any privilege arising out of that relationship.

(2) Subsection (1) is subject to any express provisions of this Act or any regulations made under this Act.

31. Appointed practitioner to pay legal aid disbursements - (1) Except as otherwise authorised by the Committee, an appointed practitioner shall pay all disbursements relating to a legally aided proceeding, but may claim for reimbursement of those costs under section 32.

(2) An appointed practitioner may, where the amount of any anticipated disbursement is such that it would be usual to seek prepayment by a client, apply for prepayment of that disbursement by the Committee and the Committee may prepay that disbursement or pay that disbursement direct to the payee (in either case in whole or in part) or may decline the application.

32. Appointed practitioner to claim for payment - Claims for payment in respect of legal services provided under any grant of legal aid shall be made by the appointed practitioner to the Committee and shall include production of hourly time sheets setting out details of the services provided for each hour and shall include (in the case of disbursements) actual receipts, showing -

- (a) the fees claimed by, or the charges attributable to, the appointed practitioner; and
- (b) the disbursements actually incurred and claimed by the appointed practitioner.

33. Committee may approve, defer for examination, or decline payment of claim -

(1) On receiving a claim for payment from an appointed practitioner, the Committee may -

- (a) approve the claim in whole; or
- (b) approve the claim in part, in which case payment of the remaining part may be deferred pending further examination and consideration; or
- (c) decline payment of the claim in part or in whole

(2) Any claim for payment received by the Committee may be deferred for the purposes of further examination and shall be examined by the Committee so soon thereafter as is practicable if -

- (a) the claim or any part of the claim appears to the Committee to be excessive in light of the Committee's standard rates for payment or its experience with comparable claims; or
- (b) the claim or any part of it is materially inaccurate; or
- (c) an aided person has requested an examination of the cost of services.

(3) The Committee may decline all or any part of a claim on any one or more of the following grounds -

- (a) the claim exceeds the maximum grant specified in the grant;
- (b) the claim is for or includes a claim for disbursements of a type not usually approved for payment by the Committee;
- (c) an examination of the claim or part of a claim under subsection (2) has determined that the claim, in the opinion of the Committee is excessive or inaccurate.

34. Misrepresentation, etc - (1) Every person commits an offence and is liable on conviction to a fine not exceeding \$1,000 (or in the case of an appointed practitioner, a fine not exceeding \$5,000) who -

- (a) intentionally fails to comply with any provision of this Act, or of any regulations made under it, requiring the person to furnish information or answer questions or produce any document or thing; or

- (b) either furnishes information knowing it to be both incorrect and material or, in furnishing such information or answering any question, makes a statement or representation knowing that statement or representation to be both incorrect and material.

(2) If any person is convicted of an offence under subsection (1), the Committee may recover from that person, as a debt due to the Committee, any amount paid under any grant of legal aid given or previously given by that aided person, in respect to which the misrepresentation relates.

(3) An information for an offence under this section may be laid at any time within 2 years from the date that the misrepresentation was made.

35. Offence in relation to listing - Every practitioner commits an offence, and is liable on conviction to a fine not exceeding \$5,000, who makes a false or misleading representation in or in relation to any application made by that person to the Committee pursuant to section 6 of this Act.

36. Service of notices, etc - (1) Any notice or other communication required to be given to any person under this Act or any regulation made under it may be given by delivering it to that person, and may be delivered -

- (a) personally; or
- (b) by transmitting it by facsimile or other electronic means; or
- (c) by leaving it at that person's usual or last known place of residence in the Cook Islands; or
- (d) by posting it in a letter addressed to the person at his or her usual or last known place of residence in the Cook Islands.

(2) If a notice or other communication is sent to a person by post, then, in the absence of proof to the contrary, the notice or other communication is deemed to have been given to that person when the letter would have been delivered in the ordinary course of post.

(3) In proving delivery, it is sufficient to prove that the letter was properly addressed and posted.

37. Appropriation - All sums required to be paid for the purpose of this Act shall be paid out of the Cook Islands Government Account from monies appropriated by Parliament for the purpose.

38. Regulations - (1) The Queen's Representative may, by Order in Executive Council, make regulations for all or any of the following purposes -

- (a) prescribing the amount or amounts, or the method or methods of calculating an amount or amounts, payable by an aided person as a contribution;
- (b) prescribing a method or methods for calculating what maximum grant, if any, should be granted under a grant of legal aid;
- (c) prescribing levels of disposable income and disposable capital for the purpose of determining whether a person is eligible for legal aid;
- (d) prescribing allowances for use in calculating a person's disposable income and disposable capital;

- (e) prescribing deductions which may be made from the cost of services for the purpose of determining the repayment payable by an aided person under a grant of legal aid;
- (f) prescribing the manner in which applications for, and grants of, legal aid in respect of minors, and other people with special requirements or under any legal or other disability, are to be dealt with;
- (g) prescribing the amount in excess of which no grant of legal aid (whether or not the subject of a maximum grant) may be funded;
- (h) prescribing types of proceedings (other than those referred to in this Act) for which legal aid is available;
- (i) prescribing conditions relating to the delivery of services under the scheme;
- (j) generally providing for such other matters as are contemplated by or necessary for giving full effect to this Act, and for its due administration.

(2) When prescribing amounts, or methods of calculating amounts, regulations made under this section may distinguish between applicants for legal aid having regard to their circumstances, taking into account matters such as the level of disposable income or disposable capital of applicants.

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This Act is administered by the Ministry of Justice

Sections 10(3); 18(1)(2);  
22(2); 38(1)(c), (d) and (2)

**SCHEDULE**

**DEFINITION OF DISPOSABLE INCOME AND DISPOSABLE CAPITAL**

1. Definitions -

In this Schedule, unless the context otherwise requires,-

“income”, in relation to a person, means all that person’s money (whether held in cash or in any bank account or other form of deposit) and the value of all benefits of a monetary nature derived or received by that person from any source for his or her own use or advantage, but does not include -

- (a) any capital money received from any source;
- (b) any benefit received under the Welfare Act 1989;
- (c) any pension or allowance received under the New Zealand War Pensions Act 1954;

“spouse”, in relation to a person (“person A”) means the person who is married to person A, or who is living with person A in a relationship in the nature of marriage, though not legally married to him or her.

2. Meaning of disposable income -

“Disposable income”, in relation to an applicant for legal aid, means the person’s total gross income during the 12 months immediately preceding the application for legal aid, or during such other period of 12 months as the Committee considers appropriate in the circumstances, less the sum of the following:

- (a) an allowance where the resources of any other person are treated as the applicant’s resources under clause 4 of this Schedule or any regulations made under this Act;
  - (b) an allowance for a dependent child or a dependent relation (not being a spouse);
  - (c) the amount of income tax (taking into account such allowances and deductions which are from time to time permitted under the Income Tax Act 1997) on the applicant’s total income.
- (2) This clause is subject to clause 4.

3. Meaning of disposable capital -

“Disposable capital”, in relation to an applicant for legal aid, means that person’s total assets after deducting -

- (a) the amount of any debts secured against those assets; and
- (b) if the person has an interest in a property which is the actual residence of that person, the value of that interest (and if that person owns more than one such home, then only the value of that person’s actual residence shall be excluded); and

- (c) if the person has an interest in a motor vehicle used principally as that person's means of transportation for domestic purposes, the value of that interest (and if that person owns more than one such motor vehicle then only the value of the motor vehicle principally used for domestic purposes shall be excluded); and
- (d) the value of the person's household furniture, household appliances, personal clothing, and tools of trade; and;
- (e) the amount of the contingent liabilities of the person that may mature within the next 12 months; and
- (f) the amount of actual debts of the person, other than those under paragraph (a) above, where there is a deduction made and whether the debts are secured or unsecured; and
- (g) an allowance for -
  - (i) any dependent child, dependent spouse, or dependent relative of the person; or
  - (ii) an allowance for any assets of the person's spouse or parents which are treated (in accordance with clause 4) as resources.

4. Resources of spouse or of parents of minor -

Except as otherwise provided in any regulations made under this Act, any resources of a person's spouse or parent shall be treated as that person's resources if they are living together, unless they have contrary interests in the proceedings to which the grant of legal aid relates.