

30 June 2022

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Chair, Wayfinding for Civil Justice Working Group

By email: [Wayfinding@justice.govt.nz](mailto:Wayfinding@justice.govt.nz)

**Re: Wayfinding for civil justice – strategy consultation document**

**1 Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the *Wayfinding for Civil Justice* strategy consultation document (**Consultation Document**).
- 1.2 The Law Society supports the initiative and agrees that there is a need for a co-ordinated approach to the various mahi being undertaken throughout Aotearoa New Zealand to improve civil access to justice. The principles and goals suggested in the Consultation Document provide a solid platform from which to seek to implement a national strategy on civil access to justice.
- 1.3 However, the Law Society considers that the draft strategy should be improved by providing additional guidance on the application of the principles which guide the strategy, and how the proposed goals are to be achieved. This includes further guidance on how the principles of Te Tiriti o Waitangi are to be embedded into the foundation of *Wayfinding for Civil Justice* (as discussed further below), and how Te Tiriti and Te Ao Māori principles are to be applied in practice. In its current form, reporting against the very broad goals and somewhat adjunct principles seems likely to be difficult, and may not reduce the risk of uncoordinated or conflicting initiatives.
- 1.4 This submission has been prepared with input from the Law Society's Civil Litigation and Tribunals Committee,<sup>1</sup> and responds to the eight questions set out in the Consultation Document.

**2 Responses to consultation questions**

**Q1: How necessary do you think a national structure is to ensure the success for Wayfinding for Civil Justice?**

- 2.1 The effectiveness of the *Wayfinding for Civil Justice* national strategy will turn, in large part, on whether it can be successfully implemented. The prospects of successful implementation

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<sup>1</sup> More information regarding this Committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/civil-litigation-and-tribunals-committee/>.

will be significantly enhanced by having a national structure to drive that implementation process. Conversely, it is difficult to see how the *Wayfinding for Civil Justice* national strategy could practically be achieved without a national structure.

*Q2: If you consider a national structure is necessary, what form and scale do you think it should take?*

- 2.2 Initially, the national structure could be relatively modest, and the suggestion that this would involve funding of one staff member appears proportionate. As with the equivalent Canadian model, a committee (or committees) of volunteers may also be able to assist.
- 2.3 The suggested tasks outlined at page 7 of the Consultation Document (namely, overseeing a national database, compiling an annual report, and running a clearinghouse that provides a central repository of data and evaluative material) appear appropriate, and, at least in respect of the first two tasks, necessary.
- 2.4 The Law Society also supports the suggestion of an annual forum for the reasons outlined in the Consultation Document (i.e., to celebrate the success of mahi completed, to support different organisations connecting, and to monitor progress against the stated goals).
- 2.5 A national structure, and an annual forum or summit, will help realise the aspirations of the national strategy, which would otherwise be considerably more difficult to progress.

*Q3: If a national structure extended the work of an existing organisation or body, which organisation or body do you think would be most appropriate?*

- 2.6 It is not readily apparent to the Law Society which existing organisation or body would be best suited to take on the national structure role envisaged. The government ministries associated with civil justice may not be best placed to take on that role, including because they are participants in, and funders of, the civil justice system. The Law Society is not the appropriate body (given this work spans beyond the provision of legal services),<sup>2</sup> and other organisations such as Te Aka Matua o te Ture | New Zealand Law Commission already have a significant workload and defined remit.
- 2.7 It may be that an existing organisation or body can self-identify that it is well-placed to take on this role. However, new funding for the initiative will be necessary, and an existing organisation or body cannot be expected to include the national structure within its existing funding budget.
- 2.8 The Law Society does see there being potential synergies with the national structure being associated with a university. The proposed tasks of the national structure – which include analysis and reporting, data compilation and assessment, and communicating and reporting – are all actions regularly undertaken by universities. While it will be important that any

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<sup>2</sup> The Law Society is the national regulator of the legal profession, and represents the interests of legal profession. The proposed national structure goes well beyond the regulation and representation of the legal profession, and requires coordination by an organisation or body which is well-placed, and well-resourced, to consider all initiatives which enable or improve access to justice.

university-based national structure remains independent (and is not seen as being aligned to that particular university), the Canadian experience suggests that should be achievable.<sup>3</sup>

Q4: How should Te Tiriti o Waitangi be reflected in Wayfinding for Civil Justice? Do you agree with the approach suggested of embedding Te Tiriti o Waitangi into the foundation of Wayfinding for Civil Justice, rather than having it as a separate principle?

2.9 The Law Society agrees with the suggestion of embedding Te Tiriti o Waitangi into the foundation of *Wayfinding for Civil Justice*, rather than having it as a separate principle. This reflects the ongoing evolution of the legal system in Aotearoa New Zealand. It also avoids the risk of a ‘box-ticking’ exercise identified in the Consultation Document.<sup>4</sup>

2.10 However, what it means in practice is less certain, and different participants may have different ideas as to what that will mean for *Wayfinding for Civil Justice*.<sup>5</sup> If Te Tiriti is ultimately embedded into the foundation, we invite the Working Group to provide some guidance on relevant Te Ao Māori principles which would help meet the proposed goals.

Q5: To what extent do you identify with the principles that we have stated to guide the approach to the goals? Do you think they are relevant to your work?

2.11 The Law Society supports the five principles identified in the Consultation Document. The principles (and goals) are closely aligned with those of the equivalent Canadian model, which appears to have been successful in improving access to civil justice in Canada since its establishment in 2007.<sup>6</sup>

2.12 The first principle (“people centred”) recognises the importance of seeing people who use the civil justice system “not just as individuals, but as members of whānau and wider communities”.<sup>7</sup> We suggest linking this notion with Te Ao Māori principles and the concepts of Te Whare Tapa Whā,<sup>8</sup> which similarly recognise the relationships between individuals, their whānau, and their communities. Such an approach could better encourage the *inclusion* of whānau and community where appropriate, rather than potentially limiting this principle to only recognition of those relationships.<sup>9</sup>

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<sup>3</sup> The Canadian body is known as the Canadian Forum on Civil Justice and is currently based at York University where it is affiliated with Osgoode Hall Law School and the York Centre for Public Policy and Law. More information is available here: <https://cfcj-fcjc.org/>.

<sup>4</sup> *Wayfinding for Civil Justice* strategy consultation document, at page 8.

<sup>5</sup> That reality is, perhaps, inescapable at the present time, and should not be a reason not to embed Te Tiriti o Waitangi into the foundation of *Wayfinding for Civil Justice*.

<sup>6</sup> *Canada’s Justice Development Goals 2021 Progress* (Canadian Action Committee on Access to Justice in Civil and Family Matters, 2021). A copy of this report is available here: [https://static1.squarespace.com/static/60804beaba3bc03016513a59/t/62886b596249c613a7f355de/1653107545897/JDGs21\\_EN.pdf](https://static1.squarespace.com/static/60804beaba3bc03016513a59/t/62886b596249c613a7f355de/1653107545897/JDGs21_EN.pdf).

<sup>7</sup> Above n 4, at page 8.

<sup>8</sup> Te Whare Tapa Whā is a Māori wellbeing model which recognises an individual’s wellbeing as a balance between the family/social (whānau), mental (hinengaro), physical (tinana), and spiritual (wairua) dimensions, the foundation being a strong whenua (land) connection and place of belonging.

<sup>9</sup> For example, encouraging and/or allowing for the inclusion of whānau and community in disputes processes, resolution, or educational endeavours, or involving community in navigator roles.

Q6: To what extent do you identify with the goals stated? What other goals do you think should be added?

Q7: Do you feel the current suggested actions in each goal provide your organisation with sufficient guidance?

Q8: Which suggested actions do you think will be particularly relevant to your work?

- 2.13 The Law Society identifies with, and supports, the seven goals proposed in the *Wayfinding for Civil Justice* Consultation Document. The first six goals are all fundamental to a well-functioning civil justice system and support the rule of law. The seventh goal is at the heart of the co-ordinated approach that the *Wayfinding for Civil Justice* strategy aspires to and provides the analytical back-bone necessary for the initiative to succeed.
- 2.14 However, we suggest changing the sixth goal to “Enable equitable access to the courts and other decision-making bodies”. This recognises the importance of enabling access to the dispute resolution system as a whole (rather than just the courts).
- 2.15 The actions suggested in each goal appear appropriate and sensible (and consistent with the Canadian model). In particular, the Law Society supports:
- (a) Increasing legal aid funding, and making the funding process more available to the public and lawyers but also addressing systemic issues with how legal aid is administered.<sup>10</sup> The Law Society recently welcomed Budget 2022, which provides for an additional \$190m to be invested over four years into maintaining and strengthening the legal aid system by retaining current legal aid lawyers and welcoming others into the system to support growing backlogs.<sup>11</sup> However, this did only include a nominal amount directed at civil legal aid and so this is an area where further investment needs to occur, which is a priority for the Law Society. The Law Society will continue to work with key stakeholders to improve access to legal aid.
  - (b) Evaluating and improving existing non-lawyer provided services.<sup>12</sup> However, care must always be taken (especially when seeking to extend such services) to ensure the parties’ resolution to a dispute is consistent with the rights and duties set out in law.<sup>13</sup> While the scale and relative importance of any dispute or legal issue must be taken into account, lawyers remain well-placed to achieve that end. Therefore, we also support including a suggested action to place a greater focus on removing the barriers to lawyers providing those legal services effectively.<sup>14</sup>
  - (c) The provision of non-lawyer services can improve access to justice (particularly where geographical and other barriers limit access to lawyers).<sup>15</sup> However, it is

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<sup>10</sup> Above n 4, at page 10.

<sup>11</sup> See here for more information: <https://www.lawsociety.org.nz/news/legal-news/legal-aid-funding-boost-welcome-relief-for-all-new-zealanders/>.

<sup>12</sup> Above n 4, at page 10.

<sup>13</sup> Above n 4, at page 16.

<sup>14</sup> These may be a mixture of self-imposed barriers (such as cost) and external barriers (such as geographical barriers).

<sup>15</sup> Above n 4, at page 10.

important to ensure that the consumers of such non-lawyer services are adequately protected by ensuring:

- (i) these services are provided by qualified and skilled advisers who are subject to professional guidelines and rules; and
  - (ii) there are appropriate channels for making complaints about the quality of such services and any alleged unprofessional behaviour and/or misconduct.<sup>16</sup>
- (d) Initiatives which encourage and enable lawyers to provide pro-bono legal services, or legal services at greatly reduced rates,<sup>17</sup> such as Community Law Centres Aotearoa (**CLCA**) and Te Ara Ture (Aotearoa New Zealand's Pro Bono Clearinghouse). The Law Society also supports the expansion of CLCA's operating model to allow community law centres to run 'hybrid services' and charge lower fees to clients who can afford to pay such fees.<sup>18</sup> This would reduce reliance on the funding that is provided under the Legal Services Act 2011 and allow scope to employ more people and expand the provision of low bono legal services. Any legal services provided on a pro bono, or low bono basis, should meet the same professional standards that apply to legal services provided for a fee, to ensure consumers are adequately protected.<sup>19</sup>
- (e) Initiatives which encourage innovation in service provision (for example, through the development of regulatory 'sandboxes'), and provide incentives to lawyers providing legal services for free or at greatly reduced rates. Of relevance here is the Independent Review of the statutory framework for legal services in Aotearoa New Zealand,<sup>20</sup> which has been commissioned by the Law Society and which will consider, among other things:
- (i) Alternative models for the regulation of legal services;
  - (ii) How to promote better diversity within the legal profession;
  - (iii) How lawyers can be encouraged, or required, to undertake pro bono or low bono work (and how this can be facilitated by the statutory framework and the regulator).

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<sup>16</sup> The *Regulation of Lawyers and Legal Services in Aotearoa New Zealand* discussion document, prepared by an Independent Review Panel, is currently seeking feedback on whether more regulation and oversight should exist for non-lawyers who provide legal advice, services and representation (a copy of the discussion document is available here: <https://www.lawsociety.org.nz/assets/Discussion-document-final.pdf>). The Law Society has welcomed the release of the discussion document and looks forward to receiving the recommendations of the Panel later this year.

<sup>17</sup> Above n 4, at page 10.

<sup>18</sup> This may require amendment of the Lawyers and Conveyancers Act 2006.

<sup>19</sup> The Law Society's substantive position on this issue is set out in its submission to the Justice and Electoral Select Committee on the *Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill*. A copy of the submission is available here: [https://www.parliament.nz/resource/en-NZ/53SCJU\\_EVI\\_99650\\_JU1559/dc23842cf387a15ca19e38df20cbd81d1814f5a4](https://www.parliament.nz/resource/en-NZ/53SCJU_EVI_99650_JU1559/dc23842cf387a15ca19e38df20cbd81d1814f5a4).

<sup>20</sup> More information regarding the Independent Review is available here: <https://www.lawsociety.org.nz/about-us/consultations/independent-review-consultation/>.

- 2.16 The Law Society also suggests consideration of the following as suggested actions, or as additions to actions already identified in the Consultation Document:
- (a) Preparing economic analyses of the impacts of legal problems on society and on the wellbeing of individuals (for example, by examining productivity and increased use of other services such as health services), under goal 2.2. This would assist with capturing data and preparing case studies to support different funding models for the provision of legal services, and the need for more funding;
  - (b) Ensuring that the regulation of legal services also seeks to attract legal service providers, under goal 2.2.<sup>21</sup> There are a large number of skilled litigators who we know are not participating presently owing to systemic issues with the way legal aid is administered. This helps ensure lawyers remain available to provide legal services via the legal aid system (and in relation to civil law matters more generally). A focus on attracting legal services may also help avoid burn out by reducing the workload of the legal profession;
  - (c) Increasing the number of specialist decision-making bodies and dedicated specialist courts (as well as the number of specialised judicial officers and referees) under goal 3.2.<sup>22</sup> This would free up judicial resources and help reduce backlogs which prevent access to justice; and
  - (d) Recognising that the physical spaces occupied by the courts and other decision-making bodies can potentially limit access to justice, and taking necessary steps to ensure these bodies are housed in physical spaces which have the necessary capabilities to facilitate access to justice. This could be added to the third suggested action under goal 3.2.

### **3 Next steps**

- 3.1 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Nilu Ariyaratne ([Nilu.Ariyaratne@lawsociety.org.nz](mailto:Nilu.Ariyaratne@lawsociety.org.nz)).

Nāku noa, nā



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**President**

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<sup>21</sup> This could perhaps be added to the suggested action in the last bullet point under goal 2.2, on page 11.

<sup>22</sup> This could be a part of the suggested action in the second bullet point under goal 3.2, on page 12.