

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

Enactment of legislation despite section 7 reports

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

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 Orders⁴ 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.

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 aid¹⁰ and duty lawyer¹¹ 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 altogether. They are also the key deterrents to commencing legal aid work. Significant work is

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.

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 wrote¹⁵ 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 announced¹⁶ 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 legislative procedures which promote democracy and transparency by allowing select committees, and the public, to give proper consideration to legislation before the House.

¹⁵ <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/I-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.

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.

Immigration (Mass Arrivals) Amendment Bill

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.

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 proceedings²¹ concerning the Government's decision to suspend processing resident visa applications due to COVID-19 border restrictions. This meant Afghan national applicants²² 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). Once a tier 2 registrant is selected, it can take years for the process to be completed and the

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.

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.

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