

30 September 2022

Judiciary
Courts of New Zealand | Ngā Kōti o Aotearoa
Wellington

By email: CourtsDigitalStrategy@justice.govt.nz

Re: Draft Digital Strategy for Courts and Tribunals of Aotearoa New Zealand – Feedback

A. Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) appreciates the opportunity to provide feedback on the draft “Digital Strategy for Courts and Tribunals of Aotearoa New Zealand” (**draft strategy**). The draft strategy is intended to inform decisions about the use of technology in New Zealand’s court system over the next decade and is a welcome proposal. This will help to supplement work already underway to improve access to justice through various projects such as Te Ao Māmara, the Rules Committee work on access to justice in civil proceedings, and the Access to Justice Advisory Group.¹
2. The Law Society sought input from several of its law reform committees,² its Family Law Section and members of the profession. This submission sets out some general comments on the use of technology, feedback on the draft objectives and principles, and preliminary concerns which may assist the focus of future initiatives.

B. General Comments

3. The Law Society has long been an advocate for improving access to justice and agrees that enhancing the way technology is used in our courts and tribunals is one tool in our kete to help achieve this goal. The development of a strategy to govern and support this process is therefore a positive step in the right direction. It is also undeniable that the Covid-19 pandemic has been a catalyst for reconsidering how our courts and tribunals operate to ensure that justice can be administered effectively and in a timely manner, with a shift towards more online processes.
4. Additionally, we acknowledge that long-term reliance on paper files can limit the courts’ ability to be agile and responsive to the changing needs of court users. However, technology itself does not come without its pitfalls, including for example issues with its quality and reliability, privacy and security, and access by vulnerable communities. To ensure technology (and the digitisation of online court systems) is genuinely aimed at removing current barriers

¹ Digital Strategy for Courts and Tribunals of Aotearoa New Zealand, Consultation Draft, Judiciary, September 2022, at p 3.

² These include the Civil Litigation and Tribunals Committee, Criminal Law Committee, Employment Law Committee, Environment Law Committee, Legal Services Committee, and Youth Justice Committee. Details about the Law Society’s Law Reform Committees can be accessed here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>

to access to justice, significant and ongoing financial investment in the core infrastructure will be essential. Further, a retention of genuine paper-based options and alternatives to engaging with the court process for members of the public who may face “digital exclusion”,³ have English as a second language, are minors, or are vulnerable due to their age/culture/background for example, will remain necessary.⁴

C. Draft Objectives and Principles

5. The draft strategy recognises that technology can be used to promote the rule of law and meet the needs of different groups of people who engage and interact with the court system. This overarching statement is supported by several key objectives, namely by using digital technology to:⁵
 - a. facilitate and expand access to justice;
 - b. support informed and effective participation in the court system;
 - c. maintain and enhance public confidence in the court system; and
 - d. enhance resilience and sustainability of the court system.
6. The draft strategy then identifies a range of principles to guide the design and implementation of digital technologies including that they be reliable, secure, flexible and user-centric.
7. The Law Society agrees with the draft objectives and principles identified in the draft strategy, in particular:
 - a. A clear focus on facilitating and improving access to justice;
 - b. Ensuring digital systems are designed based on the needs of its users and that they promote the rule of law, observe tikanga Māori and uphold the New Zealand Bill of Rights Act 1990;
 - c. A focus on streamlining the filing of documents and providing electronic filing methods as the default method (particularly in civil proceedings);
 - d. Enabling the court file to be digitised and accessed by the parties and other judges/registries; and
 - e. Updating key court software systems, with the benefit of learning from overseas jurisdictions.

D. Preliminary concerns

8. The Law Society acknowledges the draft strategy is intended to be a living document, capable of amendment and change over time. We also acknowledge that this is just the beginning of an ongoing kōrerorero. This is necessary to ensure the strategy caters to the evolving needs of court users and any updates in technology infrastructure. Any fundamental changes to the ways in which courts and tribunals utilise technology and the requirements of court forms or procedure (for example the changes outlined at page 15) will benefit from further

³ For example, by not having access to the internet and a digital device.

⁴ For further discussion see Toy-Cronin, B., Nichols, D.M., Cunningham, S.J. (2021) Designing Online Court Forms: Recommendations for Courts and Tribunals in Aotearoa. Dunedin: University of Otago at p 7-8.

⁵ Above n 1, at p 7.

consultation with stakeholders, including the Law Society, which we look forward to participating in.

9. We also note the draft strategy (at page 17) states that the relevant tribunals to which the strategy will apply, be identified following consultation with the Principal Members of those tribunals. This seems to conflict with the stated principle of user-centricity. We suggest that other stakeholders are also given the opportunity to provide feedback on whether the strategy ought to apply to a particular tribunal to ensure a more user-centric process is followed.
10. Finally, and as noted in the draft strategy, there will need to be a review of procedural rules and legislation to identify changes required to allow the ongoing use of digital technology in courts and tribunals. This will be an important opportunity to ensure that any proposed changes to the way technology is used in our court system are thoroughly considered for posterity.
11. In the meantime, we set out some high-level preliminary concerns, alongside some specific jurisdictional issues, to be considered in finalising the draft strategy.⁶

General concerns

12. First, as noted at page 8 of the draft strategy, any reforms that improve and enhance digital technology use in court must not increase barriers to access to justice for people who are already digitally disadvantaged. Alternative channels and viable options for engaging with the court system must always remain available to those who are not capable of using, or do not have access to, technology. How these alternative channels may look and operate remains open for discussion but could include, for example, retaining the traditional in person court processes as well as providing greater access to digital resources and support through the likes of community centres, citizens advice bureaux, libraries and marae. Even with the digitisation of court systems, a human element should be retained to enable bespoke advice/assistance where necessary.
13. Second, a primary concern of the Law Society is the security and privacy risks inherently present when technology is used. This issue applies across all jurisdictions. For example:
 - a. How will the portals for commencing and responding to civil proceedings, and the monitoring of key steps in a criminal matter, be securely accessed?
 - b. Will lawyers have a master password for all proceedings or one for each matter?
 - c. How will online systems ensure access to court information protects privacy and confidentiality interests? Similarly, how will court records be kept secure (for example by minimising any unauthorised access to data)? Also, what steps will participants have to take to ensure unauthorised access to court or tribunal data is not improperly accessed through participants' systems?
14. Third, any digital/online systems, including the design of online forms for starting a proceeding by a self-represented litigant, should be easy to access and navigate. For example, it may be that form design provides a good opportunity to seek to improve the capability of

⁶ The New Zealand Law Society provided confidential feedback to the Judiciary on the initial consultation for the Digital Strategy for New Zealand's Courts and Tribunals – Initial Consultation, 7 July 2022. These comments supplement that earlier submission.

self-represented litigants to effectively engage with or coherently tell their story to the court. This will ensure that the promise of online court systems is fulfilled.

15. Finally, the Law Society reserves its position on the longer-term aspirations set out at page 13, including the use of artificial intelligence tools, until we have more detailed information on their practicality and appropriateness.

Specific jurisdictional issues

16. The following preliminary issues have been raised by practitioners and members of the Law Society's specialist law reform committees. Although many of these issues are universal across all jurisdictions, we have highlighted the individual concerns in the following sections for ease of reference.

Civil

17. Preliminary issues for civil (including employment) proceedings include:
 - a. As the draft strategy anticipates, rules for swearing affidavits for example, will need to change. Other rules that relate to steps that occur *outside* the court may need to change and will require careful consideration.
 - b. Will the process for filing sealed copies of documents include electronic seals? How will that work?
 - c. It is unclear what information goes into the chatbot, what advice it gives, and how the information put into chats is to be securely stored (noting litigants in person may not know what to say/not to say and may inadvertently disclose sensitive information). How will party/lawyer availability be accommodated in automated scheduling?
 - d. Any online/digitised court system will need to cater to parties who do not speak English as their primary language and who may need an interpreter (for example parties involved in matters before the Immigration Protection Tribunal).
 - e. A broader look at initiatives to verify evidence, rather than having to rely on physical affidavits, will require changes to the High Court Rules and Oaths and Declarations Act.
 - f. How will issues like non-publication orders be managed where there is live-streaming of a hearing?

Criminal

18. Preliminary issues for criminal proceedings include:
 - a. How will any material that is allowed to be made available to the press/public be handled if information at a court hearing is exchanged digitally? The implications for transparency and openness (both positive and negative) will need to be carefully considered.
 - b. How will the provision of disclosure by digital means be managed, for example will the Court use technology to monitor the completion of disclosure by a set time?
 - c. How will technology systems manage issues of confidentiality and suppression, for example, confidentiality orders made restricting access to unredacted versions of documents to counsel only; delaying public streaming so that inadmissible, objectionable, or confidential evidence arising during a trial can be managed?

Family

19. Preliminary issues for family proceedings include:
 - a. Any distributed justice venues that allow access to digitised court processes (for example libraries, marae etc) will need to be appropriately set up to manage any privacy, security and safety risks.
 - b. Information and resources will need to be provided about how the public can engage in the digitised process, particularly for respondents but also for applicants (for example, how an applicant can provide evidence of a mandatory programme when they are required to provide proof of completion before they can apply to the court).

Environment

20. Further to the initiatives outlined in the draft strategy, environmental law practitioners suggested it would be helpful to streamline service requirements to enable any routine case correspondence to simply be uploaded to the digitised Court system rather than having to directly serve all parties (as currently occurs in some Environment Court appeals).

Youth

21. At the outset, the Law Society supports a presumption in favour of in person appearances for most youth court proceedings. While further discussion on this topic will be warranted once details of how the high-priority initiatives will apply to the Youth Court, we indicate this preliminary position for the following reasons:
 - a. Section 11 of the Oranga Tamariki Act requires that young people are encouraged and assisted to participate in proceedings involving them (to the degree appropriate for their age and level of maturity). Further, Article 40 of the United Nations Convention on the Rights of the Child states that children and young people have the right to fair trial, including the right to present a defence and to effective participation in the criminal process.
 - b. High prevalence of neurodisability, cognitive impairment, intellectual disability and mental illness among young people makes remote participation generally inappropriate – a point recognised both domestically and internationally.⁷
 - c. In a remote hearing, the young person often cannot adequately see the screen, does not appreciate they are ‘present’ in court and can have difficulties engaging with the various professionals who are also appearing remotely. They can also fail to appreciate the seriousness of the situation without the opportunity to meaningfully interact with their lawyer, judge and other court participants.
 - d. Many young people will not have routine access to technology, the internet, or possess the necessary level of comprehension to meaningfully engage with digital technology.
22. Therefore, any generic digital strategy for all courts and tribunals will need to allow for specific carve outs for youth court proceedings and ensure that when technology is used, it is appropriate or agreed to by all court participants. Measures such as being able to hear and/or

⁷ See for example: Lynch, N., & Kilkelly, U. (2021) “Zooming In” on Children’s Rights During a Pandemic: Technology, Child Justice and covid-19, *The International Journal of Children's Rights*, 29(2), 286-304; and Hutchinson, T. (2021) Court appearances via video link for young people in detention in Queensland. Australian Institute of Criminology.

see adequately, or tailored measures such as translation services and communication assistance will be equally important. As the youth court is primarily a restorative/therapeutic jurisdiction, in person appearances assist with upholding this approach.

E. Next steps

23. We look forward to having the opportunity to engage further with the Judiciary when more information about each of the specific initiatives is made available to stakeholders.
24. In the meantime, we hope this feedback has been useful. If you wish to discuss any of the contents of this submission further, 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 noa, nā

A handwritten signature in black ink that reads "Frazer Barton". The signature is written in a cursive, slightly slanted style.

Frazer Barton
Vice-President