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Report of the New Zealand Law Society Te Kāhui Ture o Aotearoa
For Aotearoa New Zealand's Universal Periodic Review 2024

A. Background

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) is the regulator of the New Zealand legal profession, and a representative body for over 16,000 lawyer members. One of its statutory functions is to '*assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law.*'[1]
2. Aotearoa New Zealand has a long-standing commitment to human rights, and a generally positive track record. There have been positive developments beyond those specifically acknowledged in this submission. The word limit is such that they cannot be included, however we anticipate their inclusion in the National Report.
3. This shadow report summarises the Law Society's submissions and observations in the period since the third Universal Periodic Review (**UPR**), primarily in respect of legislation that has had implications for the protection of human rights in New Zealand under the New Zealand Bill of Rights Act 1990 (**Bill of Rights**), and with some comment on administrative acts and decisions in the areas of conditions of detention, and immigration.

B. National human rights framework

<u>Enactment of legislation despite section 7 reports</u>

4. Section 7 of the Bill of Rights requires the Attorney-General to report to Parliament on any draft legislation that appears inconsistent with a protected right. It is an essential mechanism for ensuring consistency of legislation with domestic and international human rights standards.
5. No changes have been made to the lawmaking process followed when a section 7 report is presented. Parliament has continued to enact legislation despite a section 7 report from the Attorney-General, at times without public consultation. See **Annexure 1**.
6. Other legislation raising significant human rights issues, but not the subject of a section 7 report, has been enacted. See **Annexure 2**.
7. It is also a matter of concern that the Ministry of Justice and Attorney-General have – on occasion – failed to identify the human rights implications of proposed legislation. See **Annexure 3**. Failure to consider human rights is not limited to the legislative process and is seen in early policy analysis and pre-legislative work.[2]

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[1] Section 65(e) Lawyers and Conveyancers Act 2006.
[2] See, for example, Treasury's reported criticism of the failure to consider impacts of policy for human rights and Māori, prior to proposals being put to Cabinet: https://www.nzherald.co.nz/nz/politics/treasury-unhappy-with-rushed-gang-laws-lack-of-human-rights-consideration/FSONAETNPBAHTDVC3HWXVQPHZ4/

Declarations of inconsistency

8. The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill was enacted in August 2022. It amended the Bill of Rights to require the Attorney-General to notify Parliament of a declaration of inconsistency (DOI)[3] made by a senior court. Notification must be made within six sitting days. Within six months of notification, the Minister responsible for the legislation must provide a Government response.

9. This formal process assists New Zealand in providing an effective remedy for breaches of fundamental human rights, as required by the ICCPR. Parliament's Standing Orders[4] have been amended to provide for the parliamentary process surrounding this.[5]

C. Civil and political rights

Criminal Justice system reform

10. There have been positive developments, including the Three Strikes Legislation Repeal Act 2022, which repealed the mandatory sentencing regime commonly known as 'three strikes.' That regime resulted in excessive and disproportionate sentence outcomes. However, the repeal legislation failed to provide for transitional arrangements to examine whether the sentences of prisoners already impacted by the law were disproportionate. See **Annexure 2**.

11. We acknowledge ongoing transformational programmes such as Te Ao Mārama and Hōkai Rangi.[6]

Prisoner rights and entitlements, conditions of detention

12. While efforts have been made, adherence to minimum standards for conditions and treatment in detention remain an issue. This has been exacerbated by the COVID-19 pandemic, staffing pressures, and the large population of remand prisoners.[7]

13. Management of the COVID-19 pandemic and staffing shortages had significant impacts for prisoners and their minimum entitlements. Visits were suspended, resuming only in 2023, and still limited. While video calls were made available where possible, there was limited capacity. Some prisoners went over three years without seeing family and friends. In 2022, prisoners were relocated throughout the country to maintain appropriate staffing levels. Some prisoners were sent further away from family and legal counsel, sometimes during trial preparation, and their attendance at programmes was interrupted.

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[3] That is, a formal declaration made by a court that an Act is inconsistent with fundamental human rights protected by the Bill of Rights.

[4] A select committee considers the declaration and must report its findings and any recommendations to the House within four months of the Attorney-General's notice.

[5] In November 2022, the Supreme Court (in *Taylor v Attorney General* [2018] NZSC 104) made a DOI, that the voting age of 18 for both parliamentary and local elections was inconsistent with the New Zealand Bill of Rights Act 1990, and the inconsistency had not been justified. This was the first DOI since the amendment outlined above. The Select Committee process was followed, and in response the Government introduced a bill to lower the voting age at local elections. The Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill remained before Parliament when the House rose on 8 September in advance of the 2023 General Election. The next government will need to determine whether to proceed with the bill. Lowering the voting age at General Elections requires amendment of an entrenched provision in the Electoral Act 1993, requiring 75% or more of all MP to vote in favour. Opposition parties had made clear they would not support such a measure.

[6] These are addressed in New Zealand's draft national report.

[7] A remand prisoner is a prisoner awaiting trial or sentencing. Remand prisoners must be kept separate from sentenced prisoners, restricting their access to rehabilitative and improvement programmes and time out of cell.

14. Prisoners have also faced extended periods in cell, with reports of prisoners spending up to 44 hours in their cells, without exercise or other time out of cell.[8] Rehabilitative and other programmes were severely disrupted.

15. Contact with lawyers has been restricted. Telephone and video call bookings were limited, and it took until 2023 for face-to-face visits to resume. In February 2022, Auckland South Correctional Facility (privately operated), suspended video calls between lawyers and clients, and at times would not facilitate telephone calls. This was resolved with the assistance of the Department of Corrections, and regular meetings regarding access to counsel saw improvement.

16. Court delays due to the COVID-19 backlog have meant that some prisoners spend extended periods in custody, only to be later acquitted, while others serve longer in remand than they are ultimately given as a custodial sentence.

17. Efforts have been made to enable remand prisoners to access rehabilitation services and programmes, however the current proposal for this involves the mixing of remand and sentenced prisoners.[9]

Access to Justice

18. The legal aid[10] and duty lawyer[11] schemes are intended to ensure that all New Zealanders can access legal assistance when needed. However, the sustainability of these critical services is at serious risk. [12]

19. Budget 2022 increased the hourly rate of remuneration for legal aid lawyers.[13] However, this was insufficient to meet even the rate of inflation since their last adjustment in 2008 and did not apply to fixed fees.[14] User charges for applicants have been removed, eligibility and repayment thresholds lifted, and interest is no longer charged on debt. These are positive developments, but broader eligibility increases the pressure on a shrinking pool of providers. No further investment was made in Budget 2023.

20. There are competing budget pressures, particularly following the COVID-19 pandemic and recent natural disasters. It remains, though, that remuneration and the stress of providing legal aid are the primary reasons lawyers are doing less legal aid work, or giving it up

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8 See, for example, the Ombudsman's 2023 report *Kia Whaitake Making a Difference*, pages 70 to 80. See also: https://www.newshub.co.nz/home/new-zealand/2022/03/auckland-prison-inmates-confined-to-cells-for-44-hours-straight-due-to-covid-19-worker-shortage.html and https://www.rnz.co.nz/news/national/415563/covid-19-prisoners-confined-to-cells-for-up-to-29-hours-diary-shows.

9 See the Corrections Amendment Bill, **Annexure 3**.

10 https://www.justice.govt.nz/courts/going-to-court/legal-aid/, this covers criminal, family, and civil legal issues.

11 https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/duty-lawyers/, Duty Lawyers provide free initial advice to those charged with an offence, at their first appearance in court.

12 In the Law Society's 2021 Access to Justice Survey, more than half of respondents rated the legal system as poor or very poor in providing access to justice. Twenty-five percent of legal aid lawyers planned to do less legal aid work or stop altogether over the next 12 months. We estimated that at least 20,000 people were likely to have been turned away from lawyers in the 12 months preceding the survey. See **Annexure 4**.

13 https://www.justice.govt.nz/assets/Documents/Publications/Letter-to-the-profession-Legal-Aid-outcomes-of-Budget-2022.pdf

14 A large component of legal aid work is conducted on a fixed fee basis. The lawyer is paid a set amount to complete a particular component of the legal work, irrespective of the time taken to complete it.

altogether. They are also the key deterrents to commencing legal aid work. Significant work is required to attract new providers, and to retain and progress current providers.

21. Duty lawyers had received no increase in remuneration in almost 25 years. In April 2023, the Law Society wrote[15] to the Minister of Justice expressing concern that duty lawyer work had become unsustainable for lawyers, risking serious impacts on defendants, victims, and the wider criminal justice system. The Legal Aid Services Commissioner announced[16] a 17% remuneration increase and broad-scope review of the duty lawyer service. This initial investment in remuneration is welcomed, however the ongoing sustainability of the duty lawyer scheme must be thoroughly considered in the Review.

Treatment of young people in the criminal justice system

Minimum age of criminal responsibility

22. Recommendations from the third cycle of the UPR regarding the minimum age of criminal responsibility have not progressed. The Government accepted this recommendation in June 2019 and committed to receiving advice on any potential changes. In 2021, as part of NZ's report on UNCRC, the Government advised it was monitoring the progress of a working group set up to review the laws in Australia, where many states have set the minimum age of criminal responsibility at 10 years old. Nothing further has happened.[17]

Treatment of youth in the adult jurisdiction

23. Important progress was made in 2019, with the extension of the Youth Court's jurisdiction to include 17-year-olds. However, an exception remained: Schedule 1A of the Oranga Tamariki Act 1989 requires the automatic transfer of young people charged with certain offences to the adult jurisdiction.

24. Given extensive scientific research and appellate discussion on adolescent brain development and obligations under the ICCPR and UNCRC, the inclusion of all youth within the Youth Court jurisdiction should be a priority. The youth jurisdiction provides an age-appropriate, therapeutic, and effective response to criminal offending. See **Annexure 5**.

Parliamentary process and individual engagement in the passage of laws

25. The Law Society has observed an increasing number of bills being passed under urgency, without scrutiny by the public and by select committees.[18] We continue to advocate for

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15 https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/l-Minister-Allan-Duty-Lawyer-remuneration-6.4.23.pdf

16 https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/whats-new/#duty-lawyer-service

17 The recommendation to raise the minimum age of criminal responsibility has since been recently endorsed by the United Nations Committee on the Rights of the Child: United Nations Committee on the Rights of the Child, Concluding Observations on the 6th periodic report of NZ, CRC/C/NZL/CO/6 (28 Feb 2023) at [42(b)] and [43(b)]. The Committee similarly indicated the minimum age of criminal responsibility should be raised to at least 14 years of age regardless of offence. The Committee also said the age of criminal responsibility was offence-based rather than child-centered (at [42]).

18 During the 53rd Parliament, 100 bills were accorded urgency at some stage of the legislative process (noting this is in contrast to the 24 bills which were accorded urgency during the 51st Parliament, and 78 bills accorded urgency during the 52nd Parliament). On the Law Society's recommendation, the Standing Orders Select Committee recently considered requiring post-legislative scrutiny for bills passed under urgency, without select committee scrutiny. Unfortunately, the Committee could not reach agreement to amend the Standing Orders to include such a requirement. However, we are pleased to see the Committee's recommendation to amend the Standing Orders to clarify that proposals for entrenchment cannot be considered under urgency.

legislative procedures which promote democracy and transparency by allowing select committees, and the public, to give proper consideration to legislation before the House.

26. Positively, the enactment of the Electoral (Registration of Sentenced Prisoners) Amendment Act 2020 (re)enfranchised those serving a sentence of imprisonment of less than three years.[19]

Impact of COVID-19

27. See **Annexure 6** for key aspects of New Zealand's response to COVID-19.

D. Economic, social, and cultural rights

Migrants, refugees, and asylum seekers

Concerns regarding the exercise of discretion under section 177 the Immigration Act 2009

28. Where an individual unlawfully present in New Zealand is served with a deportation order, Immigration New Zealand (INZ) has a discretion under section 177 of the Immigration Act to consider cancelling it. An officer must consider exercising this discretion where they become aware of matters relevant to New Zealand's international human rights obligations, by way of a "purported application", or by the officer's own motion.[20] We are advised INZ has informed lawyers that the discretion is only engaged during the Compliance Officer's deportation interview with the individual to be deported, and not at any other time.

29. The Immigration Act does not stipulate a procedure to be followed in order for the section 177 discretion to be engaged and it is inappropriate to 'gatekeep' the discretion with a requirement to undertake a deportation interview. While section 177 involves the exercise of an 'absolute discretion', the decision maker cannot abdicate that discretion, or restrict the scope of its application contrary to the law by which it is circumscribed. If an individual (or their legal representative) raises information about their personal circumstances that is relevant to New Zealand's international obligations, the officer must consider cancelling the deportation order.

Concerns regarding the grant of visas under section 61 of the Immigration Act

30. Section 61 of the Immigration Act grants the Minister of Immigration the absolute discretion to grant any type of visa to any person who is unlawfully in New Zealand and not liable for deportation. Between late 2022 and early 2023, INZ declined a number of section 61 requests made by refugee claimants who were awaiting decisions regarding their refugee claims. Previously, such visas were typically granted. We are concerned the recent declines may reflect an internal policy decision.

31. The decision to consider and/or grant a section 61 visa is in the decision maker's absolute discretion, however it must be exercised by considering the applicant's circumstances. A decision not to grant a visa under section 61 places an already vulnerable claimant in a more precarious financial situation, with no ability to work or to provide for themselves until their refugee claim is determined.

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[19] This followed the Supreme Court's decision in *Taylor v Attorney General* [2018] NZSC 104, and the Waitangi Tribunal's report on Māori prisoners' voting rights. The voting restriction imposed by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the 2010 Act) disqualified all prisoners from voting. The 2010 Act was subsequently (in 2015) the subject of the first "declaration of inconsistency" [with the New Zealand Bill of Rights Act 1990] made by a New Zealand court.

[20] Section 177(3) Immigration Act.

Immigration (Mass Arrivals) Amendment Bill

32. This Bill would allow those who are part of a mass arrival group to be detained for a longer period of time, ostensibly to ensure they are afforded their rights to natural justice, including the right to obtain legal representation. The Law Society is concerned this proposal is inconsistent with New Zealand's international obligations under the Refugee Convention and Protocol (RCP), and the UNHCR Detention Guidelines. See **Annexure 2.**

Failure to provide assistance to Afghan nationals targeted by the Taliban

33. In 2021, the New Zealand High Court heard judicial review proceedings[21] concerning the Government's decision to suspend processing resident visa applications due to COVID-19 border restrictions. This meant Afghan national applicants[22] were not eligible to receive assistance from the Afghanistan Departure Taskforce, set up to provide expatriation and resettlement assistance to those with a valid New Zealand visa following the Taliban's return to power. The Court concluded the decision to suspend processing visas was unlawful and ordered the Government to promptly consider and determine the visa applications.

34. The Court also found the Government had erred in law when declining Critical Purpose Visitor (CPV) visas under the 'humanitarian reasons' exception to the COVID-19 border restrictions. It had done so on the suggestion that the exception was limited to humanitarian considerations arising *within* New Zealand. This was an error of law; the exception applied to humanitarian reasons arising outside of New Zealand, and to the circumstances in Afghanistan. Following this decision, the Immigration Instructions were amended – not by Parliament but under executive power – to restrict CPV visas to only where the humanitarian considerations arise within New Zealand.

35. The Law Society received reports of refusal to reconsider those expressions of interest for the CPV visa which were wrongly declined. We wrote to relevant Ministers, noting it was an improper and obstructive response to the Court's findings and to INZ's obligation to observe the law, and urged the Ministers to direct officials to exercise the statutory powers available to them to reconsider any expressions of interest which were previously incorrectly declined. We received a brief response from the Minister of Immigration, stating that expressions of interest for CPV visas could not be reconsidered in the absence of an empowering statutory provision or court order.[23]

RFSC visas – tier 2 sponsors

36. The RFSC visa category allows refugees in New Zealand to sponsor visa applications from overseas family members. RFSC sponsor registrations are managed by a two-tier system, which offers 600 spaces annually across both tiers. Tier 1 sponsors have no other family in New Zealand and are given first access. Any places which remain after that are then offered to tier 2 sponsors, who already have some adult family members in New Zealand.

37. The last tier 2 selection took place in 2016. At 30 June 2023, there were 969 tier 2 registrations in the queue, representing 4256 family members.[24] While it remains 'closed', no further potential tier 2 sponsors can register. Some applications have been queued for over 5 years, affecting family members who are often living in dire circumstances (including refugee camps).

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[21] *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154.

[22] Primarily those seeking to come to New Zealand because they were being targeted by the Taliban forces, due to assistance provided to the New Zealand Defence Force and other allied forces.

[23] In relation to the request to provide expatriation assistance, the Minister simply noted that Afghan nationals, like other foreign nationals, are generally allowed to board a flight to New Zealand if they hold a visa and qualify for a border exception, notwithstanding the reports which indicated otherwise.

[24] https://www.immigration.govt.nz/documents/statistics/statistics-refugee-and-protection.pdf). Even without any tier 1 selections, it would take a further eight years to clear this backlog, if the current quota of 600 spaces is to remain unchanged.

Once a tier 2 registrant is selected, it can take years for the process to be completed and the family members to arrive in New Zealand. Failure to process tier 2 registrations for such an extended period, is inconsistent with the principle of unity of the family recognised in the RCP, as well as the right to respect for the family under article 23 of the ICCPR.

Frazer Barton
President

Annexure 1: Legislation enacted despite section 7 Bill of Rights report

The following are examples of statutes enacted by the New Zealand Parliament since the 3rd Periodic Review, despite a report from the Attorney General pursuant to section 7 of the Bill of Rights Act identifying inconsistency with protected rights. Each was passed with limited or – in most cases – no public consultation.

Enactment (link to Law Society submission)	**Infringed rights** (section)	**Law Society comment**
Smokefree Environments and Regulated Products (Vaping) Amendment 2020	14, 19	Received a truncated select committee process of only 3 weeks. The Law Society was unable to see why the period for public submissions had been restricted. It could not fairly be described as so urgent as to be exceptional and to justify a period shorter than six weeks. Law Society agreed with the section 7 report, that the restrictions in the Bill on packaging, advertising and promoting vaping products are inconsistent with the right to freedom of expression. In the absence of conclusive evidence around the harm caused by vaping, and more specifically to young people, the limits on freedom of expression were not demonstrably justified. Provisions remained in the Act.
Taxation (Income Tax and Rate and other Amendments) Act 2020	14, 21	Despite the section 7 report, this bill was introduced and passed within 7 days, and without public consultation. The Act introduced a provision enabling the Inland Revenue Department to compel the provision of information from taxpayers, for the purposes of policy development, and with criminal penalties for failure to comply. Insufficient protections were included around the use of such information, and whether it could also be used for compliance purposes once obtained. It is a significant power that intrudes into the private affairs of citizens, for a non-essential purpose. The Law Society wrote to the then-Minister of Revenue to set out its constitutional and Bill of Rights concerns.

Returning Offenders (Management and Information) Amendment Act 2023	25(g), 26(2), 27(1)	Passed under urgency with no select committee process. The Act subject returning offenders to parole-like conditions in New Zealand even if they have been deported here after a prison sentence in another jurisdiction. It also allows Police to collect information from returnees to establish their identity and support future investigations. Although this was the case for returnees who committed offences after November 2015, the Act applies retrospectively to those who committed offences prior to that date, even if this is inconsistent with other law. The Act was a response to a December 2022 court decision which found that the government's retrospective application of the Returning Offenders (Management and Information) Act 2015 was unlawful.
Parole Amendment Act 2023	26(2), 18, 16, 22, 27(1)	Like the Returning Offenders (Management and Information) Amendment Act 2023, this Act was passed under urgency and with no select committee process, even though subject to a section 7 report. The Act was a response to a June 2023 court decision which held that the Parole Board could not impose certain special conditions on individuals subject to an Extended Supervision Order and undertaking rehabilitative programmes. The Act permits imposition of an effective second penalty, is inconsistent with the right to freedom of movement, and while there is provision for Parole Board review of imposed special conditions, there is no right for the individual concerned to appear and make submissions before the Parole Board.

When the 53rd Parliament was dissolved on 8 September in advance of the General Election, there remained bills subject to section 7 reports. These are noted below. Once a new government has

been formed and the 54th Parliament is summoned, the new Parliament will determine whether to reinstate this existing business.

- Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill: AG report here, Law Society submission here.
- Ram Raid Offending and Related Measures Amendment Bill: AG report here, Law Society submission currently being prepared, will be available here.

Annexure 2: Examples of other legislation enacted despite serious human rights concerns

Enactment (link to Law Society submission)	**Comment**
Three Strikes Legislation Repeal Act 2022	The Law Society supported the repeal of the Three Strikes regime, and reversion to a sentencing regime in which the full individual circumstances of an offender are considered, alongside other factors, to ensure a fair and proportionate sentencing outcome. However, the Act failed to include transitional arrangements so that persons currently in prison and sentenced under the Three Strikes regime have their sentence modified or reconsidered to ensure it is not disproportionate. The Law Society's primary concern was that prisoners serving sentences impacted by the 'three strikes regime' may be serving sentences inconsistent with their rights under section 9 of the Bill of Rights.
Terrorism Suppression Control Orders Act 2019	The select committee process for this Act provided only one week for public consultation. From the Law Society's submission: "The Law Society is fundamentally concerned that the Bill severely restricts a person's rights and freedoms on the basis that they have engaged in criminal activities, without providing for the protections of the criminal justice system in relation to establishing that supposition." The human rights concerns were so extensive as to not be capable of replication here. The Law Society summarised the concerns as: • The expansive scope of the people to whom control orders could apply under the Bill raise significant human rights concerns. • The control orders should be brought within New Zealand's criminal law, so that the protections of the criminal justice system continue to apply where the state seeks to significantly restrict an individual's liberty. • The potential for control orders to include conditions of electronic monitoring falls within the meaning of 'detention' in section 22 of the Bill of Rights, which affirms the right to be free from arbitrary detention.

	• In practical terms, if the control orders remain civil, there is a real risk that the orders will be applied to unrepresented litigants. • Applications for control orders should be brought by the Solicitor-General, who is (broadly speaking) in charge of all prosecutions, rather than the Commissioner of Police, who is in charge of investigating criminal offending. • Applications without notice should only be made where there is extreme urgency. • The conditions of the control orders should be set out exhaustively in the Act, and not left to the discretion of the courts. • The Bill does not provide sufficient protections to deal with the risk of proceeding against an individual on the basis of non-disclosable information.
Counter-Terrorism Legislation Act 2021	The Law Society considered aspects of the Bill did not comply with the right against double jeopardy protected under section 26(2) of the Bill of Rights. We recommended these did not proceed without further consideration of whether the Bill's underlying policy objective can be equally well met through the criminal justice system and the Sentencing Act 2002. In addition, the Act established three new offences, each of which were unclearly drafted and potentially overbroad: • Planning or preparing to carry out a terrorist act. • Weapons training or combat training for terrorist purposes. • Travelling intending to commit a specified offence.
Firearms Prohibitions Orders Legislation Act 2022	This Act allows a Judge to impose a firearm prohibition order (FPO) when sentencing a defendant in relation to specified offences. An FPO places a number of conditions on the defendant, including restricting their ability to reside in any premises where firearms are stored, attend activities which involve the use of firearms, or be in the presence of any person who has an unsecured firearm with them. The Law Society raised concerns as to the extent the Act would limit the rights of defendants who are made subject to an FPO without sufficient justification. The imposition of an FPO has the potential to infringe on a person's freedom of movement and association and is likely to disproportionately impact Māori. The Act contains no rational connection between the convictions to which the scheme applies and the objective of reducing the criminal

	use of firearms, and in that regard, its rights infringements cannot be justified.

Annexure 3: Examples of legislation where the Bill of Rights advice failed to identify potential inconsistency

Firearms Prohibition Orders Legislation Act 2022

In the whole, the Law Society disagreed with the assumptions and conclusions reached in the Bill of Rights report issued by the Attorney General. In particular, the Act imposes severe limitations on rights protected by the Bill of Rights, without any connection to the policy objectives of the Act, and without demonstrable justification.

The Attorney-General's report failed to consider the likelihood of a disproportionate impact on Māori. To take one particularly concerning example, the prohibition on "residing" at any premises where firearms are stored has the capacity to materially affect the ability of Māori to visit whānau, attend events at marae, or to attend tangi without risking (potentially unknowingly) a breach of an FPO. Māori are also more likely to live rurally and rely on firearms for the provision of food.

This potentially disproportionate impact was only acknowledged in passing in the Departmental Disclosure Statement to the Bill, and there was no information on the outcomes of engagement with Māori. The actual effects do not appear to have been outlined or assessed, and are likely to be significant. The Bill of Rights consistency advice did not consider section 19(1) of the Bill of Rights, freedom from discrimination.

Terrorism Suppression Control Orders Act 2019

Crown Law's advice to the Attorney-General confirming the Bill's compliance with the Bill of Rights can be described as cursory at best. It concluded that control orders are primarily civil in nature, as they are applied to individuals without a conviction, sentence, or even proof that certain conduct has occurred. Given this, the advice expressed no concern that criminal process rights will not apply. That is – the advice relied on human rights breaches (the application of control orders irrespective of proven conduct), to establish that the control orders are civil, so as to avoid criminal procedure and due process rights – with minimal substantive consideration of the implications and justification for this. The advice did not address the adequacy of protections against reliance on non-disclosable information, applications made without notice, and the implications of not including the orders within the criminal justice system (including accessibility of legal advice).

Corrections Amendment Bill (not yet enacted)

This Bill contains a provision that limits the use of non-lethal weapons against prisoners who passively resist a lawful order to situations where there are reasonable grounds for believing there is an imminent threat of injury or harm to the prisoner or another person. It contains no requirement that non-lethal weapons only be used when other potential responses that do not involve the use of weapons would be insufficient.

The courts and Government have recognised that, in some circumstances, the use of nonlethal weapons can raise issues of inconsistency with the right for people who have been detained to be treated with humanity and dignity, as protected by s 23(5) of the Bill of Rights. This was not addressed in the Ministry of Justice's advice to the Attorney-General on the Bill's consistency with the Bill of Rights.

Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill (not yet enacted)

This Bill was introduced by the Government in response to the Supreme Court's declaration of inconsistency, arising from *Make it 16 Inc v Attorney-General*.[1] It will amend the Local Electoral Act (and others) to reduce the voting age in local elections and polls from 18 to 16 years of age. It disqualifies youth offenders serving sentences of imprisonment of three years or more from registering to vote in those elections or polls.

The Bill of Rights consistency advice in respect of this disqualification is inadequate. Somewhat conveniently, the Bill of Rights protects electoral rights only for general elections. The disqualification of voters in local elections therefore does not engage section 12 of the Bill of Rights. However, the advice does not consider the particular characteristics of youth, and what this means for the disqualification's impact on other rights, such as the right not to be subjected to disproportionately severe punishment.

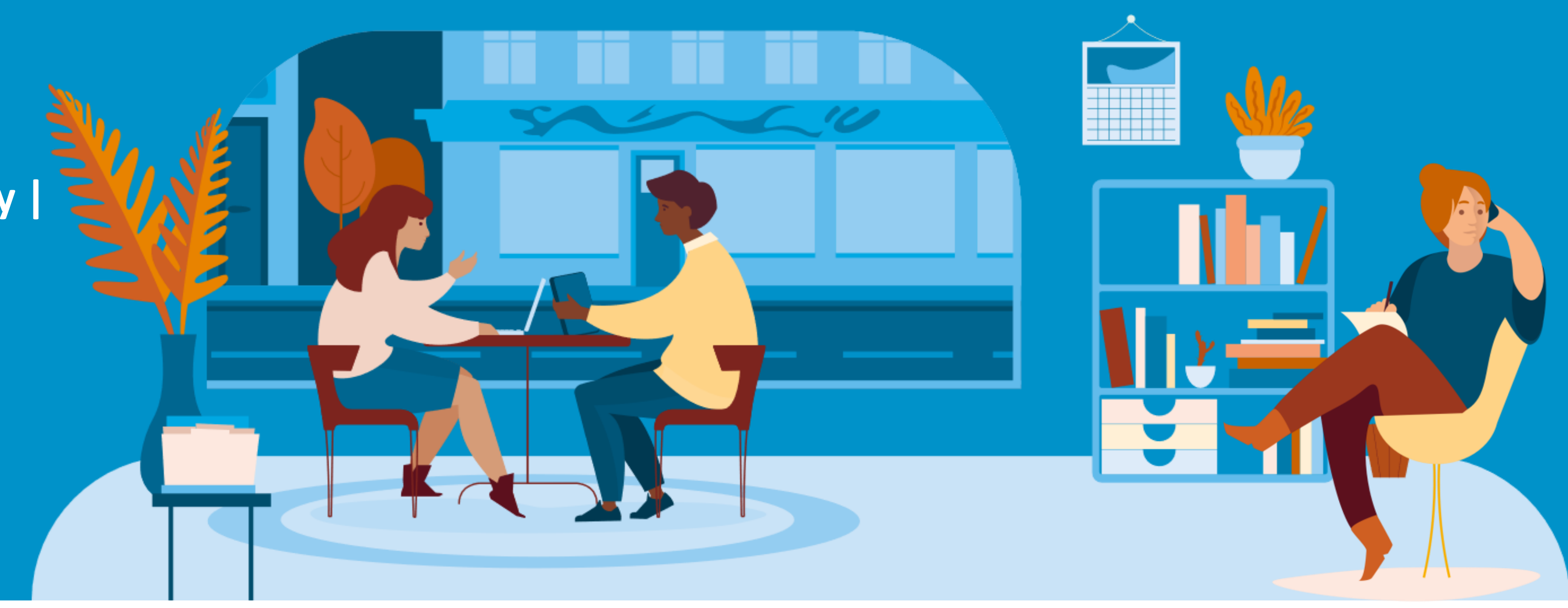
A proportionate punishment on an adult offender might not be proportionate when applied to youth. The assumption underpinning the current prisoner voting ban is that a three-year or more sentence of imprisonment is a reasonable balance to strike between loss of rights for (serious) crime and the importance of the right to vote. That logic is justified, implicitly, on the fairness of the punishment as imposed on adult offenders. Further, decisions about young people must reflect their sense of time — three years is much longer proportionately for a youth offender than for an adult offender. It is also their first election they will be prohibited from voting in, which has a much greater "milestone effect" than for adult offenders.

No analysis of this nature is evident in the advice. While it might still have concluded there was no inconsistency with a protected right, more robust consideration is needed.

1 [2022] NZSC 134.

New Zealand Law Society Te Kāhui Ture o Aoteroa
Annexure 4

Access to Justice Research 2021



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3 RESEARCH SUMMARY

Lawyers are concerned about the ability of the legal system to provide everyone with access to justice.

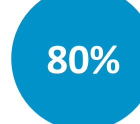
Half of the lawyers we spoke to rate the legal system as poor or very poor at providing everyone in Aotearoa New Zealand with access to justice. Only one in ten think it does a good or very good job. The remaining lawyers we spoke to think it is OK or are not sure.

Half of lawyers have had to turn away clients in the last 12 months.

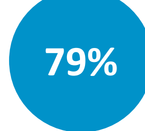
This is higher for legal aid lawyers – three-quarters have had to turn away people seeking legal assistance.

Legal aid lawyers are motivated to provide people with access to justice and feel a moral duty to do so, however, legal aid provision in its current state is not sustainable.

agree their job gives them a great deal of satisfaction



agree their job is very stressful



agree they regularly work extended hours

Legal aid lawyers express high job satisfaction (in line with the wider legal workforce). Their driving motivation is to provide access to justice, and they feel a moral duty to do so. However, the work brings with it high stress levels, and regularly extended work hours; both factors are more pronounced for legal aid lawyers than the wider workforce.

This is placing access to justice at further risk. A quarter of legal aid lawyers plan to do less legal aid work - or stop altogether - over the next 12 months.

The key reason they plan to do less is inadequate remuneration (58% say this is a reason). Indeed, half of legal aid lawyers, on average, were not remunerated for almost half of the hours (48%) they worked on their last legal aid case.

The administrative burden and the stress of legal aid are also causing these lawyers to want to step back from legal aid provision.

In an average week, legal aid lawyers are working 50 hours per week vs. 46 hours for those not providing legal aid. On average this is 11 hours more than legal aid lawyers are contracted for.

Some lawyers are interested in stepping into legal aid work, but for the majority there are barriers that prevent them from doing so.

One in ten (12%) lawyers who are not currently doing legal aid are very or extremely interested in doing so. This equates to 58% of the current legal aid workforce. Despite their interest, around half of these lawyers are working in firms that do not undertake legal aid, however, they also have concerns about the administrative burden and inadequate remuneration.

Six in ten (63%) lawyers have no interest in undertaking legal aid and for them the administrative burden and inadequate remuneration are the key barriers.

Lawyers are contributing to access to justice in other ways by reducing their fees or providing free services.

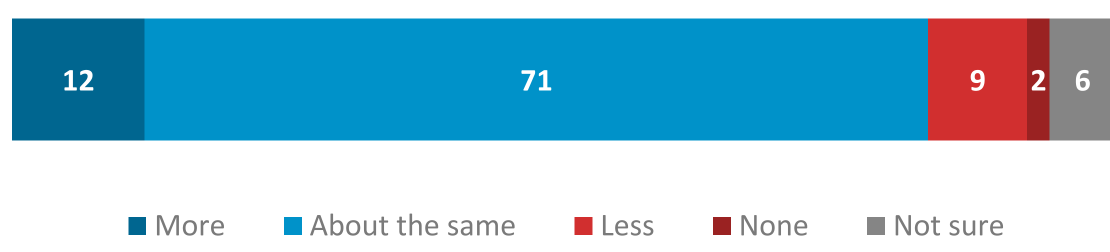
59%

Six in ten lawyers have provided legal services at a discounted rate or reduced fee in the last 12 months, and 43% have provided legal assistance at a discounted rate or reduced fee to people who can't afford it. This increases to nearly six in ten legal aid lawyers. Most are simply reducing their fees, but one in three of these lawyers (who provide legal services at a discounted rate or reduced fee) provide payment plans.

81%

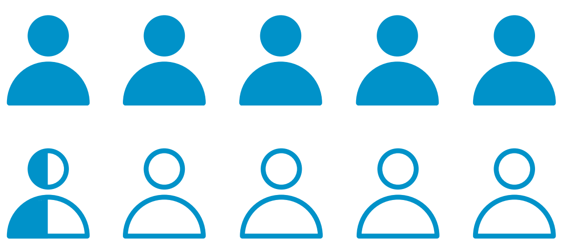
Eight in ten lawyers have provided some form of legal assistance for free in the last 12 months and nearly half have provided free legal assistance to individuals who cannot afford to access the legal system.

The motivations behind providing free services are similar to the drivers of legal aid provision. Lawyers feel this work aligns with their values, they want to give something back and do their bit to enable people to get legal representation they couldn't otherwise afford.

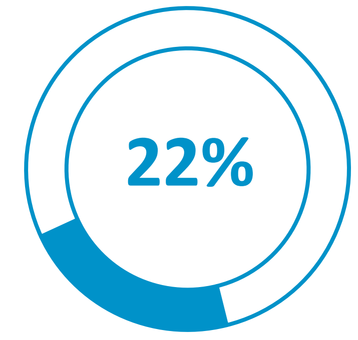


Positively the majority of lawyers plan to keep providing their services for free to those who need them. Nearly three quarters of lawyers intend to do the same amount, and one in ten intend to do more over the next 12 months.

What about lawyers who are not providing free legal assistance?



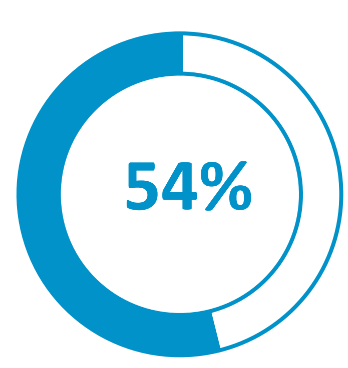
Nearly six in ten lawyers (55%) have not provided free legal assistance to people who cannot afford it. These lawyers are already feeling stretched and have heavy work commitments so most of them don't feel they are in a position to take this work on.



That said, 22% of them are very or extremely interested in doing this type of work. However, in addition to being overstretched and over committed there are further barriers for this group. Namely, 42% are in workplaces which don't allow or encourage them to provide free legal assistance to those who need it. Encouraging workplaces to allow their lawyers to undertake this work and giving them the time and space to do so will be a positive step towards overcoming this barrier.

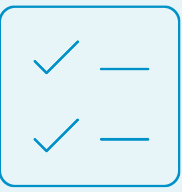
Additionally, three in ten lawyers (who are very or extremely interested in this type of work) don't know how to get involved.

Te Ara Ture is a service that connects volunteer lawyers with people who need free legal help. Lawyers register with the service, and Community Law Centres refer clients in need of assistance.



Around one in five (19%) lawyers are aware of Te Ara Ture, which launched this year. However, there is a high level of interest: 54% of lawyers not already registered with Te Ara Ture were interested in receiving further information. Continuing to talk about and communicate the benefits of this resource while providing more information to those who are interested but are not sure how to get involved will be a step towards breaking down this barrier.

1 THE TASK AT HAND



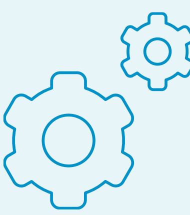
The task at hand

The New Zealand Law Society | Te Kāhui Ture o Aotearoa commissioned Kantar Public (formerly Colmar Brunton) to undertake a survey of all lawyers to assess the current state of access to justice in Aotearoa New Zealand. The survey explores the legal aid system, and the types of services lawyers are providing for free or at reduced rates.

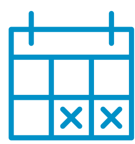
KEY OBJECTIVES:

- Understand levels of engagement and motivation behind providing or not legal aid or free legal services.
- Identify any issues with the legal aid system or access to justice with the aim of removing barriers to provision.
- Tell the stories of legal aid provision in Aotearoa New Zealand.
- Build an evidence base that will support advocacy for better access to justice within the Aotearoa New Zealand legal system.

2 RESEARCH METHOD



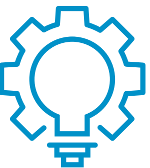
Quantitative method



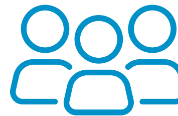
Secondary research was undertaken during the exploratory phase of the project, making use of publicly available information, as well as legal aid data provided by the Ministry of Justice. We also used questions from a survey shared with us by the University of Otago Legal Issues Centre.[1]

Following that, an online survey of lawyers was conducted from 30 August to 21 September, 2021.

The New Zealand Law Society emailed 14,628 lawyers an invitation to complete the survey. The email contained a secure link to a survey managed by Colmar Brunton. Two reminder emails were sent to maximise the response rate and the survey was promoted on social media. Confidentiality of responses was maintained at all times.



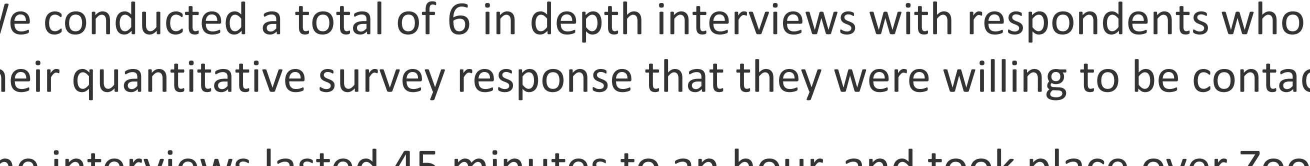
The survey took an average of 12 minutes to complete. During questionnaire development cognitive interviews were undertaken with six lawyers to stress test the questionnaire. This ensured respondents interpreted the questions as intended and were able to provide a meaningful response.



2,989 lawyers completed the survey – a response rate of 21%. The maximum margin of error on a total sample size of 2,989 (at the 95% confidence level) is +/-1.7%.

Following the completion of fieldwork, data was weighted to ensure survey findings reflect New Zealand lawyer population characteristics for gender, location and legal aid provision.

[1] Bridgette Toy-Cronin, https://ourarchive.otago.ac.nz/handle/10523/9952



We conducted a total of 6 in depth interviews with respondents who indicated in their quantitative survey response that they were willing to be contacted further.

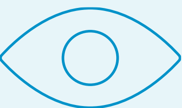
The interviews lasted 45 minutes to an hour, and took place over Zoom.

These interviews were conducted between the 20th September and 8th October.

New Zealand Law Society
Te Kāhui Ture o Aotearoa

Qualitative method

6 individual interviews				
AGE	**GENDER**	**ETHNICITY**	**REGION**	**AREAS OF LAW**
25-29: 1 30-39: 1 40-49: 2 50-59: 1 60-69: 1	Female: 5 Male: 1 *The majority of respondents who were willing to participate were female	New Zealand European: 4 Māori: 2	Auckland: 2 Otago: 1 Taranaki: 1 Wellington: 1 Nelson: 1	Family: 3 Criminal *(including youth justice)*: 3 Employment: 2 Health: 1 Civil Litigation: 1



Reading the survey results in this report

How to read subgroup differences

Any differences between subgroups that are noted in the report are statistically significant at the 95% confidence level. This means that we are 95% confident that the observed difference is real and not simply a result of surveying a *sample* of the workforce.

When a subgroups result is significantly different it will be shown in brackets. As an example, (see image on right) overall 52% of the lawyers we spoke to give a rating of poor or very poor. 70% of Lawyers working in Māori / Te Tiriti o Waitangi law give a rating of poor or very poor and this difference is statistically significant from the overall result (52%).

SUBGROUP DIFFERENCES

Lawyers **more** likely than average (10%) to give a rating of **good or very good**:

- Aged 50-64 (16%)
- Work in property law (15%)
- Work in criminal law (14%).

Lawyers **more** likely than average (52%) to give a rating of **poor or very poor**:

- Work in Māori / Te Tiriti o Waitangi law (70%)
- Pacific lawyers (66%)
- Māori lawyers (63%)
- Work in employment law (61%)
- Have given free legal assistance in the last 12 months (58%)
- Work in Administrative / public law (58%)
- Work in civil litigation (58%)
- Based in Wellington (57%)
- Work in family law (56%).

Interpreting charts

Unless otherwise specified, all results are shown on the charts are percentages.

Reading footnotes

All slides with results have footnotes (example below). Each footnote shows the question that was asked and the group of people who were asked the question. The Base is the criteria of the group who were asked the question and how many (n=). In the example below, results for all respondents are being shown and there are 2,989 respondents in total.

Base: All respondents (n=2,989)
A5 Based on your experience how would you rate the justice system in providing all people in Aotearoa New Zealand with access to justice?

4 ACCESS TO JUSTICE

Rating the legal system

Lawyers are concerned about access to justice in Aotearoa New Zealand. **52% rate the legal system as poor or very poor at providing everyone in Aotearoa New Zealand access to justice.** A further 41% rate it as OK. Only 10% rate it as good or very good. There are some subgroup differences in how lawyers rate the legal system. Lawyers working in Te Tiriti o Waitangi law are more likely than average to rate the system poorly, as are Pacific and Māori lawyers.

RATING OF THE NZ LEGAL SYSTEM FOR PROVIDING ALL PEOPLE IN AOTEAROA NEW ZEALAND WITH ACCESS TO JUSTICE

%

GOOD/ VERY GOOD 10%

POOR/VERY POOR 52%

Very good	Good	OK	Poor	Very poor	Not sure
2	8	33	41	11	5

SUBGROUP DIFFERENCES

Lawyers **more** likely than average (10%) to give a rating of **good or very good**:

- Aged 50-64 (16%)
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- Have given free legal assistance in the last 12 months (58%)
- Work in Administrative / public law (58%)
- Work in civil litigation (58%)
- Based in Wellington (57%)
- Work in family law (56%).

Base: All respondents (n=2,989)
A5 Based on your experience how would you rate the justice system in providing all people in Aotearoa New Zealand with access to justice?

Reasons for rating

Reasons for poor or very poor ratings are varied and complex. However, key themes that arise are poor legal aid remuneration, the excessive legal aid workload, and the stress involved with this type of work.

REASONS FOR A POOR RATING OF THE AOTEAROA NEW ZEALAND LEGAL SYSTEM

*"**Access to adequate criminal legal representation is limited**, even for those who can afford it. The criminal court process is **woefully slow** to the point of denying access to justice. Access to the civil courts is cost prohibitive for almost everyone."*

*"Civil legal aid **does not pay enough for good lawyers to do the work.** Serious criminal legal aid is **very stressful** and does not pay enough to have enough lawyers"*

"**Threshold is very low for people to obtain legal aid**. Legal aid rates are extremely low for lawyers - **no incentive to do legal aid work**. Particularly as issues for legal aid clients often involve drug use, mental health issues etc. Can be very difficult clients and stressful work. Much easier to take on private work and get paid accordingly"

*"Criminal justice is filled with lower-level lawyers completing an **excessive legal aid workload**. The top lawyers will be paid for by rich people who will get better outcomes. Not only does legal aid not pay well enough but it means **that lawyers need to take on a greater workload**."*

*"**Few people qualify for legal aid** and few lawyers offer legal aid, at least in the civil jurisdiction. There is no incentive to become qualified for legal aid - **rates are low and it is very difficult**."*

*"The justice system is currently a colonial system which is expensive. **The justice system is not diverse enough to cater for people who come from diverse backgrounds**. The justice system does not cater for our multicultural Aotearoa, this creates endless hurdles."*

*"There are **too many barriers to get access**. Legal aid is clearly one but there are others such as the cost of litigation and **communication and cultural barriers**"*

*"**Wider socio-economic factors** affecting income and education + also cost, knowledge of how to access justice system for particular groups"*

*"**Delays**, **lack of lawyers** available to assist people who are not financially able to seek legal assistance, **broken legal aid system**"*

*"**Difficult for people** to understand the justice system, how to access and navigate it. **Lack of transparency** in the lower courts."*

*"I am predominantly a legal aid provider. **Proper representation for clients takes time**, thought and a holistic approach. It is **exhausting** to have to fight their corner with legal aid as well as with the police or Crown just to ensure that clients have access to justice as opposed to access to a lawyer to run a cookie cutter court case."*

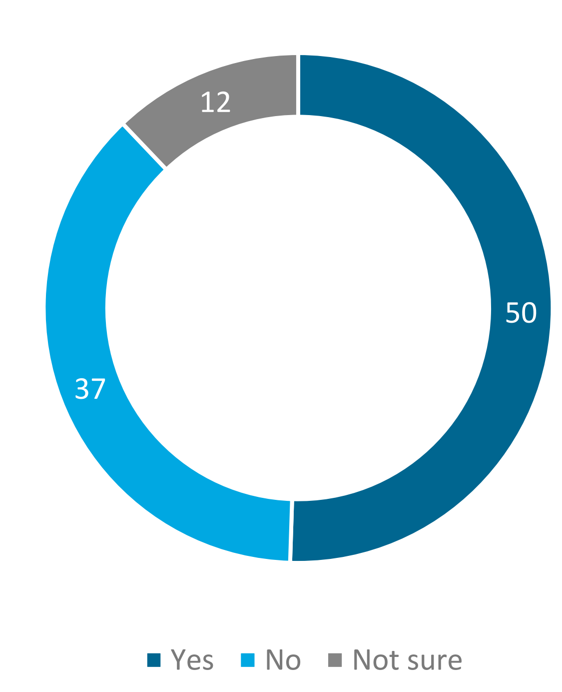
Base: All respondents who gave a rating of poor / very poor (n=1,542)
A5a For what reasons do you rate the justice system as [INSERT RESPONSE FROM A5] in providing all people in Aotearoa New Zealand with access to justice?

Turning clients away

Half of all lawyers (excluding those working in-house) have had to turn away clients in the last 12 months, and this increases to three quarters of legal aid lawyers. This occurs where lawyers do not have the time or capacity to help these clients, or where the firm has reached the maximum number of legal aid clients that it can afford. This demonstrates part of the reason why a majority of lawyers rate the legal system poorly in providing everyone in Aotearoa New Zealand with access to justice.

PROPORTION OF LAWYERS WHO HAVE TURNED AWAY IN THE LAST 12 MONTHS

%



SUBGROUP DIFFERENCES

The following sub groups are **more likely** than average (50%) to have turned clients away in the last 12 months:

- Lawyers who have undertaken legal aid work (77%)
- Barristers (70%)
- Directors/partners (61%)
- Have been in the profession 11 years or longer (60%)
- Based in the North Island excl. Auckland, Waikato and Wellington (65%).

Base: All respondents excluding those working in house (n=2,514)
G1 Some lawyers have talked about having to turn away clients. This could be for reasons such as not having the time or capacity to help these clients, or the firm has reached the maximum legal aid clients it can afford.
In the last 12 months, how many times have you personally had to do this?

Number of clients being turned away

Legal aid lawyers are having to turn away a greater number of clients. Among lawyers who have had to turn away at least one client, legal aid lawyers are twice as likely than other lawyers, to have turned away 11 clients or more in the last 12 months (50%, compared to 27% of all lawyers).

NUMBER OF CLIENTS TURNED AWAY IN THE LAST 12 MONTHS

	% ALL LAWYERS	% LEGAL AID LAWYERS
1 to 5 times	53	32
6 to 10 times	20	18
11 to 20 times	12	21
21 to 49 times	10	18
50 to 100 times	4	6
More than 100 times	2	4

All lawyers: **27%** *Proportion who have turned away 11 clients or more*

Legal aid lawyers: **50%** *Proportion who have turned away 11 clients or more*

All lawyers who have turned away clients (n=1,407)

Legal aid lawyers who have turned away clients (n=680)

Base: All respondents excluding those working in house (n=2,514)
G1 Some lawyers have talked about having to turn away clients. This could be for reasons such as not having the time or capacity to help these clients, or the firm has reached the maximum legal aid clients it can afford.
In the last 12 months, how many times have you personally had to do this?

5 THE SUSTAINABILITY OF LEGAL AID

LEGAL AID PROVISION IN AOTEAROA NEW ZEALAND

Legal aid is government funding to pay for legal help for people who cannot afford a lawyer.

Legal aid is considered a loan, and those who receive it may have to repay it, depending on what they earn, and any property they have.

The latest Ministry of Justice data for 2021 show there are 3,111 approved legal aid providers. Of those, 2,000 are active. This means a third of lawyers approved to undertake legal aid cases are not currently doing so.
The below charts show the **number** of approved and active providers broken down for family, criminal and civil law.

	Approved	Active
Family law	955	743
Criminal law	1,026	897
Civil law	482	164

Note: The numbers on this slide do not include supervised legal aid lawyers

Future of legal aid

24% of legal aid lawyers intend to do less or no legal aid work over the next 12 months, compared to 13% who intend to do more. This indicates a workforce under pressure. Just over a third of lawyers based in Otago or Southland plan to do less or no legal aid work (compared to 24% overall). Lawyers who are newer to the profession are more likely than average to say they plan to do more legal aid work in the coming months. It should be noted there are no statistically significant differences by the area of law practised (e.g. criminal, family or civil law).

THE IMMEDIATE FUTURE OF THE LEGAL AID PROFESSION

%

More likely than average to say they plan to do **more** legal aid**:**

Lawyers with up to 2 years in profession **(38%)**
Employees in law firms **(20%)**
Lawyers with 3 to 5 years in profession **(19%)**

Higher among lawyers based in Otago / Southland (35%)
Lawyers with 11 to 19 years in profession (32%)

LESS OR NONE
24%

More	About the same	Less	None	Not sure
13	61	19	5	3

Base: Lawyers who have undertaken legal aid in the last 12 months (n=911)
B4 Over the next 12 months, do you intend to do more or less legal aid work, or about the same?

Reasons for wanting to do less legal aid

The key reason for wanting to do less legal aid work over the next 12 months is inadequate remuneration. Secondary reasons include finding the work too stressful or time consuming, the administrative burden involved with undertaking legal aid cases and the complex needs of legal aid clients.

THE REASONS SOME LAWYERS WANT TO REDUCE THEIR COMMITMENT

*"We are no longer really accepting legal aid for civil law due to **inadequacy of the payments and the admin burden**."*

*"Jury trials at every level have become extraordinarily complex... Many **clients are difficult to work with** and clearly have complex needs."*

*"It's primarily a financial reason. The legal aid **rates are simply insufficient** to run a decent practice"*

*It is **not economic** for a firm to do much legal aid in terms of the other costs of practice. We continue to do some for social justice reasons and it does have some benefit for new lawyers to gain experience, but it is becoming increasingly difficult to maintain. The **costs of practice have risen much faster than legal aid remuneration**.*

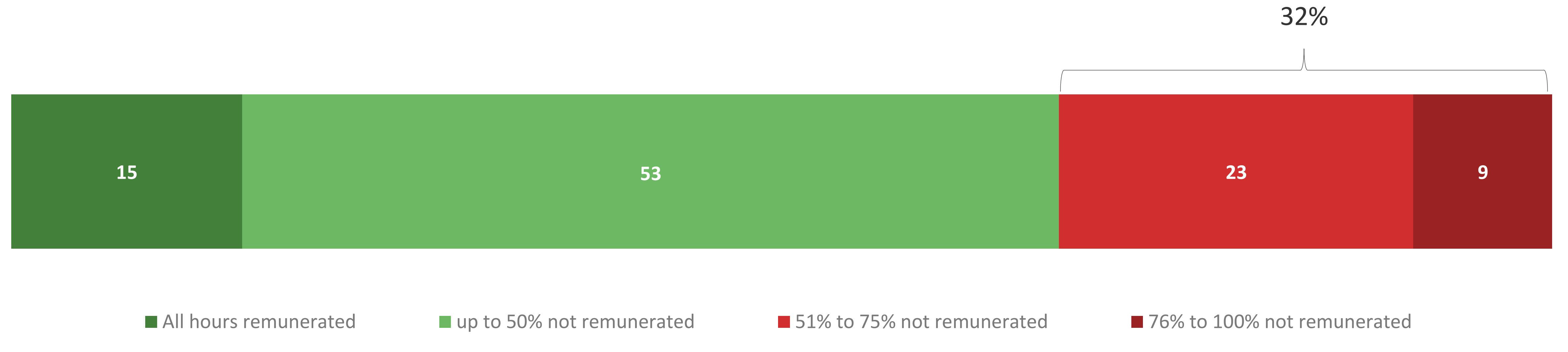
Base: Legal aid lawyers who plan to do less legal aid over the next 12 months (n=214)
B5 For what reasons do you plan to do [pull through answer from B4: IF B4=3: 'less', IF B4=4: 'no'] legal aid work over the next 12 months?

Legal aid remuneration

This issue of remuneration is widespread. On average, legal aid lawyers were not renumerated for almost half (48%) of the hours they spent on their last legal aid case. Only 15% of legal aid lawyers were fully remunerated for the amount of time they spent on their last legal aid case, while one in three were not remunerated for over half of the time they spent on their last legal aid case.

PROPORTION OF TIME NOT BEING REMUNERATED

%



KANTAR PUBLIC COLMAR BRUNTON A Kantar Company

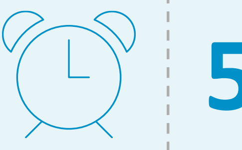
Base Lawyers who have undertaken legal aid in the last 12 months and can recall the number of hours they spent on their last case (n=496)
B7a How many hours did you personally spend working on that file, as a lead or supervised provider?
B7b And, how many hours of your time were remunerated for that file?

Hours worked

In addition to hours not being remunerated, legal aid lawyers are working an average of 50 hours each week (compared to 47 hours on average across the profession). Pacific legal aid lawyers are working particularly long hours. In addition, legal aid lawyers who are on set contracts are working 11.5 hours over and above their contracted hours each week (compared to 9.3 hours for all lawyers).

NUMBER OF HOURS LEGAL AID LAWYERS ARE WORKING

AVERAGE NUMBER OF HOURS WORKED IN A WEEK



50

Higher than the total profession average of 47

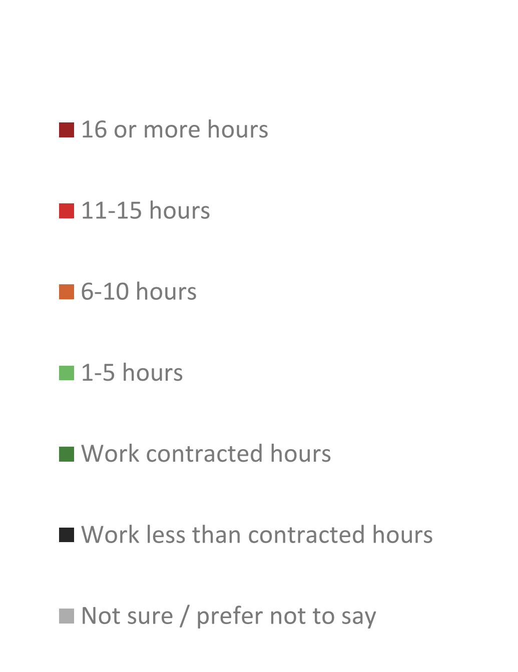
The following groups of lawyers work **more** than the legal aid average of 50 hours a week:

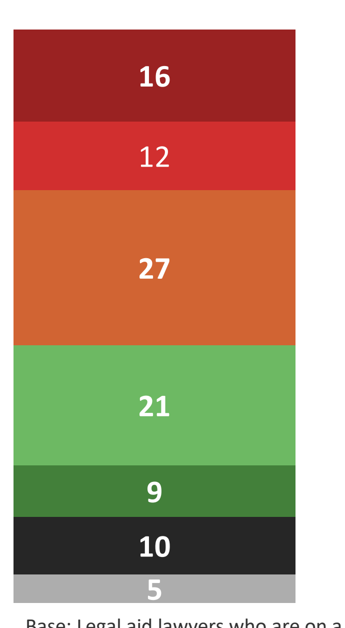
- Pacific lawyers (54 hours)
- Directors / partners (53 hours)
- 20 years or more in profession (52 hours)
- Barrister soles (52 hours)
- Criminal lawyers (52 hours)
- Auckland based (52 hours).

% NUMBER OF HOURS WORKED ABOVE CONTRACTED HOURS

Average: 11.5 hours

Higher than the total profession average of 9.3





Base: Legal aid lawyers who are on a set contract (n=373)

Base: Legal aid lawyers (n=911)
A3 How many hours are you contracted to work each week?
A4 Thinking back over the last 12 months, how many hours on average would you say you actually work in a typical week?

Stress, satisfaction and work-life balance among all lawyers

Lawyers are feeling a greater degree of job satisfaction but also higher levels of stress compared to the last time we spoke to them in 2018.

HOW ARE LAWYERS FEELING IN GENERAL?

%

	Strongly agree	Agree	Disagree	Strongly disagree	Not applicable	Not sure	Total disagree in 2021	Total agree in 2021	Total agree in 2018*
My job gives me a great deal of satisfaction	30	53	10	2		5	11	83	79
I find my job very stressful	21	46	27	2	1	3	30	67	60
I regularly work extended hours (e.g. Early mornings or late evenings)	30	39	24	5	1	1	29	69	68

*Note: Results taken from the 2018 Workplace Environment survey conducted by Colmar Brunton on behalf of the New Zealand Law Society| Te Kāhui Ture o Aotearoa
Base: All respondents (n=2,989), In 2018 (n=3,516)
A1 How much do you agree or disagree that…

Stress, satisfaction and work-life balance

The majority of legal aid lawyers find the work stressful and are having to regularly work extended hours – significantly more so than all lawyers. Despite this, the majority of legal aid lawyers report a high level of job satisfaction (in line with all lawyers).

HOW ARE LEGAL AID LAWYERS FEELING?

%

Statement	Strongly agree	Agree	Disagree	Strongly disagree	Not applicable	Not sure	*Total disagree legal aid lawyers*	*Total agree legal aid lawyers*	*Total agree all lawyers*
My job gives me a great deal of satisfaction	35	49	8	2		5	11	84	83
I find my job very stressful	33	47	15	2	1	3	17	80	67
I regularly work extended hours (e.g. Early mornings or late evenings)	42	37	15	4	1	1	19	79	69

Base: All respondents (n=2,989); Legal aid lawyers (n=911)
A1 How much do you agree or disagree that…

Reasons for doing legal aid work

Legal aid lawyers are principally motivated to do legal aid work because they want to ensure people in Aotearoa New Zealand get access to justice and because they feel a moral duty to provide these services.

REASONS LEGAL AID LAWYERS ARE UNDERTAKING THE WORK

%

	Extremely important	Very important	Fairly important	Not very important	Not at all important	Not sure	*Total very or extremely important*
I want to help people who can't afford legal representation	40	37	18	4	1	1	76
As a lawyer I feel it is my moral duty to provide legal aid services	31	32	23	8	3	2	63
Undertaking legal aid work provides me with litigation experience or work I might not otherwise get	12	20	22	21	24	1	32
It is the only option for my area of law	13	15	23	20	26	3	28
Undertaking legal aid work provides a reliable and steady income	8	17	29	21	21	3	26

Base: Legal aid lawyers (n=911)
B2 How important or not are each of the following in explaining why you undertake legal aid work?

Sub group differences for wanting to do legal aid work

Younger lawyers in the earlier stages of their career are more likely than average (32%) to say legal aid work provides them with litigation experience they wouldn't otherwise get. Criminal lawyers, those based in Waikato and barristers are more likely than average to feel legal aid work is their only option.

LITIGATION EXPERIENCE

The following groups are more likely than average (32%) to say legal aid work provides them with litigation experience they might not otherwise get:

- Under 30 years (58%)
- 3-5 years in profession (58%)
- Employees in law firms (50%)
- Up to 2 years in profession (54%)
- Asian lawyers (47%)
- Aged 30-39 (45%)
- 6-10 years in profession (44%).

ONLY OPTION FOR AREA OF LAW

The following groups are more likely than average (28%) to say legal aid work is the only option for their area of law:

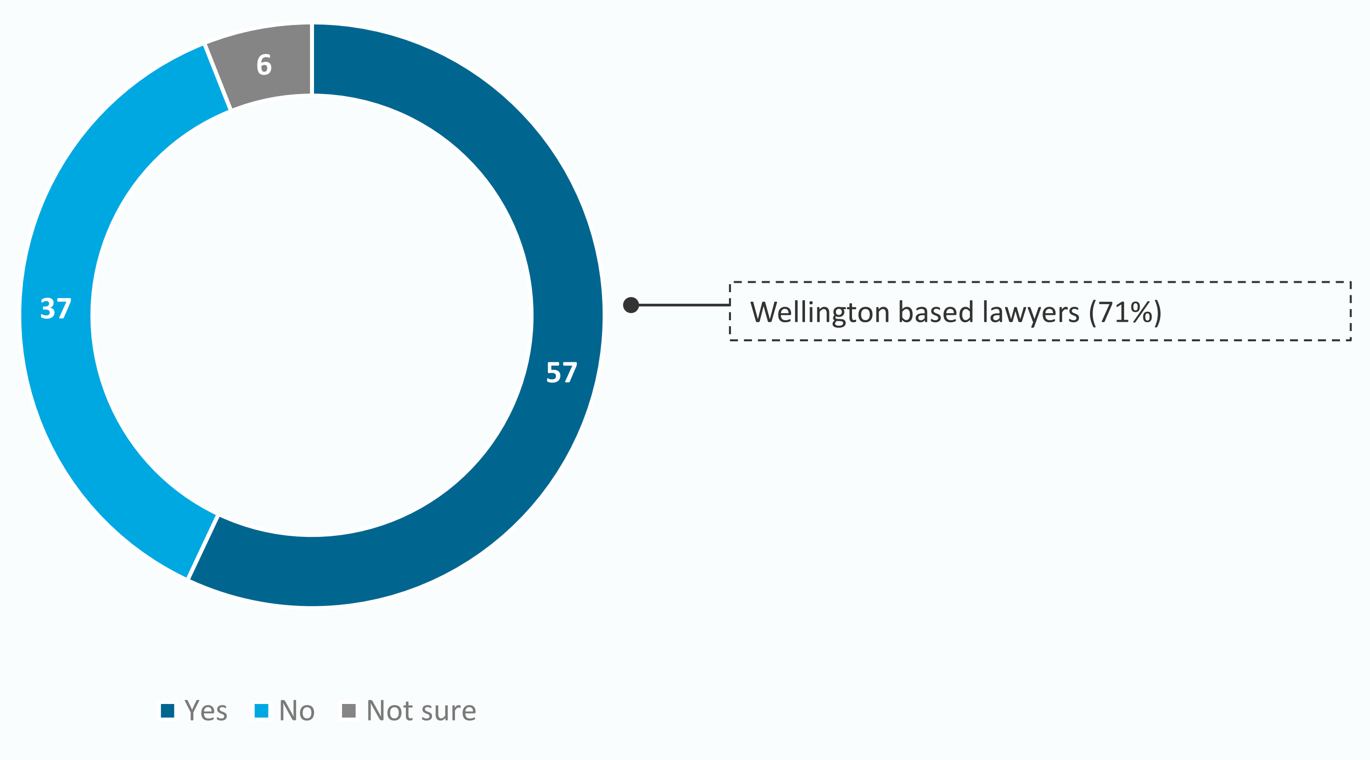
- Criminal lawyers (40%)
- Based in Waikato (40%)
- Barristers (34%).

Base: Legal aid lawyers (n=911)
B1a Did you make an active decision to work for a law firm that does legal aid work?
B2 How important or not are each of the following in explaining why you undertake legal aid work?

Active decision to undertake legal aid work

Many legal aid lawyers make an active decision to do this work. Nearly six in ten (57%) of the legal aid lawyers we spoke to made an active decision to join a law firm that undertakes legal aid work. This increases to 71% of Wellington based legal aid lawyers. This is consistent with the finding that legal aid lawyers feel a moral duty to carry out this work.

PROPORTION OF LAWYERS WHO MADE AN ACTIVE DECISION TO WORK IN A LEGAL AID LAW FIRM



Base: Legal aid lawyers excl. barrister soles (n=563)
B1a Did you make an active decision to work for a law firm that does legal aid work?

6 LEGAL AID LAWYERS: 6 CASE STUDIES

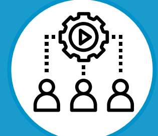
CASE STUDY ONE: DALE

New Zealand Law Society
Te Kāhui Ture o Aotearoa

Dale Lloyd

AREA OF LAW: EMPLOYMENT, FAMILY, TRUSTS, ESTATES

CURRENT ROLE: PARTNER



LENGTH OF PRACTISE: 20+ YEARS

LOCATION: OTAGO

> *"People that represent themselves consume a lot more court time therefore there's more delays and court risks becoming irrelevant."*

INTRODUCING DALE

Dale has been practising since 1990. Over the years she has acquired experience in a range of fields, including family, employment and property law. Today, she continues to work in those areas of law amongst other areas from her office in Queenstown.

Across the expanse of her career, Dale has witnessed many changes to the legal system, and believes some of them have been to the detriment of both clients and lawyers. Dale fears that if things don't change, courts will lose their relevance and clients will continue to struggle to find legal aid representation, impeding on their access to justice.

CURRENT BARRIERS TO PRACTISING LEGAL AID

Dale believes the changes that have been applied to the duty solicitor scheme and the legal aid system *"have not served our profession well*". These changes have resulted in the bar to attaining legal aid status to be so high that it has become a barrier to those in the profession.

Additionally, Dale says that the level of administrational work that comes with attaining legal aid *status "drives lawyers pink*."

Recently, Dale has only managed a handful of legal aid cases. She will often turn clients away or not open a file. *"Financially, it's just not worth it."* The rates that are offered does not cover overheads for a lot of lawyers, and the rates are *"probably less then what you would have a junior lawyers chargeout rate*."

THE IMPACTS OF BARRIERS TO PRACTISING LEGAL AID

From what Dale can see, this lack of economic return from practising legal aid means some firms must specialize for it to be profitable. *"There are some firms that do nothing but it, so they've got themselves set up. That's a limited range of firms that would do that."* Outside of this structure, it's not so simple.

Dale thinks that legal aid work is a valuable opportunity for young lawyers to get experience. *"At the moment I do that work so that the young graduate or the young people that work with me can get that type of work."* However, if rates don't increase, young lawyers will continue to miss out on work experience. *"The remuneration is so poor that there are only a small pool of people doing it and it's not worth firms training new young lawyers to embark on that course*." This will only continue to contribute to litigation being conducted by an ageing profession.

CURRENT BARRIERS TO ACCESSING LEGAL AID

Legal aid workers already have such low levels of capacity that they often have to turn clients away. This creates a huge obstacle for clients who are looking for representation. *"Mostly it's that people can't find a legal aid lawyer because they are so busy."*

The inability of people to find legal aid representation is evident in the number of people unrepresented in cases Dale is a part of. Of the 11 cases she is due to appear in, 8 of those parties have people who are representing themselves.

Dale strongly believes that living up to the promise of a fair society means the provision of a fair legal aid regime that provides access to justice for all. She isn't convinced that legal aid is serving this purpose. *"I think one of the problems with legal aid is that it's trying to be equal. Fairness is actually giving people what they need."*

THE IMPACTS OF BARRIERS TO PRACTISING LEGAL AID

Due to the current barriers for those seeking legal aid, Dale has seen the numbers of people representing themselves in court increase. Self representation means the client is acting on their own behalf, presenting their case before the courts, often with no prior knowledge of the court system or legal skills. For clients who self represent, more often than not it will lead to an unfavourable outcome. *"Unless people are represented... I dont think that they necessarily can achieve the outcome that they want."*

In Dale's view, self representation is a role that is extemely stressful. *"The legal system is an extremely stressful environment for the untrained to be in. They don't know the process, they don't know their rights, they don't know how it's going to work and often feel unheard..."* If the numbers of people self-representing continue to increase, it will not only have negative impacts on the individual, but also clog up the court system, slowing the process down further.

CHANGES THAT NEED TO BE MADE TO THE SYSTEM

There are a number of changes that Dale wants to see in the system. One of them is an increase in specialist courts. *"I would have more of those specialist type courts where people are being heard and not coming back. I think it'lll take a long time but those specialist courts will ultimately be the best outcome for us."*

Dale also believes the hoops that lawyers have to jump through to become legal aid qualified needs to change. For her, making the process easier for the few lawyers who are actually willing to take on legal aid cases is a must. As it stands currently, these processes are burdensome and discouraging lawyers from becoming legal aid qualified.

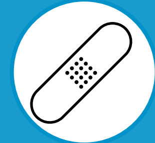
WHAT WILL HAPPEN IF THINGS DON'T CHANGE

One of Dale's biggest concerns for the future, is if the numbers of self–represented clients continue to increase, the courts will lose their relevance. Without changes to the current justice system, we will continue to see a shortage in legal aid practitioners, clients who are driven to self-represent and a court system that begins to lose its relevance. For Dale, *"If people can appear in court and have their voices heard and feel that they have had access to justice then we will get through this."*

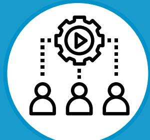
CASE STUDY TWO: MELISSA

Melissa Harward

AREA OF LAW: ACC

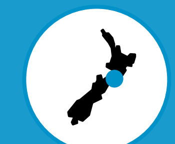


CURRENT ROLE: EMPLOYEE IN LAW FIRM



LENGTH OF PRACTISE: 1 – 2 YEARS

LOCATION: OTAGO



"If an individual was to go off and take the same steps that a lawyer took, it would take them a lot longer, and would be more expensive and it would be really taxing for them to do all those same things...you put health issues on top of that... the battle that person is going to have is immense."

INTRODUCING MELISSA

Self described as 'socially minded', her passion for people saw Melissa pursuing a career in law. Through her studies, her eyes were opened to all of the injustices that exist within the system and she is eager to change it. Her initial dream was to work in envinronmental law, but she has now found herself working in a small law firm in Wellington, with a focus on health law and ACC claims.

She believes that most people in her firm align with the belief that the system doesn't serve everyone equally.

CURRENT BARRIERS TO PRACTISING LEGAL AID

Melissa believes that the disparity between civil legal aid rates and private rates can be a key barrier to lawyers taking on legal aid work. *"Unless you do a range of areas of law, you're not necessarily going to have a profitable business. Legal aid does not necessarily pay the bills."* She explains that there are several overhead costs that need to be covered in order for a practice to be profitable.

When weighing up the decision to take on legal aid work, she thinks many lawyers see the costs outweighing the benefits. Melissa expresses that once firms cover a range of areas, their time might become too valuable to allocate towards legal aid work. *"At that point I guess it would be easy to just be so busy you wouldn't necessarily have time for the other stuff. And that's why I guess people do other pro bono work on a one-off basis rather than having a portion of their clients coming in and not necessarily covering the costs."* Melissa also notes issues around fixed fees for legal aid work, which rarely reflects the value, time and energy a lawyer has put into a case. *"Unless the case is straightforward, you would do far more hours than the case allows for".*

THE IMPACTS OF BARRIERS TO PRACTISING LEGAL AID

The reality of working in legal aid means working with vulnerable people, who are often experiencing a number of issues. For Melissa, it's all part of the job, but is something that needs to be recognised. *"I had a client ring up the other day and say he had no food, so I rang up the local food bank and sorted him out some kai, but I can't bill for that. And that's fine. But it is part of my job."* These additional responsibilites and services are common practise for legal aid lawyers. On top of their allocated rates, they spend time responding to clients and taking care of their needs that fall far outside the scope of their immediate responsibilities as a lawyer.

THE CURRENT BARRIERS TO ACCESSING LEGAL AID

Melissa knows all too well the vital role that legal aid plays in facilitating access to justice for vulnerable people, especially those who are suffering from debilitating injuries. For these individuals, access to legal aid means access to entitlements that could be the only thing keeping them afloat. However, due to the threshold for eligibility being far too high, it means that even some families who are sustaining on a single income cannot qualify for legal aid. A high threshold means there is a huge portion of those seeking legal aid that do not qualify for legal assistance, but also cannot realistically afford legal advice through private services. *"It's become a fallacy that a family can live on a single income. To exclude people from legal aid who are relying on one income, doesn't mean those people have a lot of money, and certainly don't have a lot of spare money to pay for legal aid or any legal services."* Through her work, Melissa is determined to help her clients access their entitlements to get back on their feet, but too often she has seen people become locked out of services due to rates that they simply cannot afford.

THE IMPACTS OF BARRIERS TO ACCESSING LEGAL AID

Melissa is concerned that due to the current threshold of qualifying for legal aid, those who are suffering from debilitating injuries are forced not to pursue help. *"For those with a significant injury...they are in so much pain and its not really an option to leave it, and some people do just have to leave it as is and I really worry about how people get on with their lives."* Melissa has seen firsthand the ways in which clients can become disenfranchised and 'fall out of the system' due to a lack of access to adequate legal aid. For some it leads to losing their homes, for others their injury becomes the catalyst for a range of other mental and physical health issues.

CHANGES THAT NEED TO BE MADE TO THE SYSTEM

Through her studies, Melissa discovered that *"the system is not made for certain people ... if you're not in that group, then the law isn't necessarily going to serve you."* As someone who has always been 'socially minded', Melissa wants to see changes to the law that make it accessible to all. As it stands, the expense of pursuing a claim is enough to deter clients from attempting to access justice.

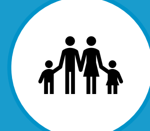
WHAT WILL HAPPEN IF THINGS DON'T CHANGE

Melissa's fear is that without improved access to legal aid, people will continue to have to take matters into their own hands. In order to navigate the justice system, the individual would have to resource a number of parties to support them through a decision that would otherwise be undertaken by a single lawyer. The additional involvement of inexperienced parties causes the system to be slowed down, and only prolongs the wait for the individual to have access to justice. *"If an individual was to go off and take the same steps that a lawyer took, it would take them a lot longer, it would be more expensive and it would be really taxing for them to do all those same things."* For those lodging claims due to injuries, the wait time not only increases mental and emotional distress, but can also in some cases cause physical health to deteriorate further, meaning a lower likelihood of ever returning to normalcy.

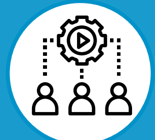
CASE STUDY THREE: CAROLINE

Caroline Silk

AREA OF LAW: EMPLOYMENT, CRIMINAL DEFENCE AND CIVIL

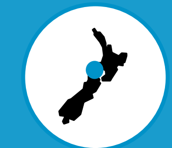


CURRENT ROLE: PARTNER



LENGTH OF PRACTISE: 20+ YEARS

LOCATION: NEW PLYMOUTH



> *"There are some really simple fixes I think that could happen within the system but its not just the justice system, its the whole social justice equity system"*

INTRODUCING CAROLINE

Born and raised in Wellington, Caroline spent most of her childhood in the multi-cultural suburb of Porirua. In her primary years she was relocated to a predominantly Pākeha school, where she became aware of the differences in her peers' perceptions towards her due to where she was from. These experiences early in life had a lasting impact and influenced her want to work in the justice system. Caroline completed her studies at Waikato University, and moved to Taranaki shortly after, where she has lived ever since. Over the course of her career, Caroline has become particulary passionate about the close relationship between legal issues and health issues, and believes this relationship needs to be addressed if things are to get better.

THE CURRENT BARRIERS TO PRACTISING LEGAL AID

Caroline believes that for lawyers looking to practise legal aid, the bar has been set too high. *"From an agency point of view, it's really difficult to get that legal aid qualified status."* Although Caroline understands the importance of a robust process for lawyers to go through in order to attain legal aid status, as the Government needs to ensure that the legal aid services they are funding are qualified, she questions if these obstacles are helping or hindering access to the system for both lawyers and their clients. *"There is good reason why there are hoops to jump through to become a legal aid provider... but it seems like it's a huge high jump, or really tiny hoops so it's really hard to get through."* Caroline also highlights the lack of remuneration for legal aid work in comparison with other work. *"It's also somewhat uneconomic when you compare it to what you get privately."*

THE IMPACTS OF BARRIERS TO PRACTISING LEGAL AID

Caroline is concerned that if gaining legal aid status continues to be difficult, less lawyers will choose to do legal aid work, and those who do practise will continue to be overloaded by the demand of people needing help. *"What I see happening in the system is that the harder it is to become a provider, and the harder it is to interface as a provider, so the amount of I guess paperwork and bureaucracy that you have to keep dealing with when you are a provider, it just becomes too hard, so people are not wanting to do it."*

CURRENT BARRIERS TO ACCESSING LEGAL AID

In Caroline's experience, it has become increasingly common for clients to give up on pursuing their case due to sheer difficulty and the toll the process can takes on one's life. *"They had got to the point where they just weren't going to bother with what was in front of them. Some of those issues are quite serious issues, so that's parents potentially giving up their rights to see their kids."* The challenges that come with pursuing legal aid in the current system are so great, it is forcing people to give up their right to an opportunity to argue their case.

Caroline also discusses several other factors that act as barriers to justice, including inadequate access to housing. *"I believe...there are unwritten policies that if you have any kind of bail condition you are not entitled to housing. You can't get bail unless you have a suitable address."* Without access to adequate health services or adequate housing, the outcomes for clients will continue to be poor, and their vulnerable position through the system will continue to be reinforced. If barriers continue to get higher and bigger for clients, Caroline fears we will only see an increase in people giving up on the system, and in turn, giving up on their chance to gain access to justice.

THE IMPACTS OF BARRIERS TO ACCESSING LEGAL AID

Caroline's philosophy is that legal issues are inextricably linked to mental and physical health issues. This is particularly evident in the criminal justice system. *"If you have a very difficult legal issue in your life, you are probably stressed, and we all know that the physical body will react to stress in different ways and will lead to some kind of health issue. Or it might be that you have a health issue that has led to the legal issue."* If this correlation continues to be left unaddressed, the struggles that vulnerable people experience whilst moving through the system and beyond will only increase. *"We see a lot of people that have mental health issues, cognitive issues, addiction issues that just aren't getting treated, and those issues lead them to commit crimes... If we could solve the health issue, then you're going to reduce the number of people in the criminal system."*

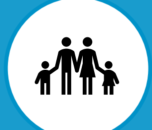
WHAT WILL HAPPEN IF THINGS DON'T CHANGE

"What it looks like is you'll have what we have now but worse and an ageing profession because you won't have people staying to do the work. You will have a shortage of availability of younger lawyers doing legal aid work...you'll have people who will avoid dealing with problems. In my view you're going being have a bigger load on the mental health system and a bigger load on the health system generally, and you're going to have this ongoing blow out of court time and resources because there just isn't the capacity for the court to keep up with the work." Caroline believes that not addressing barriers to accessing legal aid will create knock on effects that will exacerbate negative social outcomes, particulary around mental health.

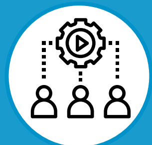
CASE STUDY FOUR: STORMIE

Stormie Waapu

AREA OF LAW: FAMILY

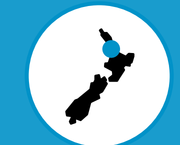


CURRENT ROLE: SOLE BARRISTER



LENGTH OF PRACTISE: 11 – 19 YEARS

LOCATION: AUCKLAND



"There's a lot of people that should be getting (legal) help. There are some really tricky issues before the court. And they're not legally represented because they don't qualify."

INTRODUCING STORMIE

From an early age, Stormie recalls her whānau being active members of the community. Born and raised in Hawkes Bay, Stormie has many memories of growing up on the Marae, with close connections to her whakapapa.

Since 2006 Stormie has been practising family law in South Auckland. Her initial career path of choice was to become a police officer, however as opportunities opened up whilst attending Victoria University of Wellington, she decided to continue on the pathway to law.

Stormie has experience working in a range of fields, including youth law and criminal law, but now works as a sole barrister and has been practising legal aid since 2008.

CURRENT BARRIERS TO PRACTISING LEGAL AID

When legal aid cases come her way she really 'has to think twice' before taking them on, particularly if the case is complicated or likely to go to a hearing. While a large part of her personal motivation for pursuing law was to help vulnerable members of the community, legal aid cases always involve more work than can be billed which can take a personal and financial toll. Sometimes she'll need to write off as much as 50% of the bill. *"The work we put in (for legal aid)… we're never ever going to be properly remunerated."* As a result, lawyers are becoming less willing to take on legal aid cases, when they have other opportunities that see them adequately remunerated for their work.

THE IMPACTS OF BARRIERS TO PRACTISING LEGAL AID

She sees less and less people willing to take on legal aid work, and more and more people saying that they can't find a legal aid lawyer who is able to represent them. Stormie has contacts in other firms that she usually refers legal aid clients to, but even these firms are becoming less able to take on these cases. She used to work in criminal legal aid but made a conscious decision to walk away from it. *"I don't even know how they are able to do that work. With fixed fees and what lawyers can seek, I got to the point where I couldn't even do criminal legal aid. There are plenty of others who just said, no, I'm not doing anymore criminal legal aid. These are also Māori lawyers, and there's a real need for Māori lawyers. People want someone they can relate to, someone they feel comfortable with, someone who has an appreciation of their background and their values. The vulnerable people lose out. The system has to change."*

CURRENT BARRIERS TO ACCESSING LEGAL AID

Stormie is approached daily by people who are unable to afford legal aid. Too often she has to turn people away because of what she describes as the threshold being too high. Her rule of thumb is that generally speaking, if people aren't on the benefit, then they are not going to qualify for legal aid. She has concerns for what she describes as the 'working poor'. These are people who may be working but are earning minimum wage. These are the people who don't qualify for legal aid but who are unable to afford legal representation. She will sometimes provide pro bono for these people or write it off, because she knows that in reality, they simply can't afford it.

WHAT WILL HAPPEN IF THINGS DON'T CHANGE

Stormie believes the whole system is broken, and is not serving the vulnerable people who need it most. She also feels that the burnout legal aid lawyers experience from consistently going over their allocated hours is going to drive lawyers away from taking legal aid cases, and away from the profession. *"A lot of us, long term, we're thinking is this really what we want to be involved in? Can we sustain this long term? And the answer is no. If the system doesn't change, doesn't adapt, then for me I'll be looking at other options. I'm not going to burn myself out. I have aroha, I want to help people, but it's emotionally draining."*

THE IMPACTS OF BARRIERS TO ACCESSING LEGAL AID

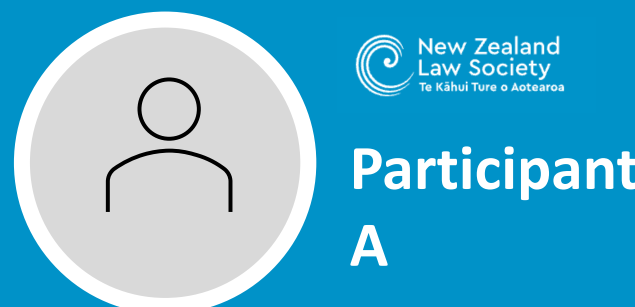
For Stormie, those people who don't have the income, and don't have the resources, often don't get the access to justice that they are entitled to. She recalls a case of a father who she was representing in a family court dispute. He had a change in income which meant he no longer qualified for legal aid but left him unable to pay a private fee. Stormie had to withdraw from the case, and the father was left to self-represent in the High Court. Stormie feels like this is a case where the legal aid threshold failed someone in need, with dire consequences. *"I'm not sure that that was the right decision that came out of the high court. He had to do it alone. That's a hard one to swallow, what he ended up going through."*

She sees people all the time who self represent due to an ineligibility for legal aid, and often they break under the pressure and just can't cope. *"There was one father I was dealing with as a Lawyer for Child. I needed him to get involved. He just couldn't deal with the stress. He kept saying 'I just can't cope with this, I already have so much to deal with'. Even the kids were saying 'we want to see our dad'. It's well known that there's better outcomes for kids when both parents are involved."*

She worries too that the financial strain of those who don't qualify for legal aid, in combination with other underlying personal or health issues, mean that some people simply give up. She sees this a lot, particularly when working as a lawyer for the child. *"I really feel for them, and what they're going through. As a Lawyer for Child, there are parents I come across that can't afford legal representation, and they are trying to do it themselves, and it's a lot of work on me, trying to just help them through."*

CASE STUDY FIVE: PARTICIPANT A

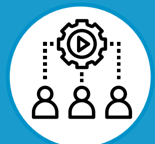
**Participant A did not wish to be identified*



Participant A

AREA OF LAW: CRIMINAL

CURRENT ROLE: EMPLOYEE IN LAW FIRM



LENGTH OF PRACTISE: 3 - 5 YEARS

LOCATION: AUCKLAND

"Legal aid is key for us as a society...it is critical that people have access to representation."

INTRODUCING PARTICIPANT A

Participant A has been working in criminal legal aid for the last six years. Prior to that he also gained experience in the field of Restorative justice. Participant A's passion for the law and for people are his motivating factors for working in legal aid. *"It's people, helping people, being involved with people is really what drives me."*

One of participant A's favourite things about his work is the variety it presents, *"It's never the same. Each day brings something new. That's a really exciting part of the job, it keeps things fresh."* From participant A's perspective, access to legal aid is fundamental.

CURRENT BARRIERS TO PRACTISING LEGAL AID

Participant A believes there are many lawyers who are driven to practise legal aid regardless of the remuneration, however they do recognize the importance of fair pay, especially because of the importance of legal aid in its purpose to provide access to justice. "*I work for a community, work for people, I like people and that's where my strength is, that's where my passion is. So, I think people would get into or someone like myself got into it regardless of the money, but money is a factor to consider...I think it should be fairly paid. It's an important role, it's important for society."*

THE IMPORTANCE OF LEGAL AID

Participant A firmly believes that legal aid plays a vital role in providing access to justice. *"That's where I see the importance of legal aid giving access to people who would otherwise not be able to. Particularly for vulnerable and marginalised communities where often there is a mistrust of the system as well."*

WHO NEEDS ACCESS TO LEGAL AID

Participant A believes that those who are of lower socio-economic backgrounds make up a portion of those who need access to legal aid, however there are a variety of people who also need access to legal aid. *"The majority of clients and particularly with legal aid are those who aren't able to afford a lawyer, but it covers all spectrums of people, demographics, that sort of thing."*

CURRENT BARRIERS TO ACCESSING LEGAL AID

From Participant A's perspective, there are a number of barriers that clients can encounter when trying to access legal aid. Some of these barriers include not being eligible due being over the threshold of income, or simply not being able to find someone to represent them. As a result, clients may go down the route of self representation. *"It would be a pretty daunting prospect i'd imagine for anyone trying to formulate their own defence."* Clients are having to represent themselves in court and argue their defence without any formal assistance.

For others who are seeking legal aid, it is the daunting prospect of having to repay their legal fees *"...when finances are basically on a knife's edge, an extra bill here or there could tip the balance and send you spiralling down into really severe poverty."* Those who are seeking legal aid are already in a vulnerable position, and these barriers only add to their vulnerability.

Participant A is also conscious of the serious consequences that can arise at all stages of a court case, and the need for representation. For example, strict bail conditions can inhibit a person from earning a living. This restriction can mean the difference between them 'keeping their head above water' or not.

THE IMPACTS OF BARRIERS TO ACCESSING LEGAL AID

Participant A has witnessed first-hand what it is like for clients to represent themselves. *"It's like turning up to a job that you have never done before that's fairly technical and trying to give it a shot."*

Self representation can not only lead to poor outcomes for the client but can also impact on the running of the court systems, where judges are given no choice but to take on responsibilities outside of their role. Participant A talks about a case where the other party was representing themselves, and how the events unfolded *"I felt like the judge felt sorry for the person so almost by defacto became a bit of an advocate for them."* The impacts of a lack of access to legal aid are not only felt by the client, but also have repercussions for the wider court systems also.

CHANGES THAT NEED TO BE MADE TO THE SYSTEM

Participant A wants to see a change in the threshold for eligibilty for legal aid in order to increase access for those who need it *"Raise the threshold, I think thats the most important...it increases the size of the net and those who can access it."*

Participant A believes that enacting these changes will not only improve access for the clients who are seeking assistance but will also contribute to positive social change in the long run.

WHAT WILL HAPPEN IF THINGS DON'T CHANGE

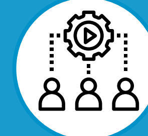
"I'll see someone and go through a legal aid form with them, and they might signal that they are employed and they might just be over the threshold in terms of being eligible for legal aid, but only just. And the bill that comes that they have to foot themselves... they can't afford it. So you're left between two places where you can't on one hand afford a lawyer, or you earn too much money to get legal aid, and that's a tough boat to be in." Participant A believes that without changes to the system, clients who are ineligible for legal aid will remain in a vulnerable position, unable to afford legal help and will be left without access to justice.

CASE STUDY SIX: SANDRA

Sandra Heney

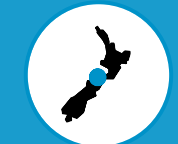
AREA OF LAW: FAMILY

CURRENT ROLE: PARTNER



LENGTH OF PRACTISE: 30 YEARS

LOCATION: NELSON



> *"It's a numbers game. Its just that the rates are so far below what the normal charge out rates are… the bottom line is just too high when you're running a firm and you've got three offices "*

INTRODUCING SANDRA

Sandra has practised for 30 years. She is originally from Christchurch but has moved to Nelson where she currently practises. She is the New Zealand Law Society Nelson Branch President, and has worked in legal aid, family law and done lawyer for child work. In the past she has taken on as much legal aid work as she can, but due to the low remuneration among other reasons, her firm has decided to no longer take on legal aid cases, and she is finishing up her last few case files. Sandra is concerned that if drastic changes aren't made to legal aid, the current legal system will become overburdened, and access to justice will only become more difficult.

CURRENT BARRIERS TO PRACTISING LEGAL AID

Low levels of remuneration and the administrative burden that legal aid puts on lawyers means that there just aren't enough lawyers available or prepared to take on legal aid work. This puts more pressure on the lawyers who are prepared to do legal aid work. Sandra's firm is inundated with approaches from people desperate for legal aid representation after unsuccessful attempts at other firms. Sandra has even had to bring in lawyers from Wellington and Christchurch to help out because they just can't keep up with the demand. *"I have a case where I'm lawyer for child and both parties just couldn't find a lawyer to represent them, despite both being eligible for legal aid. They just couldn't find anyone."* Providing pro bono work isn't something her firm does as a policy, but she says they all do it, depending on the circumstance. Sometimes the admin involved in charging clients for services just isn't worth it. *"The admin for the Family Legal Advice Service is so difficult that I would just do it for free because it's just easier. We all do things like that."*

THE IMPACTS OF BARRIERS TO PRACTISING LEGAL AID

For Sandra, she knows when taking on a legal aid case that she will do so much more than she will ever be paid for. Although she does what she can, she can see that this way of working is unsustainable for the legal profession as a whole. *"A couple of times I've had people with mental health issues and I've either had to ring the mobile community [assessment] team, or just stay on the line with someone. And of course, that's not chargeable. You end up doing so much more than you are ever paid for."*

And it's not just about the remuneration, but the number of hours spent on legal aid cases that are causing lawyers to burn out. *"Our local ones have burnt out or had to have time off, because of their stress levels. It's not viable for a lot of people, that's another reason people aren't wanting to take legal aid cases on."*

CURRENT BARRIERS TO ACCESSING LEGAL AID

Sandra often sees people in court who can't afford lawyers but are just out of the range of being eligible for legal aid. As a result, people are often left no choice but to represent themselves. These people often have big issues going on and are left to navigate their way through the complexities of the court system alone, usually resulting in unfavourable outcomes. *"They really struggle in the court system, and they generally don't get a great outcome, just because they don't know how things work."*

BARRIERS TO FINDING A LEGAL AID LAWYER

Sandra feels bad not being able to take on clients that she knows need help, but she feels like there is little choice but to turn people away. *"We would have so many calls every day, and every firm is the same. People need help and you feel terrible."*

She thinks that it's easy to underestimate the emotional toll that trying again and again to finding a legal aid lawyer and being turned down every time can have, particularly given the personal issues that people in a vulnerable situation are experiencing.

WHAT DO WE WANT TO SEE CHANGE IN THE SYSTEM?

Sandra would like to see the legal aid system change. She believes more access through lowering income thresholds, an increase in legal aid rates and lessening the administrative burden on lawyers who are willing to take on legal aid cases should be the priority for change.

WHAT WILL HAPPEN IF THINGS DON'T CHANGE

Sandra worries that if things don't change, the legal aid system might go down the same path as in the United Kingdom. She fears we'll have less lawyers willing to take on legal aid cases and more people self-representing which will make the court system chaotic and create more work for judges. She also fears that people will feel disconnected and angry at the system if they can't access the right help at the right time. *"If you can't get help and you can't get someone to explain what's going on, no wonder you get people not feeling like the system is helping them. It'll be quite sad to see if we don't get some change."*

7 ATTRACTING EXISTING LAWYERS INTO LEGAL AID

Interest in providing legal aid services

One in ten (12%) lawyers who do not currently provide legal aid services are (very or extremely) interested in doing so in future. This equates to 58% of the current legal aid workforce, and does represent an opportunity to attract new talent. However, the majority of lawyers who are not currently providing legal aid have no interest in doing so.

LEVEL OF INTEREST AMONG NON-LEGAL AID LAWYERS IN PROVIDING LEGAL AID SERVICES

%

VERY/EXTREMELY INTERESTED: 12%

NOT INTERESTED: 63%

Extremely interested	Very interested	Fairly interested	Not very interested	Not at all interested	Not sure
2	8	33	41	11	5

Base: Lawyers who are not currently providing legal aid (excluding in house lawyers) (n=1,635)
C1 Based on the current legal system, how interested, or not, are you in providing legal aid in the future?

Sub group differences for those interested in providing legal aid services

Of those lawyers not currently providing legal aid services, Pacific lawyers, and those in the earlier stages of their career have the greatest interest in providing legal aid in the future. Experienced lawyers and those who have previously provided legal aid are more likely to have no interest in providing legal aid in the future.

INTERESTED IN PROVIDING LEGAL AID

The following lawyers are **more** likely than average (12%) to be **very or extremely interested** in providing legal aid:

- Pacific lawyers (37%)
- Have been in the profession 2 years or less (36%)
- Work in immigration law (33%)
- Aged under 30 (27%)
- Have been in the profession 3-5 years (22%)
- Māori lawyers (22%)
- Work in criminal law (22%)
- Work in employment law (21%)
- Employee in law firm (18%).

NOT INTERESTED IN PROVIDING LEGAL AID

The following lawyers are **more** likely than average (63%) to have **no interest** in providing legal aid:

- Director / partners (84%)
- Have been in the profession 20 years or longer (84%)
- Based in the South Island excl. Canterbury and Otago (83%)
- Aged 50+ years (81%)
- Work in Trusts and Estates (77%)
- Have provided legal aid but not in the last 12 months (76%)
- Work in property law (75%)
- Men (73%)
- Work in family law (71%)
- Barristers (70%)
- Have provided reduced rate or free legal assistance in the last 12 months (70%).

Base: Lawyers who are not currently providing legal aid (excluding in house lawyers) (n=1,635)
C1 Based on the current legal system, how interested, or not, are you in providing legal aid in the future?

Barriers for those interested in legal aid

There are a number of barriers that prevent those who are interested in undertaking legal aid work from doing so. A key barrier is having the opportunity, with over half noting their firm does not provide legal aid. There are also concerns around the administrative burden and inadequate remuneration. Barristers have significantly greater concerns about the administrative burden and stress involved with legal aid work, whereas employees in larger law firms are significantly more likely to lack the opportunity because of the situation in their firm.

BARRIERS FOR LAWYERS WHO ARE INTERESTED IN PROVIDING LEGAL AID

%		Significantly higher among
My law firm / organisation does not provide legal aid, so I don't have a choice	53	Employees in larger law firms - 10+ directors / partners **(74%)**; Up to 5 years in profession **(71%)**
The administrative burden is too great	20	Barristers **(45%)**; Employment law **(36%)**; Auckland based **(28%)**
The remuneration for legal aid work is inadequate	15	
Legal aid funding does not cover the costs of employing or contracting juniors to support the work	11	Employment law **(21%)**; Civil litigation **(19%)**
There is a lack of demand / no demand for legal aid work in my practice area	10	
Too stressful / time consuming	6	Barristers **(17%)**
The complex needs of legal aid clients	4	
Retiring or leaving the legal profession	1	
Not sure	1	
Prefer not to say	1	

Base: Lawyers who are not currently providing legal aid but are interested in doing so (excluding in house lawyers) (n=197)
C2 For what reasons do you not undertake legal aid work?

Barriers for those not interested in legal aid

There is an opportunity to encourage some of the 63% of lawyers who are not currently interested in providing legal aid. The two main reasons they are not interested in providing legal aid are the inadequate remuneration (54%) and the administrative burden of applying for and being a provider (47%). If these barriers can be reduced, more lawyers may be interested in providing legal aid.

REASONS FOR NO INTEREST IN PROVIDING LEGAL AID

%

Reason	%
The remuneration for legal aid work is inadequate	54
The administrative burden is too great	47
Too stressful / time consuming	30
My law firm / organisation does not provide legal aid, so I don't have a choice	27
Legal aid funding does not cover the costs of employing or contracting juniors to support the work	26
The complex needs of legal aid clients	22
There is a lack of demand / no demand for legal aid work in my practice area	20
Retiring or leaving the legal profession	9
Planning a career break	1
I am leaving private practice	1
Prefer not to say	1

Remuneration inadequate (54): Employment law **(74%)**, Family law **(68%)**, Civil litigation **(66%)**

Administrative burden too great (47): Barristers **(69%)**, Family law **(68%)**, Employment law **(63%)**, Civil litigation **(63%)**

Funding does not cover juniors (26): Directors/partners **(32%)**

Complex needs of legal aid clients (22): Family law **(35%)**

Base: Lawyers who are not currently providing legal aid and are not interested in doing so (excluding in house lawyers) (n=1,022)
C2 For what reasons are you not interested in undertaking legal aid work?

8 WHAT LAWYERS ARE CURRENTLY DOING TO SUPPORT ACCESS TO JUSTICE

Services provided by lawyers at a discounted rate or reduce fee

Most lawyers are providing services at a discounted rate or reduced fee with six in ten (59%) having provided some kind of service. Four in ten (43%) have provided reduced fee legal services to people who otherwise would not be able to afford it.

PROVIDING SERVICES AT A DISCOUNTED RATE OR REDUCED FEE

TOTAL HAVE PROVIDED SERVICES AT A DISCOUNTED RATE OR REDUCED FEE: 59%

Service	%
Giving legal assistance to individuals who cannot afford to access the legal system	43
Giving legal assistance to other types of charities or non-profit organisations	20
Appearing as an advocate in any Court, Tribunal or similar (not under a grant of Legal Aid)	18
Giving legal assistance to charities or other non-profit organisations which work on behalf of disadvantaged members of the community	14
Giving legal assistance relating to issues of public interest	12
Sitting on the board of a community organisation (including a school) or a charity	9
Workplace sponsorship of events and/or organisations	8
Providing community legal education	7
Giving legal assistance provided under a grant of Legal Aid	7
Doing law reform and policy work	6
Other	3
None of the above	41

Note: These categories will sum to more than 100% as lawyers may have done work in a number of categories
Base: All lawyers (n=2,989)
D3 And in the last 12 months have you done any of the following for a discounted rate or reduced fee (i.e., provided low bono services)?

Sub group differences for providing services at a discounted rate or reduced fee

Established lawyers in the later stages of their career are more likely than average to be providing services at a reduced fee.

PROVIDES DISCOUNTED OR REDUCED FEE SERVICES

The following lawyers are **more** likely than average (59%) to have provided services of some kind at a discounted rate or reduce fee:

- Directors / partners (82%)
- Barristers (80%)
- Legal aid lawyers (75%)
- Aged 50+ (73%)
- 20 years or more in the profession (72%)
- Based in South Island (68%)
- Based in Upper North Island - Northland or Bay of Plenty (67%)
- Males (66%).

DOES NOT PROVIDE DISCOUNTED OR REDUCED FEE SERVICES

The following lawyers are **more** likely than average (41%) to have not provided any services at a discounted rate or reduce fee:

- Employees in-house (85%)
- Aged under 40 (55%)
- Up to 10 years in the profession (54%)
- Based in Wellington (51%)

Base: All respondents (n=2,989)
D3 And in the last 12 months have you done any of the following for a discounted rate or reduced fee (i.e., provided low bono services)?

Payment arrangements for low bono services

The most common payment arrangement used for ‘low bono services’ is simply reduced fees. Three quarters of lawyers use this payment arrangement, and this is higher for civil litigators, Canterbury based lawyers, and employment lawyers. A third of lawyers are using payment plans and 28% use partial fees. Although limited retainers are a less common payment arrangement, criminal lawyers are more likely to use these than average.

PAYMENT ARRANGEMENTS BEING PROVIDED FOR WORK DONE AT A REDUCED RATE

%		Higher among
Reduced fees to enable the client to afford the services	76	Civil litigation **(85%)** Based in Canterbury **(84%)** Employment law **(81%)**
Payment plan e.g. weekly payments of a fixed amount	34	Family law **(55%)** Legal aid lawyers **(49%)** Based in Waikato **(45%)** Based in South Island **(42%)**
Partial fees e.g. filing costs only	28	Sole practice **(36%)** Civil litigation **(34%)** Based in Auckland **(33%)**
Limited retainer* / unbundled legal service	14	Criminal law **(20%)**
Conditional fee arrangement / contingency fee (for those that are allowed under the legislation)	12	Barristers **(17%)**
Other	13	
None of the above	8	
Prefer not to answer	3	

*Note: A limited retainer is where a lawyer agrees with a client to provide one or more discrete tasks, while the client handles other matters that, in a traditional full-service retainer, would be services provided by the lawyer.

Base: All respondents (n=1,842)
D4 What type of payment arrangements have you offered to clients for these services? Please note this does not include legal aid.

Services provided by lawyers for free

Most lawyers (81%) have provided services for free in the last 12 months. The most common type of service provided for free is legal assistance for people who cannot afford to access the legal system – nearly half (45%) lawyers have done this in the last 12 months.

PROVIDING SERVICES FOR FREE

TOTAL HAVE PROVIDED FREE SERVICES **81%**

Service	%
Giving legal assistance to individuals who cannot afford to access the legal system	45
Volunteering for a non-legal charity or community organisation	35
Sitting on the board of a community organisation (including a school) or a charity	28
Giving legal assistance to other types of charities or non-profit organisations	25
Workplace sponsorship of events and/or organisations	23
Giving legal assistance to charities or other non-profit organisations which work on behalf of disadvantaged members of the community	21
Giving assistance at advice clinics	20
Giving legal assistance relating to issues of public interest	17
Doing law reform and policy work	17
Appearing as an advocate in any Court, Tribunal or similar (not under a grant of Legal Aid)	14
Providing community legal education	14
Giving legal assistance provided under a grant of Legal Aid	11
None of the above	19

Note: These categories will sum to more than 100% as lawyers may have done work in a number of categories
Base: All lawyers (n=2,989)
D1 Which of the following services have you provided for free in the last 12 months?

Sub group differences for providing services for free

As with low bono services, longer serving lawyers are most likely to be providing free legal assistance to people who cannot afford legal representation. In addition to undertaking legal aid, two thirds of legal aid lawyers are also providing legal assistance for free. However, this may include hours for legal aid cases which are not remunerated (see page 24).

PROVIDES FREE LEGAL ASSISTANCE TO THOSE WHO CAN'T AFFORD IT

The following lawyers are **more** likely than average (45%) to have provided free legal assistance to individuals who cannot afford to access the legal system:

- Barristers (70%)
- Legal aid lawyers (67%)
- Directors / partners (64%)
- Aged 50+ (63%)
- 20 years or more in the profession (59%)
- Based in South Island excl. Canterbury and Otago (56%).

Base: Lawyers who have provided free legal services to those who can't afford it in the last 12 months (n=1,449)
D1 Which of the following services have you provided for free in the last 12 months?

Reasons for providing free services

Providing free services speaks to lawyers values, and allows them to help people who wouldn't otherwise be able to afford legal representation. **Like legal aid, lawyers feel it is their moral duty to provide free services.**

REASONS LAWYERS ARE PROVIDING SERVICES FOR FREE

%

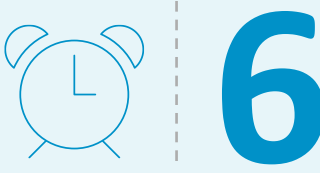
	Extremely important	Very important	Fairly important	Not very important	Not at all important	Not sure	*Total very /extremely important*
It aligns with my values	28	43	24	2	1	1	71
I want to help people who can't afford legal representation	22	36	30	5	2	2	58
I feel it is my moral duty to provide these types of services	22	34	28	7	4	2	57
There are particular causes I care about	16	32	32	11	4	1	47
I enjoy doing this type of work	10	26	38	16	5	2	37
Corporate social responsibility obligations	8	19	24	15	16	3	27
I get valuable experience doing this type of work	7	16	26	26	19	1	23
I am encouraged by my employer / law firm to do it	4	10	17	14	19	2	14
My workplace recognises / rewards those who provide these types of services	3	6	10	20	29	3	9

Base: Lawyers who have provided services for free in the last 12 months (n=2,169)
E2 How important or not are each of the following in explaining why you undertake this type of work?

Time spent

In an average week, lawyers are spending 6 hours of their time providing free services. At 11 hours a week Te Tiriti o Waitangi lawyers are providing the most hours for free.

TIME SPENT PROVIDING FREE SERVICES



6

AVERAGE NUMBER OF HOURS SPENT ON FREE LEGAL SERVICES

The following groups of lawyers are spending more hours each week providing free services:

- Work in Māori / Te Tiriti o Waitangi law (11 hours)
- Legal aid lawyers (9 hours)
- Work in criminal law (10 hours)
- Work in immigration law (10 hours)
- Pacific lawyers (10 hours)
- Māori lawyers (9 hours)
- Work in administrative / public law (9 hours)
- Work in family law (8 hours)
- Barristers (8 hours)

Note: To calculate the average, outliers of over 40 hours per week have been removed
Base: Lawyers who have provided services for free in the last 12 months (n=2,159)
E3 How many hours in an average week would you say you spend doing this type of work?

Future of free services

The provision of free services in future looks stable. Most lawyers (71%) plan to keep providing their services for free, and one in ten (12%) plan to do more, while 11% plan to do less or none at all.

THE IMMEDIATE FUTURE OF FREE SERVICES

%

More likely than average to say they plan to do **more :**

Aged under 30 **(24%)**
Pacific lawyers **(23%)**

LESS OR NONE
11%

More	About the same	Less	None	Not sure
12	71	9	2	6

Base: Lawyers who have provided services for free in the last 12 months (n=2,169)
E4 In the next 12 months, do you intend to do more or less of this type of work, or about the same?

9 DEFINING PRO BONO SERVICES

Pro bono definition

Most lawyers agree giving free legal assistance to individuals, organisations or at advice clinics or appearing as an advocate in court constitutes pro bono services when done for free. However, there is less agreement around other types of services.

WHAT CONSTITUTES PRO BONO PROVISION WHEN DONE FOR FREE

%

	Yes	No	Not sure
Giving legal assistance to individuals who cannot afford to access the legal system	96	2	2
Giving legal assistance to charities or other non-profit organisations which work on behalf of disadvantaged members of the community	92	5	3
Giving assistance at advice clinics e.g., Community Law Centre, Citizens' Advice Bureau, or similar	90	7	3
Giving legal assistance to other types of charities or non-profit organisations (e.g., environmental, community, or cultural entities)	90	6	4
Appearing as an advocate in any Court, Tribunal or similar (not under a grant of Legal Aid)	87	7	6
Giving legal assistance relating to issues of public interest	82	10	8
Providing community legal education	68	26	6
Doing law reform and policy work	58	34	8
Volunteering for a non-legal charity or community organisation	43	48	9
Sitting on the board of a community organisation (including a school) or a charity	36	55	9
Giving legal assistance provided under a grant of Legal Aid	35	56	9
Workplace sponsorship of events and/or organisations (e.g., community, cultural, and sporting)	21	72	7

KANTAR PUBLIC

Base: All lawyers (n=2,989)
D2 Do you consider the following to be pro bono legal assistance, if a lawyer does it for free?

10 SUPPORTING MORE LAWYERS TO PROVIDE FREE LEGAL ASSISTANCE

Interest in providing free legal assistance to people who can't afford to access the legal system

A fifth of lawyers are very or extremely interested in providing free legal services to people who cannot afford to access the legal system. This equates to 29% of lawyers who are already doing this, representing an opportunity to further increase access to justice for people who cannot afford legal representation.

LEVEL OF INTEREST IN PROVIDING FREE LEGAL ASSISTANCE TO THOSE WHO CAN'T AFFORD TO ACCESS THE LEGAL SYSTEM

%

Extremely interested	Very interested	Fairly interested	Not very interested	Not at all interested	Not sure
7	16	35	20	10	12

VERY/EXTREMELY INTERESTED 22%

NOT INTERESTED 30%

Base: Lawyers who are not currently providing free legal assistance (n=1,544)
F1 How interested or not are you in providing free legal assistance to people who can't afford to access the legal system?

Sub group differences for interest in providing free legal services to people who can't afford to access the legal system

Pacific lawyers and younger lawyers are more likely than average to be interested in providing free legal services to those who can't afford to access the legal system.

INTERESTED IN PROVIDING FREE LEGAL SERVICES

The following lawyers are **more** likely than average (22%) to be **very or extremely interested** in providing free legal services to people who can't afford to access the legal system:

- Pacific lawyers (49%)
- Administrative / public law (37%)
- Aged under 40 (34%)
- Up to 10 years in the profession (33%)
- Māori lawyers (32%)
- Criminal lawyers (31%)
- Employees in-house (30%)
- Employees in law firms (27%)
- Females (27%).

NOT INTERESTED IN PROVIDING FREE LEGAL SERVICES

The following lawyers are **more** likely than average (30%) to have **no interest** in providing free legal services to people who can't afford to access the legal system:

- Aged 60+ (59%)
- Director / partners (58%)
- 20 years or longer in the profession (52%)
- South Island excl. Canterbury and Otago (51%)
- Barristers (46%)
- Aged 40-59 (39%).

Base: Lawyers who are not currently providing free legal assistance (n=1,544)
F1 How interested or not are you in providing free legal assistance to people who can't afford to access the legal system?

Barriers for those interested in providing free legal services

However, there are several barriers to providing free legal services. The greatest barrier is the immediate environment i.e. working in a law firm that doesn't support this type of work. In particular, **61% of lawyers who work in large law firms and are interested in providing free legal services, feel their workplace does not allow or encourage them to do so**. Additionally, a third (31%) of lawyers don't know how to access or get involved with providing free legal services. Being overstretched or time poor act as an additional barrier for lawyers to take on more commitments.

BARRIERS FOR LAWYERS WHO ARE INTERESTED IN PROVIDING FREE LEGAL SERVICES

%

Barrier	%
My workplace doesn't allow or encourage me to do this type of work	42
I don't know how to access / get involved with this type of work	31
My work commitments are too heavy	30
I am already overstretched	22
Stressful / too time consuming	9
There are not many opportunities locally to do this type of work	8
I / my law firm can't afford to do this type of work	8
It is too time consuming	7
Doing this type of work hasn't been top of mind for me	7
I don't see other lawyers doing it	5

My workplace doesn't allow or encourage me (42):
Larger law firms (10+ partners) **(61%)**
Employees in law firms **(54%)**
Aged under 30 **(53%)**

I don't know how to access / get involved (31):
Larger law firms (10+ partners) **(41%)**
Aged under 30 **(40%)**

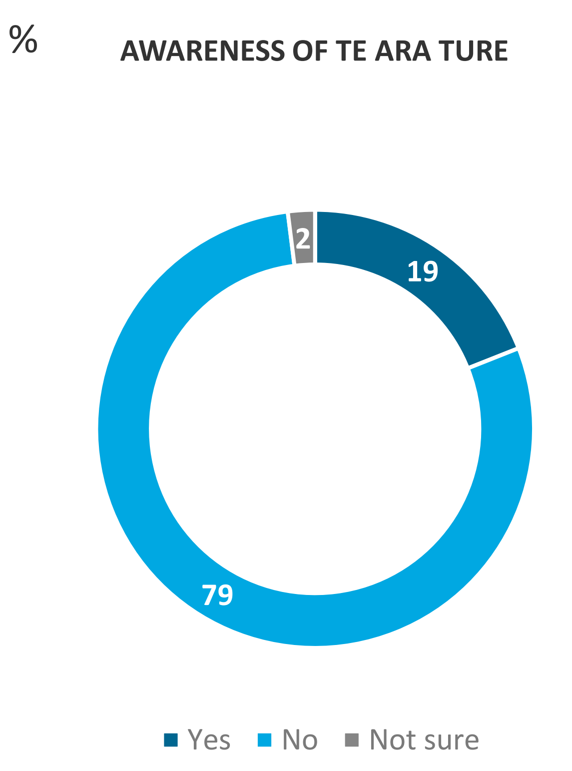
Note: Reponses that comprise 5% or more are shown
Base: Lawyers who are not currently providing free legal services but are interested in doing so (n=350)
E5 For what reasons do you not provide free legal assistance to people who can't afford to access the legal system?

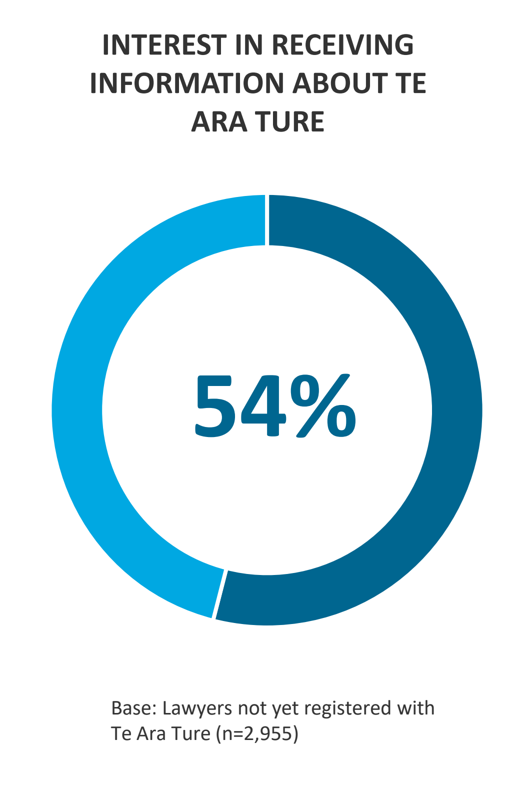
Connecting lawyers with clients in need

There is an opportunity to help lawyers who don't know how to get involved in providing free legal services. Te Ara Ture is a service that connects volunteer lawyers with people who need free legal help. Lawyers register with the service, and Community Law Centres refer clients in need of assistance. One in five lawyers have heard of Te Ara Ture (which launched in 2021) and while a small number indicate a current likelihood to register, over half are interested in hearing more about the service.

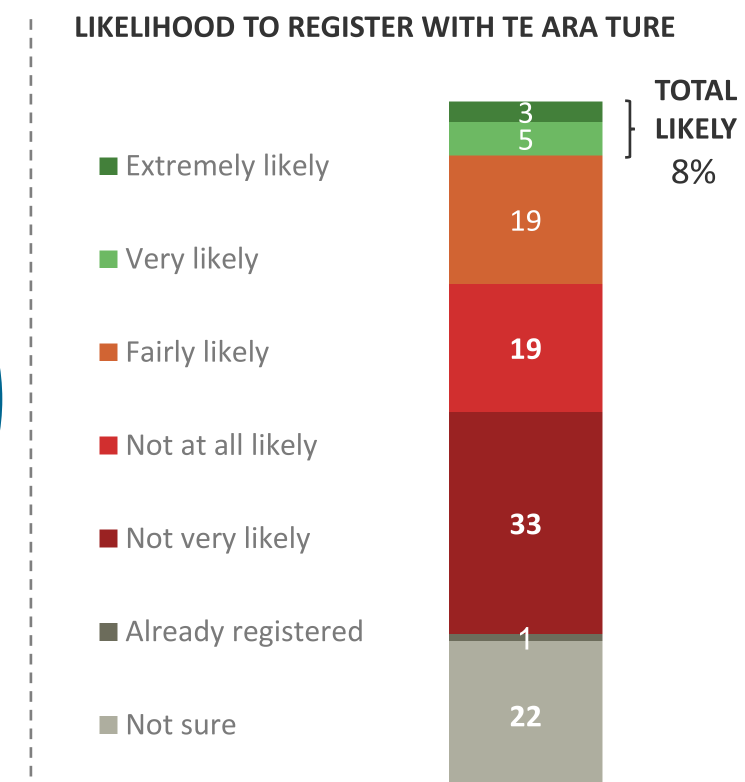
AWARENESS AND LIKELIHOOD TO REGISTER FOR TE ARA TURE

%





Base: Lawyers not yet registered with Te Ara Ture (n=2,955)



SUBGROUP DIFFERENCES

The following sub groups are **more likely** than average (8%) to be extremely or very likely to register with Te Ara Ture:

- Interested in providing free legal assistance (23%)
- Pacific lawyers (22%)
- Māori lawyers (13%)
- Employees in-house (14%)
- Work in Māori / Te Tiriti o Waitangi law (14%).

KANTAR PUBLIC

Base: All respondents (n=2,989),
G2 Before doing this survey, had you heard of Te Ara Ture before?
G [IF AN IN-HOUSE LAWYER: We appreciate not all lawyers can currently register, but if you could how likely, or not, would you be to register your services with Te Ara Ture?] [IF NOT AN IN-HOUSE LAWYER: How likely, or not, are you to register your services with Te Ara Ture?]
G4 Would you be interested in receiving more information about Te Ara Ture?

11 APPENDIX: SAMPLE PROFILE

Sample Profile (weighted)

GENDER	
Male	46%
Female	51%
Gender diverse	*
Prefer not to say	3%

AGE	
Under 25	*2%*
25-29	*14%*
30-39	*22%*
40-49	*24%*
50-59	*18%*
60-69	*13%*
70-79	*4%*
80 years or over	*
Prefer not to say age	*3%*

ETHNICITY	
New Zealand European	76%
Māori	9%
Samoan	2%
Cook Island Māori	*
Tongan	1%
Niuean	*
Fijian	1%
Other Pacific group	1%
Any Pacific (nett)	5%
Chinese	2%
Indian	2%
Pakistani	*
Sri Lankan	1%
Other Asian group	2%
Any Asian (nett)	7%
Other European group	6%
Another ethnic group	3%
Prefer not to say ethnic group	6%

CURRENT WORKPLACE TYPE	
Law firm – over 20 partners / directors	13%
Law firm – 10 to 19 partners / directors	4%
Law firm – 4 to 9 partners / directors	14%
Law firm – 1 to 3 partners / directors	19%
Sole practice (barrister and solicitor)	6%
Sole practice (barrister and solicitor) with employees	*4%*
Barrister sole (not in chambers)	6%
Barristers' Chambers	10%
Government department or agency	10%
In-house private entity	6%
Local government	1%
Academic institution	*
Not for profit	1%
Other type of workplace	2%

CURRENT ROLE	
Employee in law firm	34%
Employee in-house	15%
Partner	15%
Director	10%
In-house lawyer in charge of staff	4%
Barrister sole	17%
Employed barrister	2%
None of the above roles	5%

LENGTH OF TIME IN LAW PROFESSION	
Less than a year	4%
1-2 years	6%
3-5 years	14%
6-10 years	13%
11-19 years	22%
20 years or longer	40%

MAIN LEGAL PRACTICE AREAS (UP TO 3)	
ACC	1%
Administrative / Public	10%
Banking & Finance	4%
Civil Litigation	26%
Company/Commercial	22%
Competition	1%
Construction	4%
Criminal incl. youth justice	15%
Employment	13%
Family	18%
Governance	4%
Government/local government	9%
Health incl. mental health	3%
Immigration	3%
Insurance	4%
Intellectual property	3%
Māori/Te Tiriti o Waitangi	4%
Media	1%
Property	22%
Resource management	4%
Tax	1%
Trusts and estates	20%
Unsure of practice areas	*

GEOGRAPHIC LOCATION	
Auckland	43%
Northland	2%
Bay of Plenty	4%
Canterbury - Westland	11%
Gisborne	1%
Hawkes Bay	1%
Manawatu	1%
Marlborough	*
Nelson	1%
Otago	3%
Southland	1%
Taranaki	1%
Waikato	4%
Wellington	21%
Whanganui	*
Other region	1%

LEGAL AID PROVISION	
Have undertaken legal aid in the last 12 months	14%
Have undertaken legal aid but not in the last 12 months	31%
Have never undertaken legal aid	55%

FOR FURTHER INFORMATION PLEASE CONTACT

Edward Langley or Alexis Ryde

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8 June 2023

Vanushi Walters
Chairperson, Justice Select Committee
Parliament Buildings
Wellington

By email: justice@parliament.govt.nz

Tēnā koe,

RE: Briefing into trends in Youth Crime – NZLS supplementary submission

1. Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) is grateful for the opportunity to address the Justice Select Committee on the Briefing into Trends in Youth Crime (**Briefing**). Following the Law Society's oral appearance on Thursday 1 June 2023, this supplementary submission sets out the Law Society's concerns with Schedule 1A of the Oranga Tamariki Act 1989 (**OT Act**) and invites the Commitee to consider reviewing this exception as part of the wider Briefing.

1.2 This submission also briefly addresses the minimum age of criminal responsiblity.

1.3 The Law Society is more than happy to discuss any of the issues raised in this submission, if that is of assistance to the Committee.

2. Background

2.1 New Zealand has a world class youth justice system prefaced on a solution-focused approach to address the underlying causes of offending. It relies on inter-agency cooperation using a multi-disciplinary approach and measures that are designed to respond to alleged offending in a way that promotes the child or young persons' rights and best interests; prevents or reduces offending or future offending; recognises the rights and interests of victims; and holds the child or young person accountable.[1]

2.2 However, our youth court jurisdiction is not universal. Following the youth court's jurisdiction being expanded to include 17-year-olds in 2019, an important exception remained in Schedule 1A of the OT Act. 17-year-olds charged with an offence listed in Schedule 1A must be automatically transferred from the Youth Court to the District or High Court at their first appearance. If the young person is facing additional charges, and the Youth Court determines they are related to a Schedule 1A offence, those charges will also be transferred to the adult jurisdiction.

[1] Oranga Tamariki Act 1989, s 4(1)(i).

2.3 Given extensive scientific research[2] and appellate discussion[3] on adolescent brain development, New Zealand's commitment to the United Nations Convention on the Rights of the Child (**UNCROC**), and the Justice Committee's current Briefing, the Law Society considers it is timely to revisit this exception.

2.4 We have raised this issue with then incoming Minister of Justice, Hon Kiritapu Allan, during the Law Society's initial briefing as well as via correspondence to Oranga Tamariki (**OT**)[4] and a submission on proposed changes to the OT Act during consultation in 2022.[5]

3. Schedule 1A

Overview

3.1 At the time the changes to the OT Act were going through the House, the Law Society, along with other submitters such as then Children's Commissioner Judge Andrew Becroft, opposed the inclusion of Schedule 1A in the Bill.[6] In our view, there was no evidential basis which suggested a need to treat some 17-year-olds differently to others, particularly given the background papers clearly recognised the neurological development of adolescents required a different response to adults. The automatic transfer of proceedings based on the seriousness of the offence was (in our view at the time) inconsistent with the purpose of, and rationale for, the Bill's underlying provisions to include 17-year-olds in the youth justice jurisdiction.

3.2 By separating out some 17-year-olds from their peers we are now left with a process which disproportionately impacts rangatahi Māori given their continued overrepresentation in the youth justice system, and wider criminal justice system. It is also contrary to the underlying provisions in the OT Act that are intended to recognise mana tamaiti, whanaungatanga, and whānau capacity building.

3.3 While the numbers of young people tried in the adult courts are few, more often than not they are the ones with the most complex needs and likely to be facing the greatest adversity. A tailored, more specialised youth court process is beneficial in those circumstances. This is discussed in more detail below.

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2 See for example Lambie, I. (2020). *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand*. Auckland, NZ: Office of the Prime Minister's Chief Science Advisor. Available from www.pmcsa.ac.nz and Reil, J., Lambie, I., Becroft, A., & Allen, R. (2022). *How we fail children who offend and what to do about it: 'A breakdown across the whole system'. Research and recommendations*. Auckland, NZ: The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland.

3 See for example *Churchward v R* [2011] NZCA 531, the leading case on adolescent brain development as a potential mitigating factor to criminal offending. Subsequent cases have also held that a discount for youth can be appropriate for offenders into their early to mid-20's for example *Martin v R* [2016] NZCA 213, where the Court of Appeal noted that an appellant's age of 22 placed him at "the upper range where a youth discount would normally be available".

4 New Zealand Law Society, *Letter to Oranga Tamariki,* 8 December 2022, enclosed.

5 New Zealand Law Society submission, *Oranga Tamariki-Potential Changes to the Oranga Tamariki Act 1989*, 14 October 2022, enclosed.

6 New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017 at [250] and [275].

3.4 Further, we acknowledge the latest Youth Justice Indicators Summary Report shows a small increase in police proceedings against children in 2021/22 compared to 2020/21.[7] However, the report also highlights a continued decline in youth offending over the past decade which is evidence that our youth justice system on the whole is continuing to work as intended for most children and young people, and for the safety of New Zealanders.[8]

Issues

The need for a tailored criminal justice response

3.5 Research consistently indicates that the adolescent brain does not fully develop until at least their mid-twenties and has highlighted the complex needs faced by youth offenders,[9] and factors which increase the risk of offending behaviour are cumulative. Further, the experience of youth advocates and others who work in the youth justice jurisdiction is that children and young people who offend often come from very complex backgrounds, and typically present with a range of cognitive, communication, learning, and other difficulties (for example, communication disorders, post-traumatic stress disorder, foetal alcohol spectrum disorder, anxiety, brain injuries and substance disorders). The number of young people appearing in the youth court with a neurodiversity, for example, is increasing. More often than not, it is those young people who are highly over-represented in the criminal justice system.

3.6 Offending by children and young people does not occur in a vacuum and is also often symptomatic of wider care and protection issues,[10] which if dealt with through a traditionally adversarial criminal justice approach will most often be destructive. This is supported by the latest Youth Justice Indicators report which highlighted that in 2021/22, 92% of children and 88% of young people who were referred to a Family Group Conference (**FGC**) had previously been the subject of a report of concern to OT about their care and protection.[11]

3.7 Aotearoa's youth justice system recognises this and upholds the rights of children and young people as a distinct group by providing individual and tailored responses to the offending.

3.8 Youth Court procedures have also been specifically developed to make the criminal justice process more understandable and accessible for its participants. While existing provisions in the adult jurisdiction can assist participants to understand (such as the appointment of a communication assistant), there are many significant differences between the youth justice system and the adult justice system.[12] These include, for example:

a) A Youth Court with a principle focus on support for the well-being of children, young people and their families, whānau, hapū and iwi.

b) Youth Court Judges who have received specific training and support to communicate with children and young persons as well as a specialised court layout.

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7 Ministry of Justice. 2023. *Youth Justice Indicators Summary Report, April 2023.* Wellington: Ministry of Justice, at [YJI(1.4)].

8 Ibid, at [YJI(1.1)].

9 Above n 2.

10 Above n 7, at p 4.

11 Ibid, at [YJI(1.6)].

12 Lynch, N., Lambie, I., Becroft, A., Wilson-Tasi, T., (2021). *Four urgent law changes for the youth justice system*, Wellington, New Zealand.

c) An FGC process which is specifically designed to involve victims in decision-making.

d) Legislative requirements to explain the proceedings to the child or young person and others and encourage and assist the child or young person's participation and views including giving reasonable assistance.

e) Legislative requirements to uphold the rights of the child or young person under UNCROC and the United Nations Convention on the Rights of Persons with Disabilities.

3.9 When a child or young person is tried in the adult court, they are exposed to the full adversarial criminal process, without the benefits of this protective system and the measures identified above. Research has also highlighted the public interest in resolving a serious charge against a child or young person includes ensuring they provide the best possible evidence and are able to effectively participate.[13]

Compliance with international conventions

3.10 As a signatory to UNCROC, Aotearoa New Zealand has obligations to comply with that Convention. Following changes to the OT Act in 2019, the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and the child's or young person's rights (including those rights under UNCROC) must be respected and upheld.[14]

3.11 The United Nations Committee on the Rights of the Child when examining New Zealand's compliance with the Convention in February this year, stressed the desirability that youth justice systems should fully apply to all persons aged under 18 at the time of the offence, and those who turn 18 during the trial or sentencing process.[15] The Committee remained concerned that different treatment of some 17-year-olds deprives them of the special protections for children.[16] In recalling their General Comment from 2019, the Committee urged New Zealand "to end the automatic transfer of 17-year-olds who are accused of serious offences to be tried by the adult courts and ensure that they are dealt with in the youth justice system".[17]

3.12 These comments are intended to guide State parties' interpretation and application of the Convention considering new evidence about child and adolescent development and have been cited in recent Youth Court decisions.[18]

3.13 The Youth Court has noted a "strong emphasis on avoiding criminalising the behaviour of children and also an emphasis on diverting them wherever possible from criminal law processes".[19] Further, that children accused of a crime "need to be treated in a manner consistent with their sense of dignity and worth and that the evidence shows the prevalence

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13 Ibid, at [4.2].

14 Above n1, s 5(1)(b)(i).

15 United Nations Committee on the Rights of the Child, *Concluding Observations on the 6th periodic report of NZ,* February 2023, at 42(b) and 43(b).

16 Ibid, at 42(c).

17 Ibid.

18 See for example, *NZ Police/Oranga Tamariki v YR* [2020] NZYC 1515.

19 Ibid.

of crime committed by children decreases after the adoption of systems in line with those principles."[20]

3.14 Other learned academics, including the previous Children's Commissioner and former Principal Youth Court Judge Becroft, have conveyed similar views on the treatment of Schedule 1A offenders and recommended that all exceptions to the Youth Court jurisdiction be removed so that any child or young person who is charged with a criminal offence who have their case heard and finalised in the Youth Court (which should be a matter of last resort).[21]

3.15 Schedule 1A of the OT Act is therefore at odds with this position and undermines Aotearoa New Zealand's commitment to comply with UNCROC by creating a system which separates out some 17-year-olds from the rest of their age group.

Preferred Approach

3.16 The Law Society supports the conclusions of the United Nations Committee on the Rights of the Child and encourages the Justice Committee to examine the effect of Schedule 1A of the OT Act on those 17-year-olds who it pertains to. We also consider it is timely to closely examine whether the tailored youth justice responses should be made available to all 17-year-olds.

3.17 If all 17-year-olds were included in the youth justice jurisdiction, we note that extensive work would be required to consider the appropriate judicial procedure for serious offending. While the Law Society does not provide any views on what that procedure may look like, we note overseas models such as in Western Australia, may provide a useful starting point.

4. Minimum age of criminal responsibility

4.1 Finally, the Law Society acknowledges the joint appearance by OT, Police and Ministry of Justice officials before the Justice Committee in 2022, where they noted that Aotearoa New Zealand's acceptance of a recommendation from the United Nations Human Rights Council to increase our minimum age of criminal responsibility is yet to be actioned. In 2019 the UN Council indicated the minimum age of criminal responsibility should be raised to at least 14 years of age, but preferably 15 or 16 years of age.

4.2 This has since been recently endorsed by the United Nations Committee on the Rights of the Child where the Committee also indicated the minimum age of criminal responsibility should be raised to at least 14 years of age regardless of offence.[22]

4.3 We urge officials to continue working on options to achieve this compliance.

5. Conclusion

5.1 The Law Society considers it is timely to revisit the exception in Schedule 1A and we invite you to undertake a review as part of the Briefing into trends in Youth Crime.

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[20] Ibid.

[21] Above n 12.

[22] Above n 14, at 43(a).

5.2 I trust this letter is helpful and if we can be of any further assistance, please feel free to contact me via the Law Society's Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku iti noa, nā

Dale Lloyd
NZLS Youth Justice Committee Convenor

Encl.

Letter to Oranga Tamariki, 8.12.22

Submission on Potential Changes to Oranga Tamariki Act 1989, 14.10.22

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8 December 2022

Andre Anderson
Principal Policy Advisor
Oranga Tamariki
Wellington

By email c/o: Andre.Anderson@ot.govt.nz

Tēnā koe Andre,

Re: Oranga Tamariki Act 1989 – Schedule 1A offences and jurisdiction threshold

Introduction

I write on behalf of the New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society)** inviting officials to review the important exception in Schedule 1A of the Oranga Tamariki Act 1989 (**the Act**).

In the Law Society's recent briefing to the incoming Minister of Justice, we noted ongoing problems with Schedule 1A of the Act (discussed in more detail below) and welcomed consideration of this issue as part of the advice being provided by officials to the Minister on youth justice-related matters.

In light of extensive scientific research and appellate discussion on adolescent brain development,[1] New Zealand's commitment to the United Nations Convention on the Rights of the Child (**UNCRC**), the principles of te Tiriti o Waitangi, and recent public discussion on youth justice related issues, the Law Society considers it is now timely to revisit this exception.

Background

In 2017, the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 was passed. As a result, from 1 July 2019, the youth justice jurisdiction was expanded to include 17-year-olds. Though this was announced with much fanfare, it included an important exception – 17-year-olds charged with an offence listed in Schedule 1A of the Act must be automatically transferred from the Youth Court to the District or High Court at their first appearance.[2] If the young person is facing additional charges, and the Youth Court determines they are related to a Schedule 1A offence, those charges will also be transferred to the adult jurisdiction.

[1] See for example *Churchward v R* [2011] NZCA 531, the leading case on adolescent brain development as a potential mitigating factor to criminal offending. Subsequent cases have also held that a discount for youth can be appropriate for offenders into their early to mid-20's for example *Martin v R* [2016] NZCA 213, where the Court of Appeal noted that an appellant's age of 22 placed him at "the upper range where a youth discount would normally be available".

[2] Sections 272 – 273 amended, Schedule 1A inserted.

Issues with Schedule 1A

At the time Parliament were considering the amendment, the Law Society, along with other submitters including the Children's Commissioner, opposed the inclusion of Schedule 1A in the Bill.[3]

The background papers to the 2017 Bill acknowledged that young people have different neurological development at adolescence, with a resulting effect on behaviour, impulse control, understanding and consideration of consequences, and susceptibility to peer influence. In the Law Society's view, there appeared to be no basis for concluding that those factors required special consideration and treatment of some young persons, but not others.

The initial focus of the Regulatory Impact Statement[4] was for Schedule 1A to capture serious recidivist offenders. However, the current provision now captures first time offenders as well.

The result is a provision that disproportionately impacts rangatahi Māori, due to the overrepresentation of rangatahi in the youth justice system, and is contrary to the provisions in the Act that are intended to recognise mana tamaiti, whanaungatanga, and whānau capacity building.

Retaining the schedule 1A exceptions also undermines New Zealand's commitment to UNCRC and is a limitation on the right to be free from discrimination on the grounds of age. New Zealand's compliance with UNCRC was last considered by the United Nations Committee on the Rights of the Child in October 2016. Regarding the youth justice system, the Committee expressed regret that New Zealand "has not progressed in the area of juvenile justice",[5] in light of previous recommendations made by the Committee in 2003 and 2011. Among several other recommendations, the Committee urged New Zealand to raise the age of criminal majority to 18 years.[6]

Also of note, the Act specifically refers to the rights of children and young people set out in the UNCRC as part of the principles that should guide the use of any power under the Act.

Finally, while the Ministry of Justice concluded at the time that any limitation on the right to be free from discrimination (based on age) was justified and proportionate,[7] the Bill of Rights advice doubted whether the proposal would have the intended effects of deterrence or public confidence in the youth justice system.[8]

Preferred approach

At the time the Bill was before Parliament, the Law Society's preferred approach was for all 17-year-olds charged with a criminal offence (other than murder or manslaughter) to be included within the Youth Court jurisdiction. This position remains the same.

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[3] New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017 at [250] and [275].

[4] Ministry of Social Development, *Regulatory Impact Statement: Including 17-year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system*, 8 December 2016.

[5] United Nations, Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: New Zealand, CRC/C/NZL/CO/34, 11 April 2011, at [56(b)].

[6] The Children's Rights Alliance recently drew this to the attention of the United Nations Committee on the Rights of the Child for the 93rd pre-session in their report *Comprehensive Alternative Report on Aotearoa New Zealand: Written Inputs to State Report (SRP)*, 15 August 2022 at pp102-103, 108.

[7] Ministry of Justice, *Consistency with the New Zealand Bill of Rights Act 1990: Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill,* 5 December 2016 at [34].

[8] Ibid, at [29]-[30].

In our view, the existing provisions of the Act, section 277 (where charged jointly with an adult) and section 283(o) transfer to District or High Court for sentencing, adequately cover the range of circumstances and provide sufficient judicial discretion, to ensure the interests of justice *and* the needs of the young person are met.

The Youth Court procedures have been developed to make the criminal justice process more understandable and accessible for its participants. While existing provisions in the adult jurisdiction can assist participants to understand (for example, the appointment of a communication assistant), it is preferable that the system as a whole is more accessible.

I also note that in our recent submission on the Residential Care and Other Matters Amendment Bill (options papers),[9] the Law Society agreed with the view of Māori subject matter experts that "*Schedule 1A offences should not be dealt with in the adult jurisdiction, as transferring these 17-year-olds from the youth court leads to inequitable outcomes when young people are subject to more severe penalties that are less effective at reducing offending*."[10]

Alternative options to Schedule 1A could include a hybrid approach, where any pretrial and trial matters are heard in the District Court, with the young person then transferred back to the Youth Court for disposition. Although the District or High Court may make arrangements to address a young person's needs, this can go only so far to mitigate the effects of adolescent neuro-development. It should be a last resort to place a young person in a District or High Court trial.

Issues with transferring to the District Court

I also wish to indicate that the Law Society will write to the Department of Corrections | Ara Poutama Aotearoa to raise concerns about the lack of youth-focussed rehabilitation programmes available for young offenders who are transferred to the District Court/High Court (whether as Schedule 1A defendants or transferred under section 283(o)), and subsequently convicted and sentenced to imprisonment in the adult jurisdiction.

This issue has been recently discussed by academics[11] as well as in Youth Court decisions. For example, in *New Zealand Police v AN,*[12] a case involving a 17-year-old female, Judge Fitzgerald commented on the lack of rehabilitative programmes/resources and/or facilities designed to keep young offenders separate from adult offenders with programmes tailored to their needs, and declined to transfer the young person to the District Court for sentencing. Considerations for keeping the young person in the youth court jurisdiction included what was in the best interests of the young person, the interests of the victim, public safety, and accountability. Judge Fitzgerald concluded that these considerations would be met by keeping the young person in the Youth Court's jurisdiction, particularly where Corrections had identified there would be no rehabilitative programmes available if she was detained in a Corrections facility.

Given your current work on the Residential Care and Other Matters Amendment Bill, which includes reviewing the options available where a young person is sentenced in the adult jurisdiction but detained in a youth justice facility, we consider it timely to mention this issue in this correspondence

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9 New Zealand Law Society submission, *OT – Potential Changes to the OT Act, options papers,* 14 October 2022, accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/OT-Potential-changes-to-OT-Act-options-pa.pdf

10 Ibid, at [49].

11 See for example Lynch, Lambie, Becroft, Wilson-Tasi *Four Urgent Law Changes for the Youth Justice System,* October 2021.

12 *New Zealand Police v AN* [2020] NZYC 609.

as well. We welcome the opportunity to discuss this with you in more detail at a time that is convenient.

Conclusion

The Law Society considers it is timely to revisit the exception in Schedule 1A and I invite you to undertake a review as part of the advice being provided to the Minister of Justice on youth justice-related issues.

I trust this letter is helpful and welcome to the opportunity to discuss this issue with you in more detail. If that would be of assistance, contact can be made via the Law Society's Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku iti noa, nā

Frazer Barton
NZLS President

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14 October 2022

Andre Anderson
Principal Policy Advisor
Oranga Tamariki
Wellington

By email: legislation@ot.govt.nz

Re: Potential changes to the Oranga Tamariki Act 1989 – Feedback on Options Papers

A. Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the first tranche of Oranga Tamariki's (**OT**) options papers as part of preliminary legislative work on the Residential Care and Other Matters Amendment Bill. The options papers currently available for comment include:

   a. Information sharing;

   b. Special Guardianship Orders; and

   c. Young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences.

2. The Law Society's submission supplements our earlier feedback provided on the issues papers[1] and sets out some additional brief comments in response to the proposed options in each paper identified above.

3. This submission has been prepared with the assistance of the Law Society's Family Law Section and Youth Justice Committee.[2]

B. Options papers for other matters topics

Information sharing

42. This options paper explores whether the right information is available to support young people in care and sets out a range of potential options, proposing cumulative amendments to the information sharing provisions in the Oranga Tamariki Act (sections 65A-66Q) (**OT Act**),

1 New Zealand Law Society submission, Proposed changes to the Oranga Tamariki Act, 9 September 2022 accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/OT-Potential-changes-to-the-OT-Act.pdf.

2 More information on the Law Society's Family Law Section and Youth Justice Committee can be accessed via the Law Society's website here https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/ and here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/youth-justice-committee/

plus a potential amendment to the duties of the chief executive in section 7AA. The Law Society makes the following brief comments.

43. The Law Society's Family Law Section consider option 4 is the appropriate option as it provides the most comprehensive information sharing arrangements. This option would amend the parties to and the purposes of the voluntary information sharing provisions, include a stronger duty on the Chief Executive to share information with iwi and Māori partners, and extend the information sharing framework.

42. As previously noted, the Law Society considers that the way information is currently exchanged often means there are significant gaps in the flow of information between relevant parties and risks creating "silos" of information. Option four would ensure those gaps are less likely to occur by creating one information sharing group and allowing information to flow freely between the parties. This option would also assist in removing the current OT/Iwi and other partnerships divide as noted in the options paper.

43. While there are inherent risks in creating one information sharing group (for example no limitations on the exchange of information, no consent of the tamariki/whānau is required, limitations on the child/young person's right to privacy), the proposed safeguards to ensure a collective decision is made on who can be added as a partner to the group, rather than resting with individual kaimahi, go some way to ameliorating those concerns. It is paramount that the wellbeing and bests interests of the child continue to take precedence over the duty of confidentiality.

44. Finally, this option aligns most closely with the objectives of the Oranga Tamariki Future Direction Plan and *Te Kahu Aroha* (as outlined in the options paper) for Oranga Tamariki to move towards a future state that allows information to flow freely between the appropriate agencies operating in this space.

44. We have not identified any additional/alternative options.

<u>Special guardianship orders</u>

45. As previously noted, the Law Society is pleased to see a review of the legislation governing special guardianship orders, particularly given the existing inconsistencies with the principles in the Act, the duties of the chief executive in relation to te Tiriti o Waitangi and recent Court decisions which have resulted in divergent views on how special guardianship orders apply to tamariki Māori.[3] In light of this, the Law Society's Family Law Section agrees that option three, amend the special guardianship provisions, is necessary to address the current problems identified in the options paper. However, we do not have a view at this stage on whether amendment to those provisions should be via the proposed adaptive package or the reform package.

46. If option three were to be considered in more detail, the Law Society's Family Law Section would welcome the opportunity to be involved in any further consultation.

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[3] See for example *Re I* [2021] NZFC 210 (also referred to as *Chief Executive of Oranga Tamariki – Ministry for Children v BH*), Judge Otene, January 2021 and *Re WH* [2021] NZFC 4090, Judge Southwick, 5 May 2021.

Young people sentenced in the adult jurisdiction and detained in Oranga Tamariki residences

47. This options paper aims to address the current lack of clarity regarding the appropriate legislative framework that should apply to children and young people sentenced in the adult jurisdiction but held in a youth justice facility. As noted in our earlier submission, the Law Society agrees the current framework is not fit for purpose and that the focus should be on ensuring consistency with the principles of the OT Act first and foremost, alongside consistency with relevant international conventions and obligations (such as the Beijing Rules which provide guidance on how children should be treated in the criminal justice system).

48. Against this background, the Law Society considers the most appropriate option is a stand-alone model which would see OT take responsibility for all aspects of the young person's sentence, with flexibility retained to call on Corrections for assistance where necessary. The rationale for this preferred option is that OT are best placed to manage the young person given their primary roles and responsibilities, are obligated to act in their best interests and welfare under the OT Act, have access to appropriate tools and mechanisms to support the young person through their sentence, and allowing one agency to have responsibility would provide consistency for the young person. However, the Law Society recognises that some of the young offenders are serious and as such, it may be appropriate for some Corrections staff to train OT kaimahi around caring for serious offenders. The Law Society also notes this option would require significant investment and resourcing to implement, a matter which the option paper does not address in any detail.

49. Finally, we note the Māori subject matter expert view that "Schedule 1A offences should not be dealt with in the adult jurisdiction, as transferring these 17-year-olds from the youth court leads to inequitable outcomes when young people are subject to more severe penalties that are less effective at reducing offending".[4] The Law Society agrees with this view. At the time the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill was before the House, the Law Society raised concerns that the automatic transfer of proceedings where a 17-year-old is charged with serious offending (under Schedule 1A) undermined New Zealand's commitment to the United Nations Convention on the Rights of the Child and would disproportionately effect rangatahi Māori. [5]

50. While the options paper does not go on to discuss this issue in depth, we consider it is timely to review these provisions in light of the broader discussion on youth crime and the youth justice system as a whole, that is currently taking place.[6] The Law Society would be happy to discuss this issue further at a time that is convenient to OT.

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[4] Oranga Tamariki, *Children and young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences*, Options Paper, at p 4.

[5] New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017, at pp 43-45, accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0019-109108-CYPF-Oranga-Tamariki-Legislation-Bill-3-3-17.pdf

[6] See for example the recent joint agency briefing to the Justice Select Committee, *Youth Crime and Community Wellbeing*, makes reference to the Minister of Justice and Cabinet "considering further options relating to legislative reforms to steer at-risk children and young people away from a lifetime of offending", at slide 10. Accessed here: https://www.parliament.nz/resource/en-NZ/53SCJU_EVI_125229_JU229640/6adff70412d0a4fadeadf3d527d9a33891b1dae7

C. Conclusion

51. We trust the above is helpful and look forward to the opportunity to be involved during the remaining stages of the consultation process and at the point when a Bill is before the House.

52. If you have any questions or comments concerning this submission, contact can be made via Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku noa, nā

Ataga'i Esara
Vice-President

Annexure 6: COVID-19

Law Society feedback on:	**Key concerns**
Inquiry into the Government's response to Covid-19	In April 2020, the Law Society made the following key recommendations to the Epidemic Response Select Committee, which was established to consider and report to the House on matters relating to the Government's management of COVID-19: • The Government should identify the legal foundations for the various responses by the Government to Covid-19, as the rule of law requires the law to be clear, clearly enforceable, and able to be easily accessed and understood by all to whom it applies. • As far as possible, there should be an ongoing attempt to replicate the normal policy and law-making process (which allows for opportunities to for consultation on proposed reforms). • Henry VIII powers should be carefully tailored to provide for public consultation where possible, and should be subject to approval or disallowance through the Parliamentary process.
Compliance activities and processes of Immigration New Zealand (**INZ**)	The Law Society sought clarification on a number of matters which would affect individuals who may have become unlawful as a result of COVID-19 (i.e., closed borders and the unavailability of international flights): • **whether scheduled deportations had been postponed or cancelled**: INZ subsequently clarified it has suspended routine, non-priority deportations, but would continue to execute deportations where it was in the public interest to do so. • **whether individuals who were detained under a warrant of commitment could instead be directed to reside at a specified place where they may have family or an acceptable place in which to self-isolate**: the detention status of some (but not all) of these individuals was adjusted to allow these individuals to be released into the community on reporting conditions. • **Whether visa application processes would be updated to allow relevant documents to be filed electronically**: These processes were not updated, adversely impacting applicants' access to justice, and their ability to fully participate in the visa application process.
Immigration (COVID-19 Response) Amendment Bill 2020	In its submission to the Epidemic Response Select Committee, the Law Society raised concerns regarding the proposal to allow the Minister to exercise, by special

	direction, very broad powers which apply to *classes* of individuals. The submission recommended that these powers should be exercisable by regulations or Orders in Council and not by special direction. Although some additional safeguards around the exercise of this power were subsequently included in the Bill, the ability to issue special directions in respect of classes was retained.
Immigration (COVID-19 Response) Amendment Bill 2021	The Law Society submitted that this Bill should be amended to reduce the proposed extension to the repeal date for the Minister's special direction powers from two years to one year, and recommended that the special direction powers be made subject to a default 28-day commencement to ensure adequate public notice of a special direction. Unfortunately, neither of these recommendations were accepted, and the Bill was passed without amendment.
COVID-19 Response (Further Management Measures) Legislation Bill	In a submission to the Epidemic Response Select Committee, the Law Society noted significant concerns about the proposal to allow the use of audio-links as an alternative to audio-visual links, when conducting Corrections disciplinary hearings and criminal hearings. Most of these provisions were retained, notwithstanding the concerns raised by the Law Society about how this impacts prisoners' ability to effectively participate in such hearings.[1]
COVID-19 Public Health Response Act 2020	The Law Society made submissions on the Bill and the Act. Key concerns raised included: 1. Passing the Bill under urgency, with no opportunity for public and select committee scrutiny before the Bill was passed; 2. The low threshold for making orders under s 11 of the Act, which can impose restrictions on rights and freedoms of individuals;[2] 3. The risk threshold for the exercise of a broad warrantless power of entry, and the need to strike a better balance between the need to take enforcement action to prevent the spread of COVID-19, and the rights of citizens to be free from unreasonable searches.[3] No amendments were made to the Bill in respect of points 1 and 2 above.

1 Section 25 of the Bill of Rights affirms the right to be present at the trial and to present a defence.

2 Section 11 orders may, for example, require a person to self-isolate, to take specified actions, refrain from taking specified actions, or comply with specified measures or conditions, or wear a mask.

3 Guaranteed by s 21 of the New Zealand Bill of Rights Act 1990.

COVID-19 Response (Vaccinations) Legislation Act 2021	This was a significant piece of legislation which implemented vaccine mandates, and as a result, substantially impacted on fundamental rights and freedoms. The Act did not specify any decision-making principles or criteria relating to the implementation of vaccination requirements. Instead, these matters were left to be determined through the drafting of Orders, which would be made with little or no democratic scrutiny. The Bill providing for these powers passed through the House in 24 hours, with no opportunity for public scrutiny and input.
COVID-19 Response (Courts Safety) Legislation Bill 2022	Some provisions in this legislation allow the heads of bench to make protocols setting out various requirements relating to jurors and jury services, which become secondary legislation. Although the protocols are deemed to be secondary legislation, the effect of the legislation is that the protocols made by the judiciary may nonetheless amend primary legislation. The Law Society raised concerns about how this impacts the separation of powers, and about the consequences of establishing the judiciary as law-makers. These provisions were not removed or modified at select committee because the committee believed this was justified response to COVID-19 pandemic, and the proposed power was appropriately limited.