New Zealand Law Society
Te Kāhui Ture o Aotearoa

Strengthening the rule of law in Aotearoa New Zealand

June 2025

Foreword

"Ko te waka hei hoehoenga mā koutou hei muri i au, ko te ture. Mā te ture anō te ture e āki — The canoe for you to paddle after me is the law. Only the law can be set against the law."

— Te Kooti Arikirangi Te Turuki

Tēnā koutou katoa

In my role as President of the New Zealand Law Society Te Kāhui Ture o Aotearoa, I have had the honour of meeting the leaders of legal organisations across the world. Many of the conversations held at these global events have reflected a world in which adherence to the rule of law is declining year by year. My counterparts have told me of concern for the safety of lawyers, targeting of the judiciary, and disregard for — or the deliberate dismantling of — constitutional safeguards.

Here at home, lawyers have a fundamental obligation to uphold the rule of law. This reflects both its central importance in our legal system, and that lawyers are particularly well placed to identify when the rule of law is under challenge.

The Law Society also has a statutory function "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".

With this in mind, in 2024 the Law Society went out to the legal profession, seeking to understand how lawyers conceive of the rule of law, and what they identify as the most significant challenges to the rule of law in Aotearoa New Zealand.

This report is the result of those conversations. It outlines some of the main challenges as identified by lawyers, supplemented by the Law Society's observations and submissions over the years, as well as the work of academics, judges, lawyers, and other organisations. It is my hope that it will spark both conversation and commitment.

While we may not face challenges of the same magnitude as other nations, we do face challenges. For the rule of law to remain strong, we must remain vigilant and be proactive in responding to challenges as they emerge. In identifying how we can respond to some of the challenges we face here in Aotearoa New Zealand, I am hopeful this report will serve as a useful resource for everyone wanting to play their part in promoting and upholding the rule of law.

Ngā mihi

Frazer Barton
President

Acknowledgements

The New Zealand Law Society Te Kāhui Ture o Aotearoa is grateful for the contributions of everyone who participated in our consultations and provided input and assistance with preparing and launching this report.

We are particularly grateful to our law reform committee members, as well as the lawyers, academics, external stakeholders and others who took time to share their views on the rule of law (including through our survey, workshops, meetings, phone calls, and written correspondence). Your contributions have helped us identify some of the main challenges to the rule of law here in Aotearoa New Zealand, and have formed the basis of this report.

We thank Eden Design Ltd for designing this report.

Contents

Executive summary

The rule of law is the idea that the law applies equally to everyone (including governments, officials, and civilians). This important concept is critical to upholding democracy and maintaining a stable social, political and economic landscape in Aotearoa New Zealand and beyond.

Despite its necessity, the rule of law is in global decline. In 2024, the World Justice Project found that the rule of law had declined globally for the seventh year in a row.

We are fortunate to have broad compliance with the rule of law in Aotearoa New Zealand. However, we are not immune to threats. Aotearoa New Zealand's rankings in both the *Rule of Law Index* and the *Corruption Perceptions Index* have declined over time, consistent with global trends. We have already seen some challenges from other jurisdictions 'creep' into our own, such as statements about the judiciary that, by undermining judges' role, in turn are detrimental to principles of comity, judicial independence and the separation of powers.

If we are complacent, these challenges will likely grow over time, further undermining the rule of law in Aotearoa New Zealand. It is important to remain alert and play our part in responding to challenges as they emerge.

In 2024, we consulted lawyers, legal academics, and others throughout the country to identify some of these challenges. The feedback received was consistent with many of the themes arising from the Law Society's law reform work over the years.

The main challenges, according to those who engaged with us, are outlined below (and canvassed in more detail in the remainder of this report). It is important to note these do not encompass all of the challenges to the rule of law in Aotearoa New Zealand today, and the absence of other challenges from this report does not speak to their importance.

Barriers to access to justice

Those who participated in our consultations identified barriers to access to justice as one of the key challenges to the rule of law. Barriers can include:

- ***Difficulties with accessing and understanding the law.***
- ***Difficulties accessing lawyers and legal advice.***
- ***Issues which impact access to the courts, tribunals and other dispute resolution bodies.***

The rule of law requires that individuals have a means of resolving disputes and enforcing their rights. Our report explores these challenges and makes recommendations on how to improve access to justice to uphold the rule of law.

A number of our recommendations will require ongoing governmental funding and support: for example, greater investment in the legal aid and Duty Lawyer schemes, as well as the courts, tribunals, Community Law Centres, and other dispute resolution services (such as employment mediation). It will require, among other things, the provision of adequate resources, facilities and technologies. We urge both current and future governments to commit to providing this funding and support, in order to make much-needed improvements to access to justice.

Deficient policy and legislative processes

Deficiencies in the processes for developing and passing legislation continue to undermine the rule of law in Aotearoa New Zealand.

Governments are increasingly resorting to rushed policy development processes and the use of urgency to progress significant reforms (at times, without public consultation or select committee scrutiny). Some of these reforms have also had retrospective effect. We have also seen Amendment Papers being used to make significant policy changes to bills which have already gone through select committee and public consultation processes. These practices prevent public input into the law-making process, and preclude external and independent scrutiny of laws and policies. Overriding such safeguards heightens the risk that ineffective and low-quality legislation will result.

Our recommendations for both Parliament and governments to adhere to principles of good legislation will require, among other things, meaningful engagement with experts, stakeholders and members of the public about the development of policies and legislation, and post-legislative scrutiny of laws (particularly laws that have passed under urgency).

Issues relating to the substantive content of legislation

This report identifies several types of legislative provisions which, in our view, can offend the rule of law:

- ***Clauses that enable the retrospective application of legislation.***
- ***Clauses that empower the making of secondary legislation to amend primary legislation.***
- ***Clauses that grant the Executive absolute discretion to act or to make decisions.***
- ***Clauses that prevent or limit judicial review or appeal rights.***

These types of clauses should only be used sparingly, and in the limited circumstances discussed in our report.

Lack of awareness and understanding of the rule of law

Even within the legal profession, there appear to be differing levels of awareness and understanding of the rule of law, its performance, and what is required to protect it here in Aotearoa New Zealand. Without this awareness and understanding, there is a risk that individuals, organisations, and the government itself may feel less equipped and be less motivated to actively identify and respond to challenges to the rule of law.

We hope this report will help fill some of those gaps in knowledge and generate discussion about how we can strengthen and benefit from the rule of law in Aotearoa New Zealand. We will also make available other resources and guidance for both the profession and the wider public as we continue to advocate for the rule of law.

Threats to judicial independence and the separation of powers

The report outlines concerns about the number of comments and criticisms directed at members of the judiciary, which are unrelated to the substance of judgments they have issued. We know lawyers share our concern that these comments and criticisms can, over time, erode public confidence in the judiciary. When made by Ministers and members of Parliament, they can also undermine the constitutional principles of comity and the separation of powers.

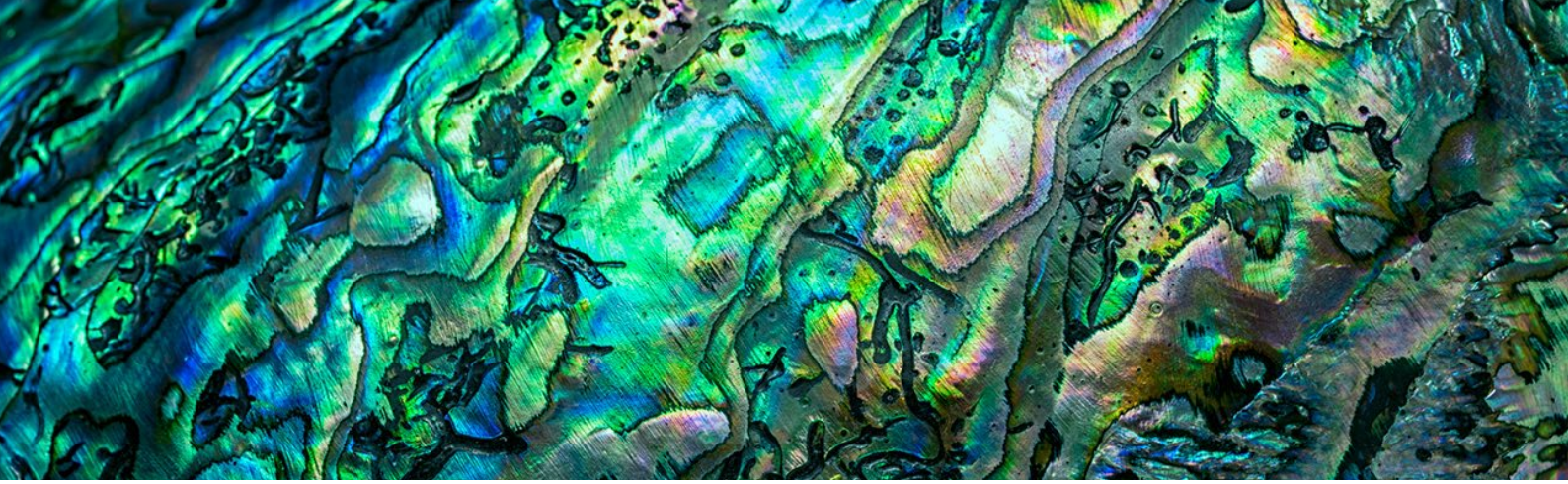
Because judges cannot defend themselves, it falls on us, and others, including members of the profession, to do so. With the publication of this report, we aim to increase awareness of the impacts these comments and criticisms can have on the separation of powers, democracy and the rule of law. We aim, further, to contribute to discussions on how we can continue to recognise the important role of the judiciary and judicial independence in Aotearoa New Zealand.

Automated decision-making (ADM)

The use of ADM systems (including those which rely on artificial intelligence) to resolve disputes and deliver justice has sparked concerns about their impacts on transparency, accountability, and the rule of law.

While ADM systems can help increase the speed and efficiency with which decisions are made and, in some cases, help to strengthen the rule of law, the Law Society supports constraints and prerequisites for the use of ADM systems — particularly within government departments, the courts and other adjudicative or decision-making bodies. These could include, for example, avoiding the use of 'black-box algorithms' and requiring human oversight of decisions made using ADM systems.

Appendix 1 summarises the 78 recommendations we have made throughout this report to address the concerns we have raised.



1 Introduction

1.1 In 2024, the rule of law declined globally for the seventh year in a row,[1] and weakened in a majority of countries surveyed by the World Justice Project. As one academic recently observed, various interconnected crises are now posing "a grave threat to democratic values, processes and institutions, globally and locally".[2]

1.2 While we are fortunate to have broad compliance with the rule of law here in Aotearoa New Zealand, there are ongoing and emerging challenges which can impact our commitment to this foundational principle. Concerns have been expressed, by some, that overseas trends could be contagious across other democracies, including Aotearoa New Zealand. Future events generated by the current "global polycrisis" may test our democratic institutions and shared commitment to the rule of law in unparalleled and unexpected ways.[3]

1.3 At any time, the rule of law is critical to upholding democracy and maintaining a stable social, political and economic landscape in Aotearoa New Zealand and beyond. It is particularly so in today's environment. While we are a relatively small country with limited influence over global events and trends, we continue to have control over our own constitutional and democratic arrangements, policies, processes and safeguards which can help promote *our* adherence to the rule of law.[4] It is important we remain vigilant about local threats to the rule of law, and take steps to respond to challenges as they emerge.

1.4 Research undertaken by the International Bar Association (**IBA**) has identified a low level of clarity on where or with whom the responsibility lies for tackling challenges to the rule of law.[5] In Aotearoa New Zealand, both lawyers and the Law Society have statutory obligations to uphold the rule of law, and are uniquely placed to defend it.[6] The Law Society discharges this important function in a number of ways, including, for example, commenting on law reform proposals, intervening in court proceedings which engage rule of law issues, and engaging with stakeholders and advocating to strengthen the rule of law.

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1 World Justice Project *WJP Rule of Law Index 2024 Global Press Release* (23 October 2024).
2 Jonathan Boston "Threats to democracy, global and local: How worried should we be? And what should we do?" (Paper prepared for Hāpai Public, 1 April 2025) at 2.
3 Jonathan Boston "Threats to democracy, global and local: How worried should we be? And what should we do?" (Paper prepared for Hāpai Public, 1 April 2025) at 12.
4 Jonathan Boston "Threats to democracy, global and local: How worried should we be? And what should we do?" (Paper prepared for Hāpai Public, 1 April 2025) at 13.
5 See International Bar Association *Future of Legal Services – White Paper 2024* (October 2024) at 10.
6 Lawyers and Conveyancers Act 2006, ss 4(a) and 65(e). This is also a strategic priority for the Law Society: see Law Society Strategy 2023–2026 (available at: www.lawsociety.org.nz).

1.5 We believe there is an opportunity for the Law Society to improve awareness and understanding of the rule of law, and to proactively identify threats and challenges. In 2023, we published an online resource which identifies some key aspects of the rule of law, and what the rule of law looks like in Aotearoa New Zealand,[7] and in 2024, we commenced a research project to understand how the rule of law could be strengthened within Aotearoa New Zealand. This report contains our main findings and recommendations. It explores how the rule of law is perceived in Aotearoa New Zealand, key challenges to the rule of law, and how those challenges can be addressed in order to strengthen the rule of law.

1.6 We believe everyone has a role to play in upholding the rule of law, and we hope this report will help to:

a. improve awareness and understanding of key concepts of the rule of law in Aotearoa New Zealand;

b. identify specific actions for the government to promote and strengthen the rule of law;

c. highlight areas which require further government funding and resource;

d. identify ways in which the Law Society, lawyers, members of Parliament, and public officials are able to help strengthen and advocate for the rule of law; and

e. inform the Law Society's future law reform and advocacy work.

"All parts of society have a part to play in upholding the rule of law. Those working in … democratic and independent institutions have a responsibility to promote public trust in the rule of law, while the public's commitment to this fundamental principle is essential for it to be maintained in the long term. Politicians have a particularly important role to play. Ministers bear responsibility for upholding the rule of law when they develop their policy goals, given their power over state force and funding. … Parliament is the final decision-making body for shaping and passing laws. It passes budgets that set funding levels for the justice system, and holds the executive to account between elections. This gives it the ultimate responsibility for upholding … the rule of law."[8]

1.7 The implementation of some of these recommendations in this report will require ongoing governmental funding and support. The Law Society urges current and future governments to commit to providing this funding, in order to maintain Aotearoa New Zealand's commitment to the rule of law.

1.8 The Law Society also calls on those who work within the justice and public policy sectors — particularly members of Parliament, lawyers, public officials, as well as the media — to pay close attention to the issues discussed in this report, and take steps to advocate for the rule of law where opportunities arise.

1.9 Finally, it is important to note that this report does not outline all of the challenges to the rule of law in Aotearoa New Zealand today. It is confined to the main challenges as identified by the profession, wider legal sector, and the Law Society's law reform work. There will be other challenges which are not discussed here, and their absence from this report does not speak to their importance.

7 This is available on the Law Society's website: www.lawsociety.org.nz.
8 The Constitution Unit "The rule of law: what is it, and why does it matter?" (*The Constitution Unit Blog*, December 2022).

2 What is the rule of law and why does it matter?

"The rule of law is indispensable to human co-existence and happiness."[9]

2.1 At its core, the rule of law is the idea that the law applies equally to everyone — both the government and its citizens. It is the basic idea that governments, officials and citizens alike should comply with the law, and that Ministers, officials and public bodies must follow the law when carrying out their functions.[10]

2.2 However, there is no set definition of the rule of law, and numerous understandings have emerged over time. These range from the formal (or procedural) definitions, and substantive definitions, through to the 'thin' and 'thick' conceptions of each definition.[11] As Mark Ellis, Executive Director of the IBA, has observed:[12]

"No single political ideal has ever been so widely accepted and endorsed. While such universal support may reasonably stem from the intrinsic value of law, it also comes from a certain elasticity of meaning."

2.3 The rule of law can have significant positive impacts regardless of whether it is given a narrow or broad definition. It promotes:

Democracy, by ensuring elections are conducted fairly and transparently, and laws made by the democratically-elected Parliament are properly administered and enforced.

Fundamental rights and freedoms, including through legislation and the courts.

Social harmony, by improving public confidence in the law and the justice system, and requiring everyone to comply with the law.

Economic growth and social progress, for example, by upholding property rights, and maintaining a business environment in which contracts and international laws are enforced.

9 Philip A Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ Limited, 2011) at 71.
10 Law Society *The Rule of Law in Aotearoa New Zealand* (available at: www.lawsociety.org.nz).
11 See B Z Tamanaha (2005) *On the Rule of Law: History, Theory, Politics* (Cambridge: Cambridge University Press) at 91.
12 Mark Ellis "Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice" (2010) 72 U Pitt L Rev 191 at 192.

2.4 The rule of law can also have broader positive flow-on impacts across society. Research undertaken by the IBA has shown that countries which are more effective at upholding the rule of law have:[13]

Higher life expectancies

Better access to healthcare

Higher GDP per capita

Better access to formal education

Lower homicide and child mortality rates

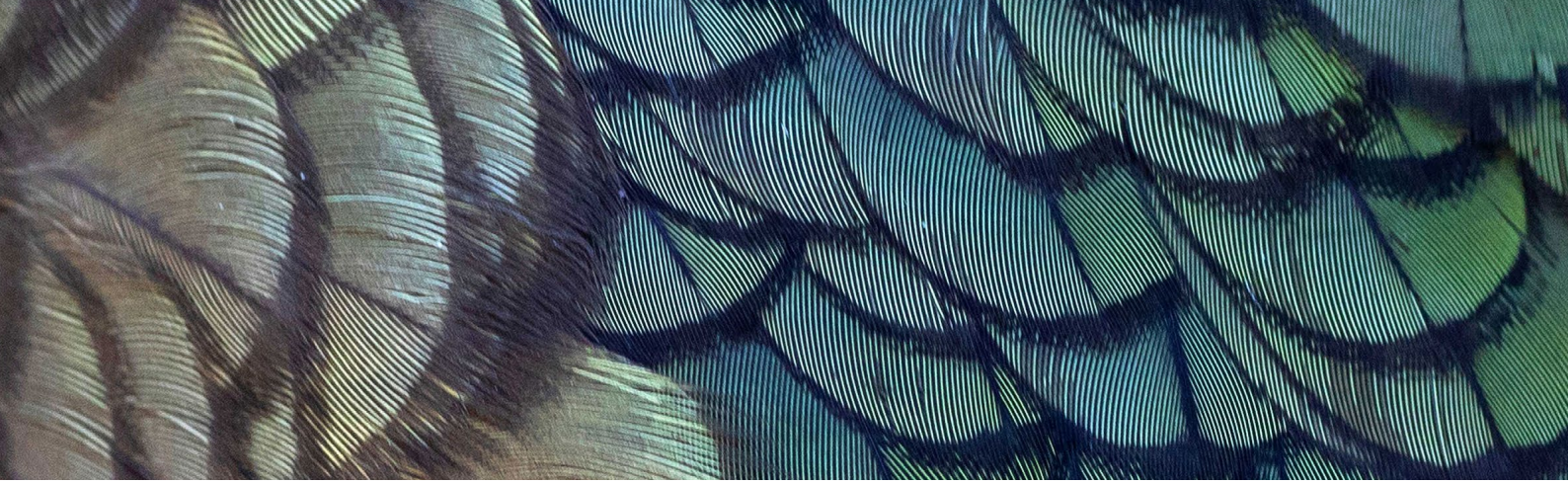
Less corruption and executive overreach

Fewer young people who are not engaged in education, work or training

Decreased air pollution and more rapid adoption of renewable energy initiatives

2.5 These far-reaching positive impacts of the rule of law illustrate, at a practical level, why it is important to promote and strengthen it.

13 International Bar Association *The IBA report on the social and economic impact of the legal profession* (2024) at 11–15; LexisNexis *LexisNexis Rule of Law Impact Tracker* (available at: www.lexisnexis.com/en-us/rule-of-law/measuring-the-rule-of-law.page).



3 Understanding how the rule of law operates in Aotearoa New Zealand

3.1 To promote and strengthen the rule of law in Aotearoa New Zealand, it is necessary to understand how New Zealanders perceive the rule of law, and what they think are the current challenges to the rule of law in this country. While there are abundant resources on the meaning of the rule of law, and general challenges to the rule of law, they do not take a holistic approach to improving the rule of law in Aotearoa New Zealand, or make specific recommendations for strengthening the rule of law by addressing key domestic challenges.

3.2 To contribute to addressing this, during 2024 the Law Society engaged with lawyers and academics to understand their views. This included a survey of the legal profession, and targeted consultations with lawyers, legal academics, and stakeholder organisations.

3.3 This report focuses on the main challenges to the rule of law identified by those who engaged with us on this project. The findings and recommendations in this report have been informed by the feedback we received, and the Law Society's previous law reform and advocacy work.

Consultation with the legal profession

3.4 In June 2024, the Law Society launched an online survey inviting feedback on the legal community's perspectives on the rule of law, and current challenges (the **2024 survey**). The Law Society received 416 survey responses, primarily from lawyers. Appendix 2 of this report contains further information about the 2024 survey, and the questions which formed part of the survey.

3.5 Those who participated in the 2024 survey were asked to indicate if they wished to engage in further discussions with the Law Society about the rule of law. The Law Society subsequently organised several workshops, meetings and conversations with survey respondents who wished to participate in further discussions. The Law Society also spoke to several legal academics who expressed interest in the project.

3.6 Those who responded to the 2024 survey and / or participated in targeted consultations are referred to below as 'research participants'.

Our findings

3.7 Research participants identified a number of concepts which, in their view, formed part of the definition of the rule of law in Aotearoa New Zealand.

3.8 Some preferred formal or narrow definitions, which simply require the courts to compel everyone to comply with law put in place by the legislature and the development of the common law. Others preferred broader, substantive definitions, which both encompass the thin or formal definitions, and extend to a raft of other procedural and substantive values (for example, fairness and the protection of fundamental rights).[14] The nature of the identified challenges to the rule of law suggests that survey participants largely preferred a broader definition.

3.9 The five most commonly identified aspects of the rule of law were:

Everyone is subject to the law

Clear, predictable and enforceable law

Access to justice

Fairness

Judicial independence

3.10 Research participants were also asked whether they thought the rule of law operates, or ought to operate, differently in Aotearoa New Zealand. Feedback provided in response to this question largely reflected the challenges identified by respondents, predominantly focusing on unequal access to justice (and inequity more generally), as well as concern for failure to follow lawmaking processes. Several survey respondents raised the role of Te Tiriti o Waitangi (Treaty of Waitangi), as well as broader cultural diversity within communities. During discussions with several research participants, the constitutional significance of Te Tiriti was raised, with participants noting that disregard for Te Tiriti obligations is contrary to the rule of law. As this was not one of the main challenges raised by participants, and would likely benefit from a more singular focus, it is not discussed further in this report.

14 Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, Wellington, 2018) at 21.

4 The current state of the rule of law

4.1 The IBA has observed that, globally, the rule of law has suffered constant erosion in recent years, and to such a degree that the United Nations Secretary-General António Guterres has referred to the risk of the "rule of lawlessness".[15]

4.2 Research undertaken by the World Justice Project (**WJP**) supports these observations. An assessment of the adherence to the rule of law in 142 countries and jurisdictions around the world shows that between 2022 and 2023, and then again between 2023 and 2024, the rule of law declined in more countries than it improved.[16] Countries which are 'backsliding' appear to be experiencing, among other things, weakened limits on government power and diminished human rights, as well as worsening access to justice (driven by longer delays, less effective alternative dispute resolution mechanisms, and increased government influence).[17]

4.3 Research undertaken by the IBA in 2024 also highlighted challenges to the rule of law that are, in some respects, similar. These included: challenges to the independence of the legal profession and the judiciary; the use of artificial intelligence (**AI**) in dispute resolution and the delivery of justice; limitations on access to justice; and the impacts of domestic and international political uncertainty on legal and regulatory environments.[18]

The current state of the rule of law in Aotearoa New Zealand

4.4 Positively, our research (including the 2024 survey) shows that Aotearoa New Zealand is generally seen to have a strong adherence to the rule of law. However, there are ongoing and emerging challenges which impact our adherence to the rule of law.

15 International Bar Association *The IBA report on the social and economic impact of the legal profession* (2024) at 9, referring to "UN chief warns that rule of law risks turning into 'rule of lawlessness'" *Euronews* (online ed, 13 January 2023).

16 World Justice Project *The World Justice Project Rule of Law Index® 2024* (2024) at 21. The *Rule of Law Index* relies on assessments of over 214,000 households and 3,500 legal practitioners and experts in 142 countries and jurisdictions, and measures the performance of the rule of law against eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. The Index and related reports are available at: worldjusticeproject.org/rule-of-law-index.

17 World Justice Project *The World Justice Project Rule of Law Index®: 2024 Insights* (2024) at 22.

18 See International Bar Association *Future of Legal Services — White Paper 2024* (October 2024).

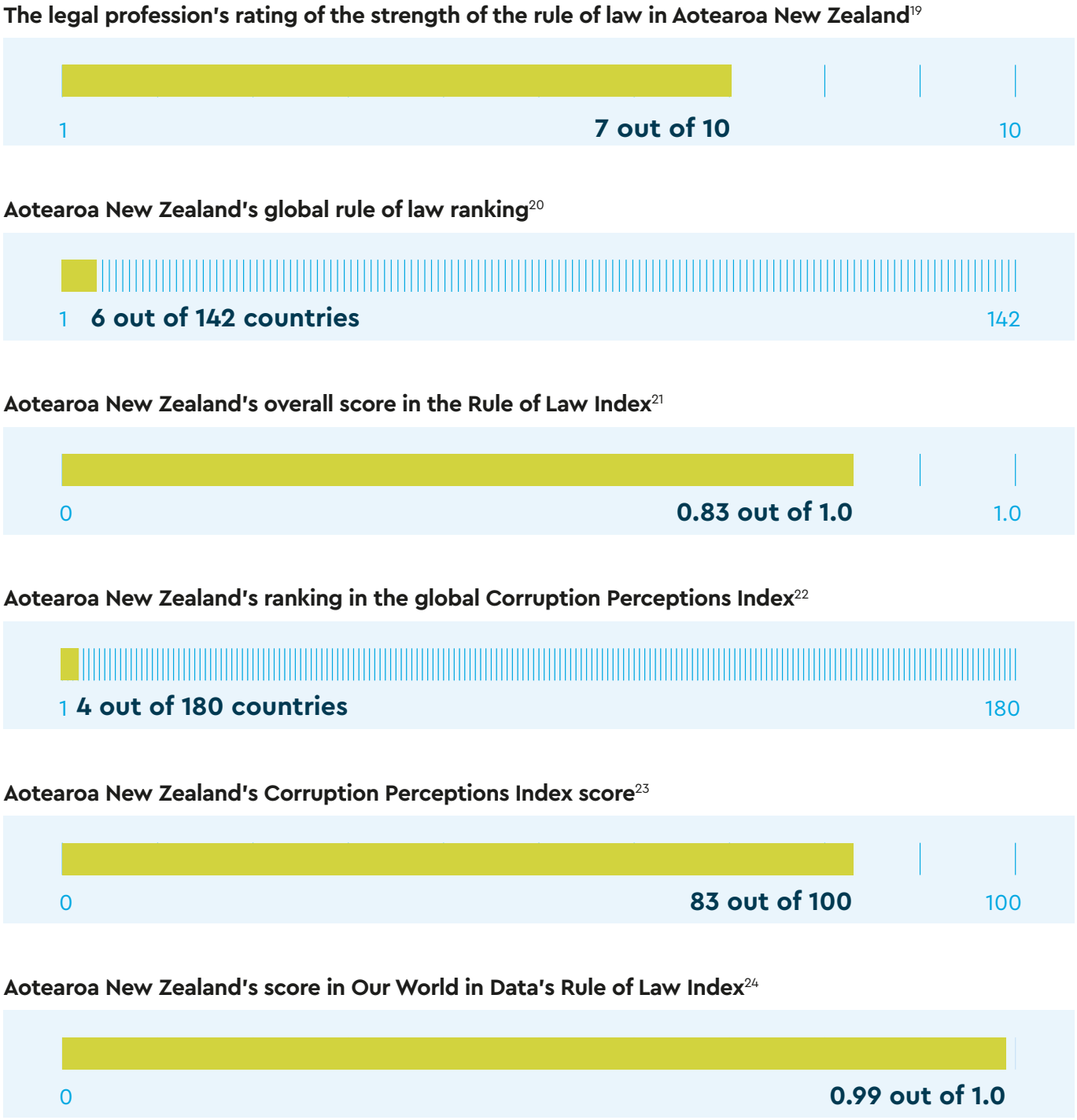


Figure 1: *Aotearoa New Zealand's rule of law rankings*

19 This is the average of ratings given by those who responded to the Law Society's 2024 survey.
20 World Justice Project The World Justice Project Rule of Law Index® 2024 (2024).
21 World Justice Project The World Justice Project Rule of Law Index® 2024 (2024).
22 Transparency International Corruption Perceptions Index 2024 (February 2025).
23 Transparency International Corruption Perceptions Index 2024 (February 2025).
24 V-Dem (processed by Our World in Data) Rule of Law index (2024), available here: https://ourworldindata.org/grapher/rule-of-law-index.

4.5 Aotearoa New Zealand's overall scores and rankings in both the Rule of Law Index and the Corruption Perceptions Index also appear to have declined slightly over time.

4.6 Aotearoa New Zealand is currently ranked sixth in the world for its overall adherence to the rule of law. Some of the challenges which have contributed to this ranking include:[25]

25 World Justice Project *The World Justice Project Rule of Law Index® 2024* (2024) at 133.

4.7 Transparency International has reported that, in 2024, Aotearoa New Zealand was knocked out of the top three rankings of the Corruption Perceptions Index for the first time since the Index was revised in 2012.[26] Data held by Transparency International also show that Aotearoa New Zealand's Corruption Perceptions Index scores have been gradually declining over time:[27]

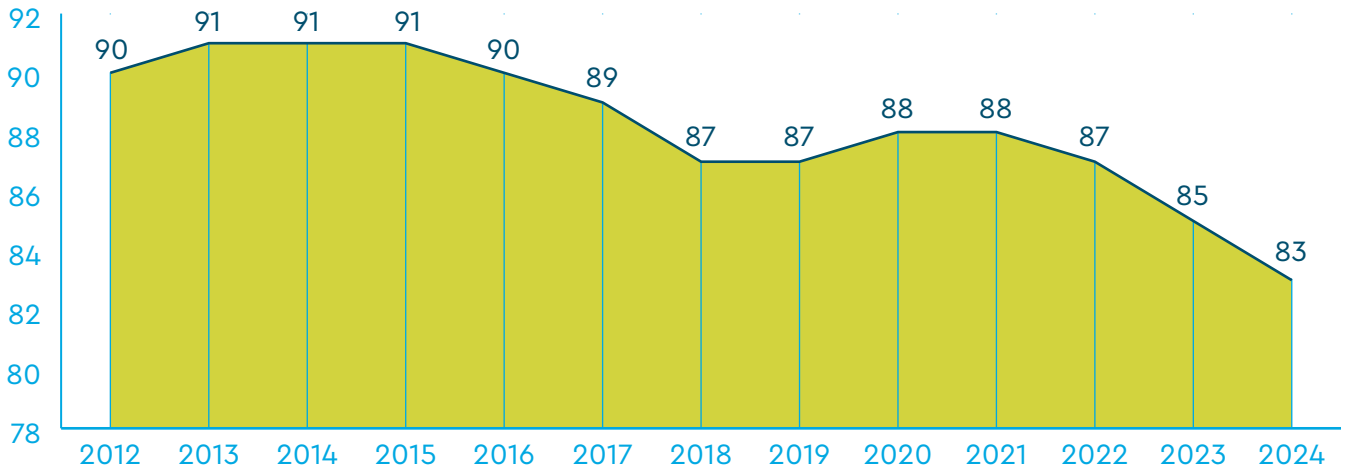


Figure 2: *Aotearoa New Zealand's Corruption Perceptions Index scores between 2012 and 2024*

4.8 The main challenges identified by those who responded to the Law Society's 2024 survey are:

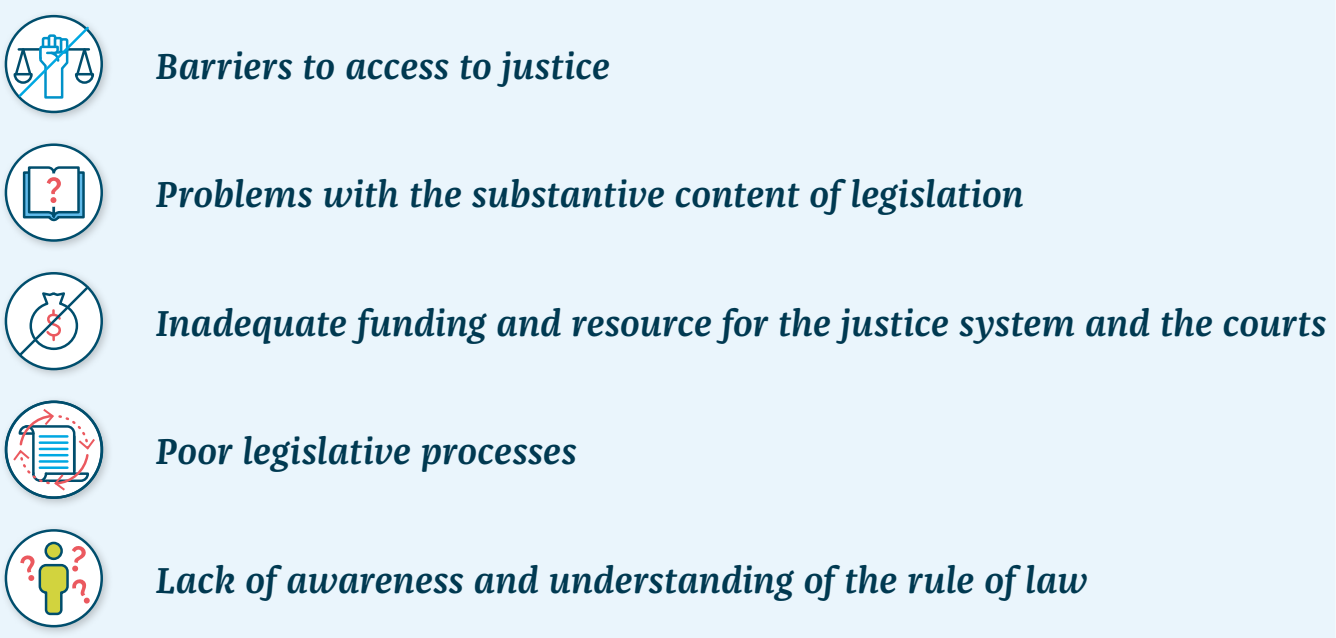
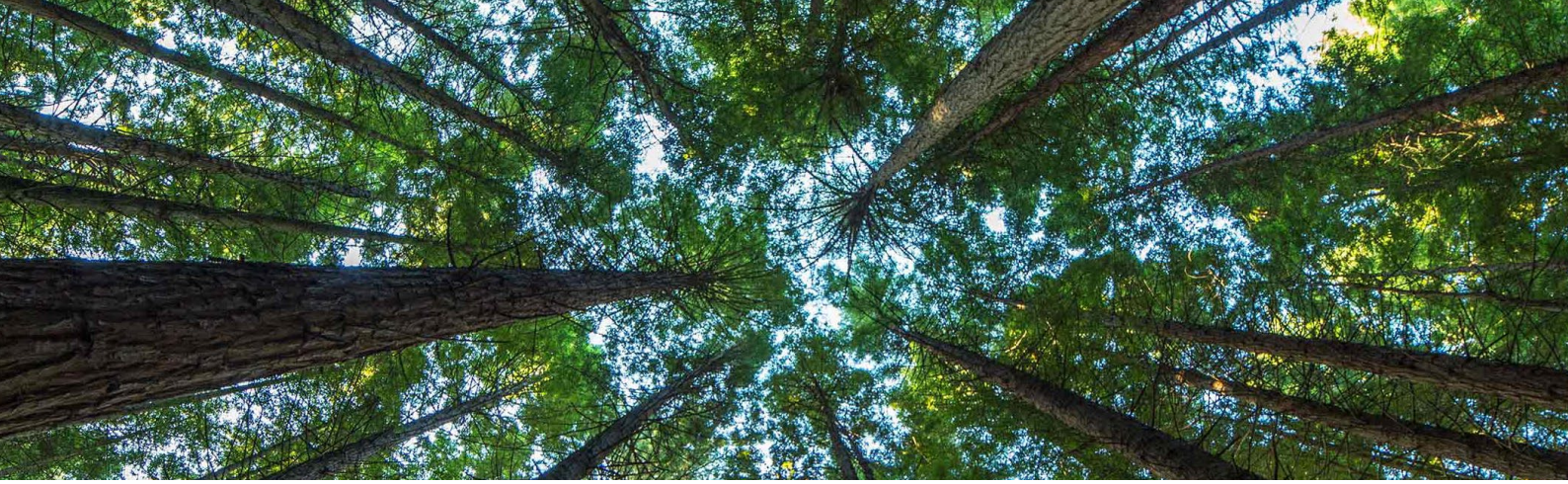


Figure 3: *Research participants' views on key challenges to the rule of law*

4.9 The remaining chapters of this report focus on how we can strengthen the rule of law in Aotearoa New Zealand by addressing these challenges.

26 Transparency International *Corruption Perceptions Index 2024* (February 2025). The *Corruption Perceptions Index* is a global indicator of public sector corruption. The index scores 180 countries and territories around the world based on perceptions of public sector corruption, using data from 13 external sources, including the World Bank, World Economic Forum, private risk and consulting companies, think tanks and others. The scores reflect the views of experts and businesspeople.

27 Transparency International (2024) (see www.transparency.org/en/countries/new-zealand).



5 Barriers to access to justice

5.1 If the rule of law is based on the concept that everyone is subject to the law, and can benefit from the laws which apply to them, then it follows that everyone must have access to justice systems to administer and enforce those laws. Access to justice is therefore a key component of the rule of law.

"Access to justice is a pressing contemporary legal issue relevant in jurisdictions across the world: it is not only a fundamental right in itself, but also a precondition to the enjoyment of many other rights. As a core aspect of the rule of law, access to justice allows people to have their voices heard and is an essential enabler of social and economic development."[28]

5.2 Those who responded to the Law Society's 2024 survey identified barriers to access to justice as one of the key challenges to the rule of law. Access to justice is a very broad concept which can encompass, among other things:

a. Access to the law, which means legislation and court decisions must be clear and easy to access and apply.

b. Access to lawyers and legal advice, including access to pro bono legal services and legal aid, to assist with understanding legal rights and options, and how the law applies to particular circumstances.

c. Effective enforcement of the law, which requires decisions to be made, and disputes to be resolved, in an affordable, timely and efficient manner (for example, through independent decision-making bodies and the courts).

5.3 Barriers to access to justice can impact individuals' ability to exercise and benefit from their rights and understand their obligations. It can also undermine public confidence in the justice system and the rule of law (for example, by contributing to perceptions that, in reality, not everyone is equal before the law because not everyone has equal access to the law).

28 Anna McNee *Legal expenses insurance and access to justice* (International Bar Association, 2019) at 8.

5.4 The WJP has identified barriers to access to justice in both the civil and criminal jurisdictions in Aotearoa New Zealand, which have contributed to Aotearoa New Zealand's overall rule of law score.[29]

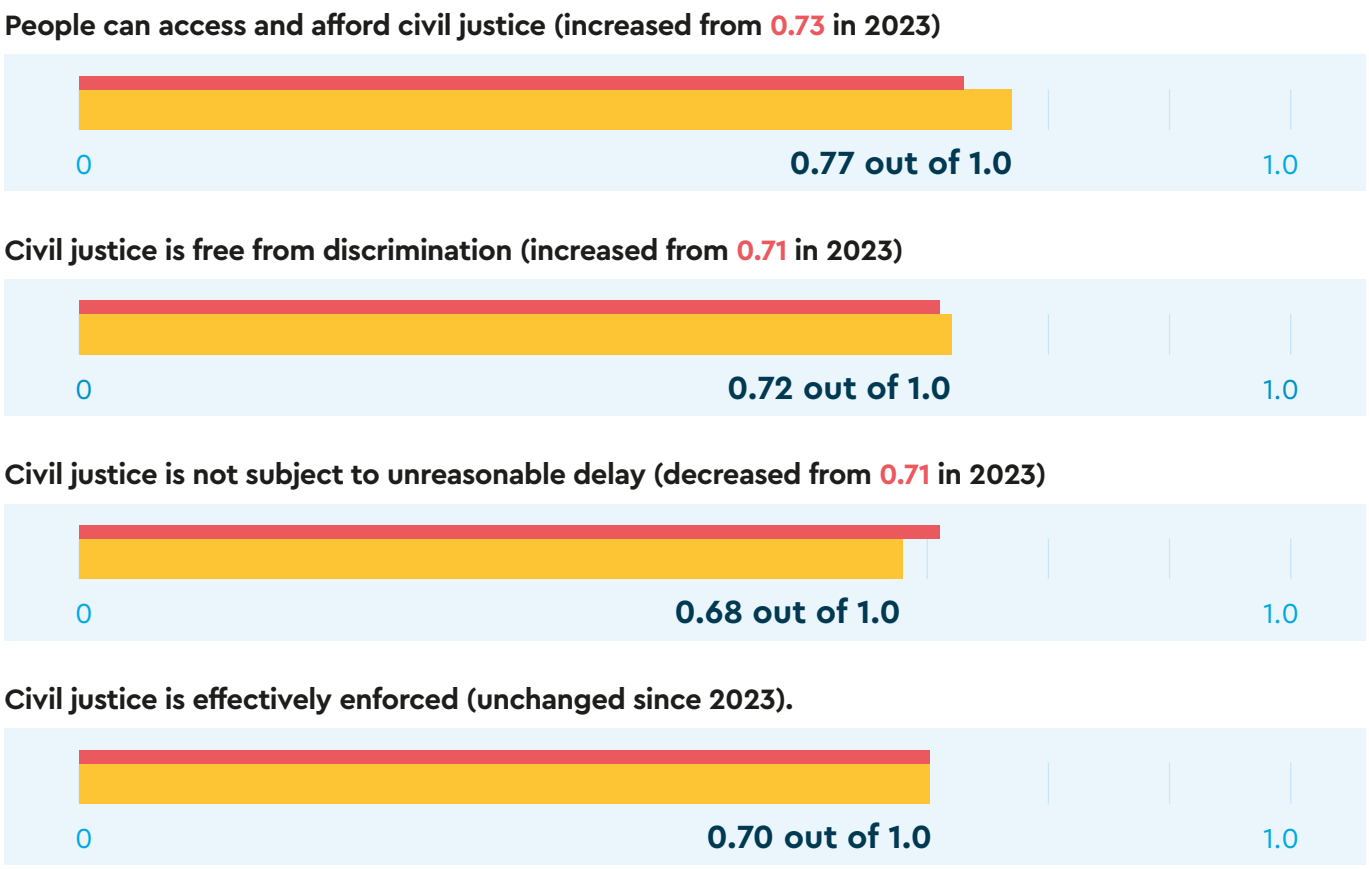


Figure 4: *Aotearoa New Zealand's access to civil justice scores in the WJP's Rule of Law Index*

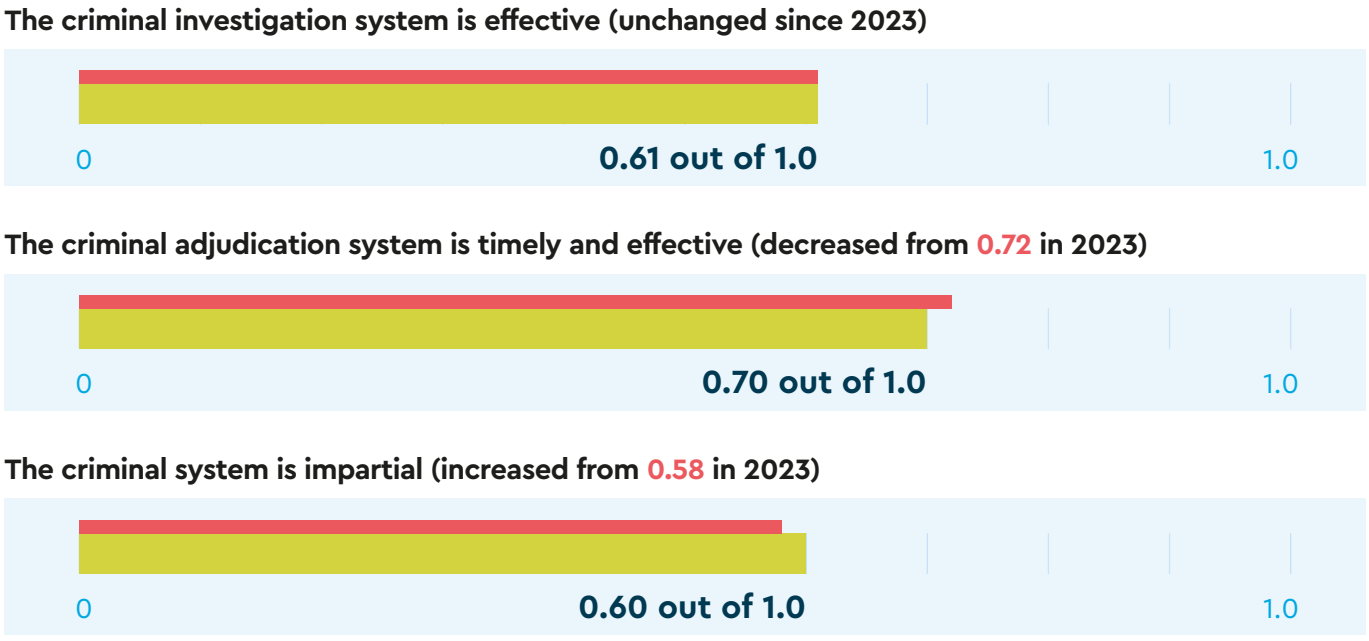


Figure 5: *Aotearoa New Zealand's access to justice scores in the criminal jurisdiction in the WJP's Rule of Law Index*

29 World Justice Project *The World Justice Project Rule of Law Index® 2024* (2024) at 133.

5.5 Research participants also raised concerns about inequitable access to justice across certain communities For example, Māori are disproportionately represented at every stage in the criminal justice system in Aotearoa New Zealand (as both victims and offenders), and experience worse outcomes than other New Zealanders at every stage of the justice process. They are, as a result, more likely to be impacted by barriers to access to justice. Some of these barriers are discussed in this chapter, followed by recommendations on how to address them.

Difficulties accessing and understanding the law

5.6 Ability to access the law is widely accepted as a fundamental aspect of the rule of law.[30] If key actors are unaware of the laws that apply to them, then they may not be able to behave in a way that complies with the law.

5.7 The Law Society's *Access to justice: stocktake of initiatives* report concluded that some of the main barriers to accessing justice include the use of confusing and inaccessible 'legal jargon', and difficulties accessing comprehensive, accurate and up-to-date information about legal rights, responsibilities and ways to prevent, contain and resolve disputes.[31]

5.8 In his book *Making Laws That Work: How Laws Fail and How We Can Do Better,* Goddard J also notes that one "depressingly common problem" is that those whose behaviour legislation is intended to influence are not aware of it, or do not understand it. As his Honour observes:[32]

> **"... as the law becomes more complex, it also becomes harder for people to comply with it, or take advantage of the benefits it provides. And it becomes harder for officials and courts to apply the law — and in particular, to apply it in a way that is consistent with the policy underpinning the law. All too often, the policy is lost sight of as we scramble through the complex maze of interlocking (and overlapping) provisions."**

5.9 We agree with his Honour's observations. The Law Society's submissions on draft legislation often comment on provisions which appear to be unclear, unnecessarily complex, or inconsistent with underlying policy objectives, and make recommendations to improve their accessibility. In our experience, public consultation on law reform proposals (for example, via the select committee process) can play a significant role in identifying and fixing provisions which, without amendment, would result in unnecessarily complicated legal frameworks and undermine the rule of law.[33]

30 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 17.
31 Law Society *Access to justice: stocktake of initiatives research report* (December 2020) at 12.
32 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 17, 136, 138 and 144.
33 See, for example, the Law Society's submissions on the Financial Markets Authority's consultation on *Draft Fair Outcomes for Consumers and Markets Guide* (1 March 2024), the Fair Pay Agreements Bill 2022 (115–1) (19 May 2022) and the Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill 2020 (310–1) (28 April 2021), which make recommendations to simplify proposed laws and regulations. These submissions are available on the Law Society's website: www.lawsociety.org.nz.

Addressing these problems

5.10 Goddard J makes various recommendations to address some of these challenges. We agree with these recommendations, particularly the recommendations that:[34]

a. Legislation should be as clear and simple as possible to comply with where it imposes obligations, and as easy as possible to invoke for the people who are meant to benefit from it. This may require, for example, the use of plain language, and examples and illustrations in the text of the legislation itself.

b. All legislation must be published online.

c. Public information campaigns and other guidance about the operation of the law should be made available, particularly to those to whom the new laws will apply.

5.11 The Law Society acknowledges the work being done by the Parliamentary Counsel Office to ensure all Acts, bills, and Amendment Papers are published on the *New Zealand Legislation* website.[35] The Law Society also commends the free resources produced by the Parliamentary Counsel Office for the purpose of helping drafters and agencies improve the accessibility of legislation. These include:[36]

a. a *Plain Language Standard*, and a checklist for applying the Standard, which are designed to support good drafting of legislation;

b. *Secondary Legislation Access Standards*, which are designed to promote compliance with agencies' obligations to publish secondary legislation in a manner that ensures web accessibility; and

c. a *Secondary Legislation Drafting Toolkit*, which provides an in-depth guide to the process and nature of drafting legislation, including how to draft in plain language and tips for reducing drafting complexity.

5.12 The Law Society also supports measures to improve the accessibility of court judgments, which, like legislation, form part of the law in Aotearoa New Zealand. The Aotearoa New Zealand Legal Information Institute (**NZLII**) is currently the only legal database in Aotearoa New Zealand which provides free access to both legislation and court decisions.[37] In 2023, the website recorded 34 million visits to the site, which indicates there remains a high demand for free access to legal databases.[38] Despite this high demand for its services, NZLII has been chronically underfunded, and currently operates with an annual budget of around $70,000.[39] It is currently funded by donations from organisations and individuals (including from the Parliamentary Counsel Office, members of the judiciary, and lawyers).

34 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 17, 76–80 and 136.
35 www.legislation.govt.nz. This website also contains previous versions of Acts and bills, as well as current and earlier versions of secondary legislation drafted by the Parliamentary Counsel Office.
36 See: www.pco.govt.nz.
37 Some judgments of particular public interest are also published on the *Courts of New Zealand* website (www.courtsofnz.govt.nz) and the Ministry of Justice's website (www.justice.govt.nz/courts/decisions). However, these websites do not publish *all* of the decisions issued by the courts.
38 Geoff Adlam "Under-funded NZLII celebrates 20th anniversary" (*Capital Letter,* 6 December 2024, online ed).
39 Geoff Adlam "Under-funded NZLII celebrates 20th anniversary" (*Capital Letter,* 6 December 2024, online ed).

5.13 Organisations which provide free education and resources also play a crucial role in educating community groups and members of the public about the law and their legal rights and obligations, and in assisting those who are experiencing legal problems (such as self-represented litigants). Activities undertaken by Community Law Centres, alongside their national body, Community Law Centres Aotearoa, include:[40]

a. publishing *Law Manual Online*, a free database of plain language legal information designed to empower everyday people to know their legal rights, and to make the law easy to understand;

b. producing pamphlets, books, guides, template legal letters and teaching kits which cover a range of legal topics and issues and are intended to assist individuals "without getting lawyers involved";

c. providing free law-related education and training to individuals and organisations; and

d. publishing accessible information about how individuals can advocate for law reform and give feedback on law reform proposals.

5.14 Adequate funding and resourcing, including government funding, could help ensure the ongoing delivery of such services and fill any gaps or meet growing needs for education and legal assistance.

Access to lawyers and legal advice

5.15 The Law Society's *Snapshot of the Profession 2024* shows there are now over 15,000 lawyers based in Aotearoa New Zealand. That is one lawyer for every 339 non-lawyers.[41] However, despite this seemingly high ratio of lawyers to non-lawyers, there remain significant barriers to accessing legal advice and representation.

5.16 Research undertaken by the Law Society shows that the cost of accessing forums for resolving disputes and legal representation and advice is likely the biggest barrier to access to justice.[42] Similarly, the *Access to Justice: 2023 Legal Needs Survey* undertaken by the Ministry of Justice and the Ministry of Business, Innovation, and Employment identifies that costs can be a barrier to seeking out legal representation and assistance,[43] and only 52 per cent of survey participants who sought someone to represent them in a court or tribunal received all of the help they wanted.[44]

5.17 Cost is not the only barrier to accessing legal advice and representation. Individuals may also encounter:

a. Geographic barriers: for example, where individuals are based in rural areas with few or no suitable lawyers in the immediate vicinity.

b. Language barriers, where individuals are unable to find a suitable lawyer who speaks their preferred language, or do not have the means to access interpretation services.

40 See: communitylaw.org.nz/resources.
41 Law Society *Snapshot of the Profession 2024* (30 June 2024) at 1.
42 New Zealand Law Society Te Kāhui Ture o Aotearoa *Access to justice: stocktake of initiatives research report* (December 2020) at 44.
43 Ministry of Justice and the Ministry for Business, Innovation, and Employment *Access to Justice: 2023 Legal Needs Survey* (29 October 2024) at 88.
44 Ministry of Justice and the Ministry for Business, Innovation, and Employment *Access to Justice: 2023 Legal Needs Survey* (29 October 2024) at 16.

c. Difficulties in accessing lawyers from Corrections facilities. Lawyers are continuing to report access issues in this context to the Law Society and, while we continue to work with the Department of Corrections to facilitate access, the progress of this work continues to face challenges.

5.18 Unequal access to lawyers and legal assistance can undermine public confidence in the rule of law. One lawyer who participated in our targeted consultations noted, for example, that some members of the public believe those who can "pay for expensive lawyers" get less harsh sentences for criminal offending, and that "you have to have money to access justice", which suggests there are already perceptions that the law does not equally apply to everyone.

"I agree that if the rule of law is a standard by which we measure ourselves, as a society we fall a long way short. You know better than I the extent to which the benefit of the law is inaccessible to large parts of our society — the extent to which people are unable to access basic information about their rights, the extent to which they cannot afford or access legal representation, and to which they are unable to access the courts or tribunals to assert or defend their rights."[45]

5.19 Through our law reform and advocacy work, we have identified two key areas where improvements can be made to address some of these concerns by increasing access to legal representation and advice. They are:

a. the legal aid scheme; and

b. the Duty Lawyer Scheme.

5.20 Each is discussed in more detail below.

45 Rt Hon Dame Helen Winkelmann, Chief Justice of New Zealand "Address to the Community Law Annual Hui" (2 November 2023).

The legal aid scheme

"A well-functioning democracy needs a fair, just and sustainable legal aid system to provide access to justice and to promote respect for the rule of law. Aotearoa New Zealand's legal aid system is underfunded and some of its legislative and regulatory settings are creating their own barriers to access to the courts and legal representation. These deficiencies are causing the system to fail to meet its objectives of facilitating access to justice and upholding the rule of law."[46]

5.21 Legal aid is a government-funded loan intended to help individuals pay for legal services if they cannot otherwise afford a lawyer. An individual's eligibility for legal aid depends on their income, assets, and (in some areas of law) the merits of their case, and members of the profession have raised concerns with the Law Society about how these eligibility thresholds can prevent individuals from accessing justice. For example, from 1 July 2025, a single applicant with no dependent children will need to show that they earn an annual income of less than $28,984 in order to qualify for civil legal aid.[47] This income threshold will be well below the annual income of an individual earning minimum wage (who, despite earning more than the income threshold for legal aid, may be unable to take a matter to court without legal aid or pro bono assistance).[48]

5.22 The legal aid scheme also imposes limits on the funding that will be granted to those who qualify for legal aid — for example, the scheme:

a. only allows for the grant of fixed fees for undertaking certain types of specified work (rather than fees which are calculated by applying an hourly rate to the number of hours worked);[49] and

b. imposes caps on the total number of hours of work which will be funded by legal aid.[50]

5.23 Those who are granted legal aid are also generally expected to repay some or all of their loan (even if they are found not guilty, or succeed in their matter before the court).[51]

5.24 The Law Society's research and consultation with the profession over the years has highlighted further problems within the legal aid scheme, which have the potential to impact the long-term sustainability of the scheme, and the availability of legal aid to those who meet relevant criteria. These issues indicate that the legal aid system is on life support:

46 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Annual Report for the period 1 January 2020 to 31 December 2021* at 41.
47 Legal Services Regulations 2011, reg 5(1).
48 That is, an annual income of $48,880, based on the current minimum wage rate of $23.50 an hour.
49 For example, in relation to certain types of work undertaken on criminal, family and ACC matters.
50 Legal aid funding for refugee and protection status applications, for example, is capped at 25 hours (see Ministry of Justice *Refugee and protected persons proceedings steps* (February 2017)). Refugee legal aid providers have advised the Law Society this does not account for the total number of hours typically spent on preparing these applications, which leaves providers with no choice but to undertake the additional unfunded work on a pro bono basis.
51 Unless their circumstances meet the limited criteria for writing off the debt – see: www.justice.govt.nz/courts/going-to-court/legal-aid/do-you-need-to-pay-back-your-legal-aid/apply-to-write-off-your-legal-aid-debt.

a. In 2021, the Law Society conducted the largest ever survey of lawyers on access to justice in Aotearoa New Zealand and published its findings in its *Access to Justice Research 2021 Report*.[52] Almost 3,000 survey responses showed that in the preceding 12 months, three-quarters of legal aid lawyers had to turn away people seeking legal assistance. This equated to over 20,000 individuals being turned away, some likely multiple times.[53] A quarter of legal aid lawyers also planned to do less legal aid work, or stop altogether. The key reason for this was inadequate remuneration, as well as the administrative burden of legal aid, and stress.[54]

b. The Law Society's *2023 Workplace Environment Survey* indicates many criminal and family lawyers, in particular, continue to experience lower levels of job satisfaction and higher levels of stress.[55] The number of cases in the system has not reduced and cases are often taking longer, so fewer lawyers are juggling the same amount of work across the system and more individuals are representing themselves in court. This has implications for addressing the current court backlogs and access to justice.

c. The Law Society's 2024 survey *Benchmarking costs of law practice* found that the cost of practising law in Aotearoa New Zealand has increased by an average of 15.3 per cent every year over the last three years. Increases to the legal aid rates over the last 10–12 years are perceived to be insufficient to meet rising operational costs and legal aid administration.[56] The survey also found that non-recoverable overhead costs for legal aid providers are 39.8 per cent higher than non-legal aid providers,[57] and that administration and client needs — in conjunction with inadequate remuneration and higher overheads — are reducing the productivity of legal aid lawyers and exacerbating operational challenges.

d. Meetings we have had with legal aid providers over the years have highlighted a critical shortage of legal aid lawyers.

5.25 These issues, which impact the long-term sustainability of the legal aid scheme, have the potential to weaken the rule of law by:

a. Undermining the principle of equality before the law, and creating an inequality of arms[58] by only enabling more well-resourced individuals and parties to access legal representation and advice.

b. Preventing some individuals from obtaining legal advice that would enable them to better understand the law, and how they can comply with a particular law, or enforce rights guaranteed by a particular statute.

c. Weakening the ability to hold individuals and the government to account, and to enforce the law through the courts or other dispute resolution bodies.

d. Reducing public confidence in the justice system.

52 Law Society *Access to Justice Research 2021 Report* (October 2021).
53 Law Society *Access to Justice Research 2021 Report* (October 2021) at 3.
54 Law Society *Access to Justice Research 2021 Report* (October 2021) at 5.
55 Law Society *2023 Workplace Environment Survey* (October 2023).
56 Law Society *Benchmarking costs of law practice in New Zealand* (March 2024) at 5.
57 Law Society *Benchmarking costs of law practice in New Zealand* (March 2024) at 32–35.
58 "The Judiciary and the Legal Profession under the Rule of Law" (1959) 35 NZLJ 148; *Conclusions of Committee of Congress of International Commission of Jurists*, New Delhi at [6.59]–[6.60].

"A central pillar of the rule of law is access to justice, with lawyers working hard to ensure their clients have access to good legal advice and representation before the courts. This is as true for criminal proceedings with the risk of imprisonment, as for civil disputes where families may be divided, or severe financial consequences imposed. Yet the harsh cuts to legal aid and court services have resulted in justice all-too-often delayed, and increasingly denied."[59]

5.26 While a small increase to hourly rates for legal aid was welcomed by the Law Society in 2022, we have been clear there needs to be greater and ongoing investment in the legal aid system. The 2024 and 2025 Budgets did not provide for that, and the Law Society remains concerned about what this means for the ongoing viability and sustainability of the scheme.[60]

"We have been clear about this with successive governments now, and this year we provided further evidence to show that the costs of providing legal aid are increasing. Without fair remuneration, we will see a continuing reduction in the number of lawyers willing to provide legal aid. At a time when the judiciary is working hard to clear case backlogs, insufficient lawyers to assist the public will result in poor outcomes for families, individuals, and victims."[61]

Addressing these problems

5.27 The rule of law provides that, in committing to obey the law, individuals are promised the protection and benefits of the law. This requires the government to provide necessary resources so that people can not only know the law, but also gain access to it.[62]

5.28 The long-term sustainability of the legal aid scheme requires:

a. appropriate remuneration of legal aid providers; and

b. ensuring the legal aid system is adequately resourced so it is able to flex and adapt to increasing demand (noting that demand for legal aid is likely to be affected, for example, by new offences that result in an increased number of charges being laid; new offences in the Gangs Act 2024 are an example of this).

5.29 The Law Society will continue to advocate for the improvement and long-term sustainability of the legal aid regime, and engage with the Ministry of Justice and officials on behalf of providers. In 2024, the Law Society organised a series of workshops with the Legal Services Commissioner and legal aid providers to discuss proposals to simplify the process for obtaining approval to provide legal aid, and to assist with getting juniors on serious sexual violence cases, as well as to identify low-cost administrative improvements to the scheme. The Law Society is pleased to see progress being made to address some of these issues, and will continue to facilitate discussions between providers and the Legal Services Commissioner to inform other improvements to the scheme.

59 JUSTICE *The State We're In: Addressing Threats & Challenges to the Rule of Law* (September 2023) at [7.6].
60 Law Society "Budget 2024 for the legal profession" (30 May 2024), available here: www.lawsociety.org.nz. In Budget 2025, the legal aid scheme received a small budget increase, however this was to meet anticipated demand and the cost of reports required by the courts.
61 Law Society "Budget 2024 for the legal profession" (30 May 2024), available at: www.lawsociety.org.nz.
62 Michael J Trebilcock and Ronald J Daniels *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing Limited, UK, 2008) at 237.

5.30 We also acknowledge the review of the legal aid system that is currently underway.[63] The Law Society has been clear that this should not be a cost-cutting exercise, and must instead be focused on ensuring a sustainable and fair legal aid system, which ensures that those who need a lawyer can access one, and that lawyers are appropriately remunerated.[64] We are hopeful the review will result in a commitment to provide ongoing, increased investment in the legal aid system.

The Duty Lawyer Scheme

5.31 The Duty Lawyer Scheme has its origin in a grassroots initiative which started in Nelson over 50 years ago, with the aim of helping young Māori in Nelson navigate the legal system. Similar initiatives spread throughout the country, and in 1974 the national Duty Lawyer Scheme was established. Today, the scheme sits within the Ministry of Justice portfolio, administered by the office of the Legal Services Commissioner and the Public Defence Service (**PDS**).[65]

5.32 Like legal aid providers, duty lawyers are critical to ensuring access to justice in Aotearoa New Zealand. They provide timely and necessary legal advice to unrepresented defendants in criminal proceedings at first appearance, and are key to the efficient operation of the District Court and improving access to justice.

5.33 Research shows the Duty Lawyer Scheme (including aspects of the scheme managed by the PDS) is also under pressure. Many law firms now find the duty lawyer scheme commercially unviable, with funding failing to cover basic costs.[66]

5.34 In April 2023, the Law Society wrote to the Minister of Justice conveying its grave concern that duty lawyer work had become unsustainable for lawyers, risking serious impacts on defendants, victims, and the criminal justice system as a whole. The government subsequently announced a 17 per cent pay rise for duty lawyers, and a broadly scoped review of the Scheme to ensure it remains fit for purpose in meeting the needs of unrepresented defendants in the District Court.[67]

5.35 Despite this pay rise, duty solicitors remain significantly underpaid, even when compared to most legal aid work. In 2023, the Ministry of Justice engaged KPMG to undertake a review of the Duty Lawyer Scheme. KPMG subsequently published a report of its findings (**KPMG report**), noting concerns about remuneration, as well as the sustainability of the Scheme and its ability to provide sufficient duty lawyers to meet the needs of stakeholders.[68]

5.36 These concerns stemmed from the inability to attract and retain enough duty lawyers (particularly recruiting junior lawyers onto the roster) along with overall dissatisfaction with the current remuneration rate. In addition, there is no nationwide provision of training and development, or readily available resources to assist non-PDS duty lawyers to perform their role. Instead, the Scheme relies on individuals to source materials and upskill themselves. This leads to inconsistencies across courts and places an additional burden on duty lawyers.[69]

63 Hon Paul Goldsmith "Public consultation begins on legal aid review" (online ed, Beehive Releases, 11 June 2025).
64 Frazer Barton "Outlook for 2025" LawTalk (Issue 961) (New Zealand, 28 March 2025), available here: www.lawsociety.org.nz/news/publications/lawtalk.
65 For more information about the Duty Lawyer Scheme, see "Reflecting on 50 years of the Duty Lawyer Scheme" (LawTalk, online ed, 6 December 2024).
66 Law Society *Reflecting on 50 years of the Duty Lawyer Scheme* (LawTalk issue 960, 6 December 2024, online ed).
67 Letter from Tracey Baguley (Legal Services Commissioner) to Bronwyn Jones (General Manager Policy, Courts and Government, New Zealand Law Society) about the Duty Lawyer Scheme (10 July 2023), available at: www.lawsociety.org.nz.
68 KPMG *Review of the Duty Lawyer Service* (April 2024) at 4–5.
69 KPMG *Review of the Duty Lawyer Service* (April 2024) at 4–5.

5.37 Some of the key concerns identified in the report include:[70]

a. ***Remuneration***:[71] remuneration remains a concern for duty lawyers and duty lawyer supervisors. Remuneration was a material factor that influenced lawyers' decisions on whether to remain on or join the duty lawyer roster, with 70 per cent of responses from criminal lawyers not on the duty lawyer roster stating that the duty lawyer rate is not sufficient.

b. ***Shortages***:[72] while the courts are generally able to function with the available number of duty lawyers, some courts in rural areas are struggling to fill their duty lawyer rosters. In courts that are struggling to fill the roster, some duty lawyers are rostered several times per week, placing a significant strain on their ability to manage their private caseload and causing stress and burnout. The report notes that if this does not change, the ability of the Scheme to meet the needs of defendants, courts and other stakeholders will be "severely impacted".[73]

c. ***Training, development and resources***:[74] there are currently no specific resources for duty lawyers, and training programmes do not adequately cover cultural competency and 'soft skills'. Opportunities to improve practice once on the roster or to monitor performance also appear to be limited.

d. ***Joining the duty lawyer roster***:[75] "considerable confusion" has been noted among criminal defence lawyers about how to join the roster.[76]

e. ***Non-PDS courts lack duty lawyer supervisors***:[77] non-PDS courts do not have mechanisms to monitor duty lawyers to ensure standards are upheld, or to receive complaints about a particular duty lawyer's performance or behaviour.[78]

Addressing these problems

5.38 The KPMG report makes a number of recommendations to address the concerns it has identified,[79] including a key recommendation for the government to undertake a detailed remuneration review to determine how remuneration could be better structured and what an appropriate rate would be. The Law Society supports the recommendations in the report, and invites the government to:

a. develop an action plan; and

b. set aside necessary funding to implement these recommendations.

5.39 We acknowledge some work has already been undertaken, for example, to centralise the rostering and the on- and off-boarding processes across all courts).[80]

70 The KPMG report also identifies some additional concerns relating to the PDS, which do not relate to the wider Duty Lawyer scheme.
71 KPMG *Review of the Duty Lawyer Service* (April 2024) at 11–12.
72 KPMG *Review of the Duty Lawyer Service* (April 2024) at 10.
73 KPMG *Review of the Duty Lawyer Service* (April 2024) at 10.
74 KPMG *Review of the Duty Lawyer Service* (April 2024) at 12–13.
75 KPMG *Review of the Duty Lawyer Service* (April 2024) at 14–15.
76 KPMG *Review of the Duty Lawyer Service* (April 2024) at 14.
77 KPMG *Review of the Duty Lawyer Service* (April 2024) at 17–18.
78 Whilst there are formal referral and complaints processes, the report notes that having a point of contact to informally address issues appears to be preferable and more time effective.
79 KPMG *Review of the Duty Lawyer Service* (April 2024) at 21–23.
80 Ministry of Justice "What's new for lawyers providing Legal Aid" (13 March 2025) (see: www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/whats-new).

Other ways to improve access to legal representation and advice

Supporting pro bono initiatives and services

5.40 Free legal services are provided by Community Law Centres.[81] These services are provided through both volunteer and staff lawyers. Pro bono legal services are also enabled through Te Ara Ture,[82] as well as the *Framework for Collaborative Pro Bono in Aotearoa.*[83] These pro bono and free legal services play a crucial role in bridging the justice gap in Aotearoa New Zealand, particularly for individuals who do not qualify for legal aid. During the 2023 / 2024 financial year, for example:[84]

a. Community Law Centres around the country provided 156,652 hours of assistance in relation to 59,904 legal matters, assisting a total of 46,709 clients.

c. Te Ara Ture received 186 requests for assistance, and provided pro bono casework services to 120 individuals and organisations.

5.41 The Law Society encourages lawyers to reach out to Community Law Centres and Te Ara Ture if they are interested and able to provide pro bono assistance. However, the legal profession has a strong ethic of service and a commitment to access to justice, and we acknowledge that a high proportion of lawyers already provide pro bono services.[85] While pro bono services are valuable and important to the legal profession and the communities they serve, they are not a suitable long-term solution to bridging the justice gap. We know lawyers are already feeling stretched and have heavy work commitments, and a significant cohort do not feel they are in a position to take on additional pro bono work.[86] In addition, lawyers who are able to do pro bono work may not have the necessary expertise or skills to be able to provide advice and representation in practice areas with the highest levels of unmet legal need.

5.42 Therefore, it is important that Community Law Centres and Te Ara Ture are well funded and supported so they can continue to provide much-needed pro bono services to the community (including targeted services in areas with higher unmet legal needs).

81 Community Law Centres are located throughout the country. Every Community Law Centre is a member of the national body, Community Law Centres Aotearoa.

82 Te Ara Ture is New Zealand's national pro bono clearinghouse which connects parties requiring free legal assistance to volunteer lawyers. It is a unit of Community Law Centres Aotearoa, funded by the Ministry of Justice.

83 The Framework is a profession-led initiative dedicated to supporting and promoting pro bono within law firms in Aotearoa. Each participating firm will strive to achieve an aspirational target of at least 25 hours of pro bono legal work per fee earner per year (averaged across the firm's FTE fee earners): see Te Ara Ture *Framework for Collaborative Pro Bono in Aotearoa* (October 2024).

84 Community Law Centres Aotearoa *Annual Report 2024* at 18 and 27.

85 81 per cent of lawyers who completed the Law Society's access to justice survey provided some form of legal assistance for free, and nearly half provided free legal assistance to individuals who cannot afford to access the legal system: Law Society *Access to Justice Research 2021 Report* (October 2021) at 7.

86 For example, 55 per cent of lawyers who completed the Law Society's access to justice survey indicated they have not provided free legal assistance because they are feeling stretched and have heavy work commitments: Law Society *Access to Justice Research 2021 Report* (October 2021) at 8.

Other ways to improve access to lawyers

5.43 Those who responded to the Law Society's 2024 survey and participated in the targeted consultations also suggested other initiatives to improve access to lawyers. These included:

a. A duty lawyer scheme or roster to assist self-represented litigants in civil matters.

b. Greater use of legal expenses insurance schemes, which are widely used in Germany, Japan, and Sweden (for example), and have been described as "a mechanism through which the 'forgotten middle' could potentially access legal advice or representation (and consequently access justice)".[87]

Access to the courts, tribunals and other dispute resolution services

"It is the core task of the judiciary to uphold the rule of law. The rule of law is the ideal that all are equal before the law. For that ideal to be served, hearings have to be conducted in ways that enable all to fully participate, no matter their ethnicity, culture, disability, means or educational status. It also requires that the law is developed and applied with knowledge of the needs of all in our society, so that it is fit to provide just outcomes. This then requires court processes that are able to deliver just outcomes for victims, defendants and wider society alike, and judges with the knowledge, experience and support needed to provide those just outcomes."[88]

5.44 Access to the courts, tribunals and other dispute resolution bodies enables matters to be heard and determined in accordance with the law and the principles of natural justice. This is a critical aspect of the rule of law. The consideration by courts of legal matters also provides the opportunity for application, clarification and development of the law,[89] which further enhances the rule of law.

5.45 The significant role that courts play in promoting and upholding the rule of law has been explained by Te Aka Matua o te Ture | Law Commission:[90]

> *Courts uphold the rule of law. They act as a bulwark against the arbitrary abuse of power. Everyone, including the Head of State and the elected members of Parliament — who make the laws — is subject to the law through the courts. The counterbalancing of the executive, the legislature and the judiciary accords the courts a place in our constitutional arrangements as 'the third arm of government'.*
>
> ...
>
> *The degree of confidence people have in the court system will influence their belief in the rule of law. If people cease to see courts as relevant, effective and accessible, they are less likely to believe that the rule of law means everyone is entitled to the benefit and protection of the law, including them and people like them. They are less likely to believe that courts will fairly and impartially resolve disputes between citizens and the state.*

87 Anna McNee *Legal expenses insurance and access to justice* (International Bar Association, 2019) at 5.
88 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Annual Report for the period 1 January 2020 to 31 December 2021* at 2.
89 Rt Hon Dame Sian Elias "Address given at the New Zealand Bar Association Annual Conference" (24 August 2013) at 10.
90 Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (March 2004, Wellington) at 3.

5.46 This report considers several key areas where challenges to the rule of law and access to justice arise within the court systems, as well as other dispute resolution mechanisms in Aotearoa New Zealand. These include issues relating to delays, cost, and the lack of appropriate resources, facilities and technology.

Delays and backlogs

5.47 Delays in court systems and other dispute resolution services can reduce meaningful access to justice and undermine public confidence in the court system. This can ultimately undermine the rule of law.

5.48 In 2023, it was reported that since March 2020 more than 140,000 court appearances were delayed because of the Covid-19 pandemic.[91] While most of those delays and backlogs now appear to have been dealt with, there remains room for improvement. For example, the Law Society understands that:

a. In the High Court's civil jurisdiction, the cost of litigation has increased, and the increasing length and complexity of cases has contributed to an ongoing decrease in their disposal.[92]

b. As at 31 December 2024, the average waiting time for criminal trials in the High Court (i.e., the time from the first appearance in the High Court to the first scheduled trial date) was 494 days.[93] In the civil jurisdiction, the average waiting time (i.e., the time between the date on which the case is ready for hearing and its future defended hearing date) was 566 days.[94]

c. In the District Court, only 69 per cent of applications to commence civil proceedings were processed within a target timeframe of six days in 2023–24, due to an increase in the volume of applications received, coupled with capacity and resourcing limitations.[95]

d. Only 61 per cent of Category 2 criminal cases in the District Court were disposed of within three months (against a target disposal percentage of 70 per cent), due to higher inflow and a focus on progressing or disposing of older and more complex cases.[96]

e. Less than 60 per cent of Category 3 jury cases in the District Court were disposed of within the target timeframe of 15 months in 2023–24.[97]

f. Only 35 per cent of Māori Land Court and Māori Appellate Court applications were disposed of within 12 months in 2023–24: a figure well below the target disposal percentage of 80 per cent.[98]

91 See, for example, Jimmy Ellingham "Justice system bogged down in 'delays of two to three years' for trials" *Radio New Zealand* (online ed, New Zealand, 10 August 2023), which discusses some of 'the lingering effects' of Covid-19.
92 High Court of New Zealand *Annual Report 2023* at 18; Rules Committee *Improving Access to Civil Justice* (November 2022) at 40.
93 Courts of New Zealand "High Court – criminal trials – waiting time for scheduled hearings as at 31 December 2024" (see: www.courtsofnz.govt.nz/the-courts/high-court/annual-statistics).
94 Courts of New Zealand "High Court – general proceedings – waiting time for scheduled hearings as at 31 December 2024" (see: www.courtsofnz.govt.nz/the-courts/high-court/annual-statistics).
95 Ministry of Justice *Annual Report 2023/24* (2024) at 71.
96 Ministry of Justice *Annual Report 2023/24* (2024) at 70.
97 Ministry of Justice *Annual Report 2023/24* (2024) at 11.
98 Ministry of Justice *Annual Report 2023/24* (2024) at 75.

5.49 Parliament's Justice Select Committee also recently identified court delays as a key issue impacting access. In its first Scrutiny Activities Report for the 54th Parliament, the Committee referred to court delays as a "long-term issue in the justice system".[99]

5.50 The Law Society is aware that some progress appears to have been made in reducing backlogs and delays. In June 2025, the Minister for Courts announced that initiatives aimed at tackling delays across the courts are delivering "promising results":[100]

a. In the Auckland District courts, the backlog of criminal cases has reduced by 26 per cent over the past year, and the number of jury trials awaiting a hearing has dropped by 8 per cent.

b. The criminal court backlogs have also reduced by 11 per cent at a national level.

c. In the High Court, a higher percentage of civil probate cases are being resolved within 15 working days.

5.51 While this is welcome news, at the time of writing there was no additional publicly available data on the progress made across all courts and jurisdictions. Further resources remain necessary to work through the remaining delays and backlogs, with consideration given to any additional resource necessitated by recent law reform, such as that in the criminal justice system.

5.52 The Law Society is also aware of delays and backlogs elsewhere, which are impacting access to justice. At the time of writing this report, these include:

a. Only 55 per cent of Disputes Tribunal claims being disposed of within three months, despite targets to dispose of at least 70 per cent of matters in that timeframe.[101]

b. Weeks-long backlogs and delays impacting employment mediations conducted by the Ministry of Business, Innovation and Employment's Employment Mediation Service.[102]

c. Some cases in the Human Rights Review Tribunal reportedly taking years to be disposed of.[103]

d. A decrease in the overall percentage of Immigration and Protection Tribunal cases being disposed of because of an increase in the volume of cases entering the Tribunal.[104]

e. Reports of delays of eight weeks or longer in hearing residential property matters in the Tenancy Tribunal.[105]

f. Waiting times of (in some cases, more than) 12 months from lodgement for asylum claims to be allocated to a Refugee and Protection Officer at the Refugee Status Unit for processing (a preliminary step in the process).[106]

99 Justice Committee First scrutiny activities report for the 54th Parliament (May 2025) at 5.
100 "Courts making strong gains on tackling delays, says minister Nicole McKee" *Bay of Plenty Times* (online ed, New Zealand, 1 June 2025).
101 Ministry of Justice *Annual Report 2023/24* (2024) at 74.
102 Alice Peacock "Demand for private mediation grows due to tough labour market and Govt backlog" *Newsroom* (online ed, New Zealand, 15 May 2025).
103 Chelsea Daniels and Jeremy Wilkinson "How does the Human Rights Review Tribunal work — is it delivering justice for Kiwis?" iHeartRadio (online ed, 31 March 2025); Alison Pugh "Woman's wait for answers three years after human rights hearing" *1News* (online ed, New Zealand, 20 September 2024); Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* (December 2021), ch 2.6.
104 Ministry of Justice *Annual Report 2023/24* (2024) at 75.
105 Anne Gibson "Tenancy Tribunal claims eight-week wait for hearings: what landlords say back" *The New Zealand Herald* (online ed, New Zealand, 17 February 2025).
106 Immigration New Zealand "Claiming refugee or protected person status" (see: www.immigration.govt.nz). The Law Society has also received anecdotal feedback from lawyers that, while the *Immigration New Zealand* website refers to timeframes of 9 to 12 months, current backlogs in the Refugee Status Unit mean it could take up to 18 months for claims to be allocated to a Refugee and Protection Officer.

Costs

5.53 The costs of commencing or defending a proceeding can include, among other things, lawyers' fees, filing fees, and disbursements such as travel expenses and expert reports. These costs can prohibit access to the courts, particularly to those who do not meet eligibility criteria for legal aid, but lack the resources to meet the costs of bringing a matter before the courts.

5.54 Recent increases to court fees as well as the fees for various tribunals have heightened these concerns. Budget 2024 resulted in some significant fee increases across a range of courts and tribunals, including inflation adjustments in the civil jurisdictions of the District Court, High Court, Court of Appeal and the Supreme Court, as well as a 10 per cent increase for fees in the criminal jurisdiction of all courts, the Family Court, the Environment Court, the Employment Court, and the Māori Land Court. These included:[107]

a. an $810 increase to the fee for scheduling hearing dates in the Court of Appeal for applications and proceedings that are not interlocutory applications or applications for leave to appeal;

b. a $480 increase to the fee for scheduling hearing dates for certain types of applications and proceedings in the High Court; and

c. a $330 increase to the fee for filing applications for leave to appeal to the Court of Appeal and the Supreme Court.

5.55 These increases have the potential to make the overall cost of participating in proceedings more pronounced for parties (particularly for those on lower incomes), prompting the Chief Justice to raise concerns about the "significant barrier" they present to access to the courts.[108]

5.56 A further 3.65 per cent increase to the fees in all courts and most tribunals (rounded to the nearest dollar) was announced alongside Budget 2025.[109]

Inadequate technology and facilities

5.57 Access to justice in the court system can also be hindered by inadequate investment in technology and court facilities, including suitable premises. Under-investment in these facilities raises issues of:

a. unequal access to technology;

b. 'postcode justice'; and

c. courthouses that are not fit for use.

107 Ministry of Justice *Ministry of Justice fee changes: List of fee changes for Courts, Tribunals, Collection Services and Criminal Records Checks* (2024).
108 Rt Hon Dame Helen Winkelmann, Chief Justice of New Zealand "Address to the New Zealand Law Society" (Auckland, 15 May 2025).
109 Letter from Carl Crafar (Chief Operating Officer) to Frazer Barton (Law Society President) and others regarding Budget 2025 (22 May 2025). Significant increases included: a $128 increase to the fees for scheduling certain hearing dates in the Court of Appeal; a $76 increase to the fees for scheduling certain hearing dates in the High Court, and a $64 increase to the fees for filing initiating documents, as well as certain counterclaims in High Court proceedings; a $71 increase to the fees for the issue of certain orders in the High Court; and a $52 increase to the fees for filing various applications in the Court of Appeal, including applications for leave to appeal and applications for judicial review.

Unequal access to technology

5.58 The *Digital Strategy for Courts and Tribunals* notes that "[t]he use of appropriate digital technology is now essential to enable the courts to perform their function of upholding the rule of law, and to enable the judiciary to administer justice for the benefit of all people."[110]

5.59 Remote participation can be efficient and cost-effective in circumstances where the necessary technology is reliable, up-to-date, and available to all participants. However, the technology that is currently available in most courts does not, in our view, effectively enable or encourage remote participation.[111] This can result in poor outcomes, wasted court time, and unsatisfactory and unequal experiences for court users.

5.60 Work that is underway to increase remote participation and the digitisation of the courts (as discussed below) will need to be supplemented by remote participation infrastructure, including appropriate technology, as well as suitable facilities which enable court participants to access that technology.

'Postcode justice'

5.61 The Chief Justice recently noted that resource constraints mean many of our solution-focused courts are only available to people living in certain locations (for example, the Young Adult List Court in Porirua, Gisborne and Hamilton, the Matariki Court in Kaikohe, the Court of Special Circumstances in Wellington, and the Alcohol and Other Drug Treatment Court in Auckland, Waitakere and Hamilton).[112]

"This leads to the possibility of 'postcode justice' – that a defendant will receive a different outcome and different opportunities depending on where they live. This prospect is contrary to the rule of law, which requires that all people will be treated equally under the law."[113]

110 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Digital Strategy for Courts and Tribunals* (March 2023) at 9.
111 Shortcomings include unreliable technology due to poor or limited internet access, outdated hardware and software, connectivity issues with AVL facilities between different courts, as well as the AVL facilities available to lawyers and other participants, unreliable AVL links from prisons to the courts, and delays in setting up AVL for prisoners: see the Law Society's submission on the Ministry of Justice's consultation on the *Review of the Courts (Remote Participation) Act 2010* discussion document (12 December 2024) at 2 and 7.
112 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Annual Report for the period 1 January 2023 to 31 December 2023* at 38.
113 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Annual Report for the period 1 January 2023 to 31 December 2023* at 38.

Courthouses that are not fit for use

5.62 Many of Aotearoa New Zealand's courthouses are in poor condition, and a number of our courtrooms are no longer fit for use. The Law Society is aware, for example, that:

a. "Chronic underspend" in the past has left the Ministry's property portfolio in "critical condition" because the historical rate of investment in New Zealand's courthouses has not been sufficient to keep pace with essential maintenance.[114] As a result, the majority of buildings are not fit for purpose and do not meet the standards of 21st century courthouses or courthouses for the future.[115]

b. The Ministry is already experiencing the impacts of underinvestment now, including the temporary closure of six courtrooms in Auckland District Court in 2023 due to flood damage.[116]

c. The Nelson courthouse was recently vacated to allow urgent seismic repairs to be undertaken following the findings of an assessment. The closure of this courthouse required the triaging of trial matters and the establishment of temporary courtrooms for criminal, civil and family matters. It has since been reopened.

d. The Ohakune District Court was suddenly closed in 2022 due to health, safety and security concerns which would require upgrades estimated to cost several million dollars. The closure has required the transfer of all active cases to the Taihape District Court 56 kilometres away, raising concerns about how the closure will affect access to justice for parties whose matters were initially scheduled to be heard in Ohakune.[117] Parliament's Justice Select Committee also recently expressed concerns that courthouses in regions and smaller areas could disappear, resulting in people having to travel long distances.[118]

e. Practitioners remain concerned about inadequate security features in courthouses (such as security cameras, dedicated lawyer spaces, security presence, and adequate visibility into interview rooms). The Ministry of Justice has also conveyed to the Justice Select Committee that the courts are "becoming more dangerous places"; in 2022 / 23, there were just under 2,500 incidents at courthouses across the country, and, in 2023 / 24, this increased to about 3,500 incidents.[119]

5.63 The Law Society has raised concerns about the state of our courthouses with the Minister for Courts as well as the Ministry of Justice,[120] and welcomed subsequent budget allocations in 2024 and 2025 for work relating to some new and existing courthouses.[121]

114 Ministry of Justice *Maximising the value from the Ministry of Justice's Property Portfolio* at 4.
115 Ministry of Justice *Maximising the value from the Ministry of Justice's Property Portfolio* at 8; Ministry of Justice *Annual Report 2023/24* (2024) at 17.
116 Ministry of Justice *Maximising the value from the Ministry of Justice's Property Portfolio* at 4, 6 and 8.
117 Leighton Keith "Sudden closure of Ohakune District Court causes concerns around access to justice" *The New Zealand Herald* (online ed, New Zealand, 29 October 2022).
118 Justice Committee *2023/24 Annual review of the Ministry of Justice* (March 2025) at 9.
119 Justice Committee *2023/24 Annual review of the Ministry of Justice* (March 2025) at 9.
120 Law Society letter to Hon Nicole McKee (Minister of Courts) about the Law Society's key priorities (5 December 2023), available here: www.lawsociety.org.nz.
121 The Estimates of Appropriations 2024/25 – Justice Sector (2024) at 78; The Estimates of Appropriations 2025/26 – Justice Sector (2025) at 46, 70, 71 and 73.

5.64 However, we remain concerned about the long-term prospects of funding to repair, maintain, and upgrade all courthouses requiring work. We note, for example, that the Rotorua District and High Court, Rotorua Māori Land Court and Waitākere District Court (which are some of our busiest courts, meaning their failure will cause the most disruption) have been identified by the Ministry of Justice as being in "very poor condition", and needing prioritisation for investment into better infrastructure.[122] However, Budget 2025 did not provide funding for either courthouse.[123] While the Government had announced it intends to follow a Public Private Partnership model to design, build and finance these courthouses,[124] it is unclear how and when this will occur, and how long it will take to deliver new infrastructure.

5.65 Members of the profession also continue to raise concerns with the Law Society, for example, about leaking buildings, air quality, and plumbing issues as well as serious concerns around the health and safety of court users.

5.66 A failure to maintain these buildings creates significant risks and can lead to closures for remediation purposes (if there was a significant leak, for example). In such circumstances, proceedings would either have to be adjourned or moved to courts in other centres. These are unsatisfactory outcomes that create further delays and make it more difficult for individuals to participate in the court process.[125]

Disabilities, trauma, and social and cultural barriers

5.67 Research undertaken by the Law Society has identified that cultural, social and language barriers present some of the biggest barriers to access to justice in Aotearoa New Zealand.[126] Cultural, social and language barriers can stem from several causes, including:[127]

a. socio-economic and cultural factors influencing individuals' behaviour and their interactions with the justice system;

b. those involved in administering justice lacking an adequate understanding of diverse social and cultural needs;

c. systemic racism and unconscious bias within public institutions leading to feelings of alienation, mistrust, fear and lack of participation in justice processes; and

d. social and psycho-social constraints which discourage the pursuit of legal remedies.

122 Ministry of Justice *Maximising the value from the Ministry of Justice's Property Portfolio* at 6.
123 Letter from Carl Crafar (Chief Operating Officer) to Frazer Barton (Law Society President) and others regarding Budget 2025 (22 May 2025).
124 Hon Paul Goldsmith, Minister of Justice, and Hon Nicole McKee, Minister for Courts "Investment Summit: Improving access to justice through investment" (online ed, *Beehive Releases*, 31 March 2025).
125 This has already happened with the closure of the Ohakune Courthouse in late 2022, which resulted in appearances being moved 60km away to Taihape with no feasible public transport options.
126 See, for example, the Law Society *Access to Justice Research 2021 Report* (October 2021) at 17. Those who responded to the Law Society's 2024 survey also agreed these barriers were hindering access to justice and, as a result, weakening the rule of law.
127 Law Society *Access to justice: stocktake of initiatives research report* (December 2020), for example, at 12.

5.68 The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions also identified numerous barriers which impact disabled and vulnerable individuals as they navigate court processes. Civil litigation has been described as "a stressful, expensive, slow, and adversarial process" for survivors of abuse in care,[128] and the Royal Commission has noted that disabled people (including people with learning disabilities) and individuals who have suffered significant trauma in their lives find it difficult to participate in court cases or claims processes.[129]

5.69 Such barriers can in turn weaken the rule of law by impacting individuals' abilities to:

a. seek legal representation in the courts and other dispute resolution bodies;

b. meaningfully engage with the court or other dispute resolution processes (including to seek justice); and

c. understand decisions that have been issued, and how they can comply with those decisions.

Addressing these problems

5.70 The Law Society will continue to advocate for improvements to access to justice, for example, through:

a. law reform submissions and feedback provided during consultations on reform proposals;

b. ongoing engagement with the legal profession and other stakeholders (including Ministers, officials, government departments, members of the judiciary, select committees, other legal bodies and community organisations) to identify and remove barriers; and

c. continued support and involvement in initiatives to improve access to justice (for example, engagement with the Ministry of Justice on the implementation of *Te Au Reka*; providing assistance to the Rules Committee to implement changes to the High Court Rules 2016 to improve access to civil justice; and engagement with officials on issues directly impacting the profession, such as legal aid, and courthouse safety and security).

128 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* (December 2021), chapter 1.1.5.

129 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Tāwharautia: Pūrongo o te Wā — Interim Report* (December 2020), Part 4.

5.71 The Law Society is also pleased to see a number of initiatives and reforms led by the government and courts to address some of these problems, including:

Recommendations for operational, policy and legislative changes in the Rules Committee's *Improving Access to Civil Justice Report*,[130] and the steps being taken to implement these recommendations.

Amendments to District Court, High Court, and Court of Appeal rules that enable successful self-represented litigants to claim costs.[131]

The District Court's *Timely Access to Justice Judicial Protocol*, which establishes a timely access to justice standard and category-based timeliness thresholds for criminal cases in the District Court.[132]

Significant changes to the rostering of judges and scheduling of cases in the District Court (including priority-based rostering and scheduling, which allows rostering as many judges as possible to sit in the courts with the largest backlogs).[133]

Justice sector agencies now meet every two to three weeks to discuss court timeliness and are collaborating to improve court timeliness. This has seen, for example, additional resources for the Police Prosecution Service, and a new model for Police disclosure.[134]

The establishment of the Family Court Associate and associate coroner roles in order to reduce delays in the Family Court and Coroners Court.[135]

The *Digital Strategy for the Courts and Tribunals of Aotearoa New Zealand*, which outlines how the judiciary, supported by the Ministry of Justice, will strive to capture the benefits of technology in a manner that promotes the rule of law.

Te Au Reka, the new digital case management system, which aims to "make a profound difference to all those who access and participate in our courts and tribunals, by establishing trusted, modern, and responsive digital case and court management capability".[136] Work is currently underway to implement *Te Au Reka* in the Family Courts in July 2026.

130 Rules Committee *Improving Access to Civil Justice* (November 2022).
131 See the District Court Amendment Rules 2024, the High Court Amendment Rules 2024, and the Court of Appeal (Civil) Amendment Rules 2024.
132 Chief District Court Judge *Timely Access to Justice — Judicial Protocol Ref#01* (June 2024).
133 Chief District Court Judge Heemi Taumaunu "Te Ao Mārama — A new way of working" (*LawTalk* Issue 957, March 2024) at 36.
134 Justice Committee *2023/24 Annual review of the Ministry of Justice* (March 2025) at 7.
135 Following the enactment of the Family Court (Family Court Associates) Legislation Act 2023 and the Coroners Amendment Act 2023.
136 See: www.justice.govt.nz/justice-sector-policy/key-initiatives/te-au-reka.

New courthouses in Papakura, Whanganui and Tauranga, and building work which will increase capacity in two of the country's busiest courts: Auckland District Court and Manukau District Court.[137]

A 'first principles' review of the framework for remote participation in court proceedings.[138]

Te Ao Mārama, which currently operates in eight courts, and seeks to increase the wellbeing of court participants and their communities, including improved cultural identity, social and whānau connections, and social cohesion (although we note that the 2024 and 2025 Budgets have paused funding for the expansion of Te Ao Mārama to other locations).[139]

The *Kia Mana Te Tangata* Handbook, a new resource for the judiciary on how to better accommodate disabilities, and support full participation for disabled people and members of the deaf community in court proceedings. The Handbook will be published at the end of 2025.[140]

5.72 Private sector-led initiatives such as legal expenses insurance schemes, and litigation funding schemes can also play an important part in facilitating access to justice.

5.73 While these initiatives are highly commendable, further resourcing and investment is needed to enable timely and affordable access to justice through the courts and other dispute resolution bodies. This requires — in addition to the recommendations made elsewhere in this report (for example, in relation to legal aid) — further investment in:

a. ***Human resources.*** The Law Society welcomes the funding in Budget 2025 for the appointment of two more permanent High Court judges, three additional community magistrates and a Chief Community Magistrate[141] (noting the last increase to the statutory cap on the number of High Court judges was in 2004).[142] However, further resources are needed elsewhere too — this includes, for example, additional staff for the courts, tribunals and other public dispute resolution bodies (such as the Employment Mediation Service) in order to clear backlogs and reduce delays.

b. ***Initiatives to ensure 'solution-focused courts' can be made available to everyone***, regardless of their location in the country.

137 *Ministry of Justice Annual Report 2023/24* (2024) at 17.
138 See: www.justice.govt.nz/justice-sector-policy/key-initiatives/review-of-courts-remote-participation-act-2010.
139 Letter from Carl Crafar (Chief Operating Officer) to Frazer Barton (Law Society President) and others regarding Budget 2025 (22 May 2025).
140 Rt Hon Dame Helen Winkelmann, Chief Justice of New Zealand "Address to the New Zealand Law Society" (Auckland, 15 May 2025).
141 Letter from Carl Crafar (Chief Operating Officer) to Frazer Barton (Law Society President) and others regarding Budget 2025 (22 May 2025).
142 Rt Hon Dame Helen Winkelmann, Chief Justice of New Zealand "Address to the New Zealand Law Society" (Auckland, 15 May 2025).

c. ***Technology and suitable facilities*** for using that technology, including facilities for court participants who are unable to access the necessary technology themselves. The Law Society notes that the Ministry of Justice is currently putting together an indicative business case for better investment into remote participation services and facilities, and we welcome this move. Courtroom availability has also been described in some centres as "a real issue" which impacts the time to take a matter to trial.[143]

d. ***Courthouses***, both for maintenance and improvements.

e. ***Initiatives aimed at breaking down cultural, social and language barriers***. Within the justice system, this requires, for example, funding and resources for:

   i. The expansion of Te Ao Mārama to other District Courts across the country (and we acknowledge that the Ministry of Justice has recently announced that an evaluation of Te Ao Mārama is due to be completed in 2026, and decisions on funding of the expansion of Te Ao Mārama beyond the eight existing sites will be made as part of future budget processes).[144]

   ii. Expanding the Matariki Courts. Currently, the Matariki Court only operates in Kaikohe, Northland. It allows offenders to participate in culturally-appropriate rehabilitation programmes before a sentence is imposed under the Sentencing Act 2002. The Chief Justice recently expressed concerns that resource constraints limiting the operation of the Matariki Court can lead to 'postcode justice' (as discussed at 5.61 above).[145]

   iii. Additional resourcing for the Rangatahi and Pasifika Courts, which are designed to re-engage young offenders with their culture and "bring together the purpose and values that come from cultural awareness".[146] These courts can improve access to justice by developing a culturally-adaptable system in settings that individuals feel comfortable in, and to which they can relate and connect. However, they are resource-intensive: they can place big demands on marae, stretch constrained judicial resources, and require detailed consultation and planning to deliver good outcomes.[147]

   iv. Expanding the use of simultaneous interpretation in courts and tribunals,[148] as well as trilingual interpretation to assist individuals who use sign language and understand a language other than English.

5.74 These investment decisions must be made by taking a holistic approach to improvements within the courts, tribunals and other dispute resolution bodies. This could help to ensure, for example, that investments in technology and digitisation are accompanied by investments needed to make critical improvements to the courthouses and facilities in which that technology will be housed.

143 Rt Hon Dame Helen Winkelmann, Chief Justice of New Zealand "Address to the New Zealand Law Society" (Auckland, 15 May 2025).
144 Letter from Carl Crafar (Chief Operating Officer) to Frazer Barton (Law Society President) and others regarding Budget 2025 (22 May 2025).
145 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Annual Report for the period 1 January 2023 to 31 December 2023* at 38.
146 Principal Youth Court Judge John Walker "Taking lessons from the Rangatahi Courts" (*LawNews*, 2018).
147 Principal Youth Court Judge John Walker "Taking lessons from the Rangatahi Courts" (*LawNews*, 2018).
148 This service is currently limited to interpreting New Zealand Sign Language and te reo Māori – see: Ministry of Justice *Conducting proceedings with interpreters* at 1 (available at www.justice.govt.nz).

6 Deficient policy and legislative processes

6.1 Good policy and legislative processes should, first of all, allow ample time for law reform proposals to be designed, carefully considered (including against alternative options which may be better suited to achieving the policy objectives), debated, and modified.

6.2 Second, they should enable public debate and consultation on what is being proposed. This should include consultation with legal and subject-matter experts, as well as those who are likely to be affected by the proposal. Such consultation should occur both before making any decisions to proceed with a particular proposal, as well as after key policy decisions have been made and legislation has been drafted.

6.3 However, the Law Society continues to identify deficiencies in the processes for developing and passing legislation (including legislation that, if enacted, could result in significant constitutional changes).[149] These are discussed below.

Rushed processes and the use of urgency

"If rushed law is bad law, then a good proportion of the law made by Parliament is suspect from a process-oriented Rule of Law perspective."[150]

6.4 The rule of law requires the law to be clear and predictable. This requires, among other things, laws which are clearly drafted, remain stable over time, and have foreseeable effects and application.[151]

6.5 Rushed policy development processes can undermine these aspects of the rule of law in several ways:

149 See, for example, the Law Society's submissions on the Principles of the Treaty of Waitangi Bill 2024 (94–1) (7 January 2025) and the Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill 2025 (128–1) (16 April 2025), both of which raise concerns about deficient processes for making significant constitutional changes. These submissions are available on the Law Society's website: www.lawsociety.org.nz.

150 Andrew Geddis "Electoral Finance, Lawmaking and the Politics of the Rule of Law" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ Limited, 2011) at 213.

151 Venice Commission of the Council of Europe *The Rule of Law Checklist* (adopted by the Venice Commission at its 106th plenary session, Venice, 11–12 March 2016).

a. They can limit or prevent meaningful consultation (including with Māori, where that is required under Te Tiriti) and scrutiny of policy proposals, the identification of issues affecting the implementation of the policy, and analysis of unintended consequences.[152] All of these issues can ultimately reduce the clarity and certainty of any resulting legislation.

b. Time pressures within the policy development process make it harder to clearly identify the policy objective, gather and assess relevant evidence, and complete cost-benefit analyses and quality assurance processes.[153]

c. Rushed processes can also limit the public's understanding of why certain legislation was introduced and / or passed. They reduce transparency and accountability and inhibit open democracy (particularly where time constraints also impact the production and publication of information regarding the policy problem which needs to be addressed, and the impacts of the proposed legislation).

6.6 The use of urgency within the legislative process is also damaging:

a. Urgency can be used to shorten the time available to debate and scrutinise a bill, as well as to bypass the select committee process altogether.[154] In doing so, it can prevent or limit scrutiny of the bill by members of the public, select committees and other members of Parliament (who may have had little or no time to scrutinise the bill prior to its introduction, and are nevertheless expected to vote either in favour of, or against, the bill).

b. Like rushed policy development processes, the use of urgency can prevent or limit the identification of any drafting deficiencies, unintended effects, or other potential issues with implementing the legislation.

c. When urgency is taken, the public can be left with a sense that Parliament is not following its own rules, and that legislation is being "rammed through the House at the will of the executive".[155] This undermines public confidence in Parliament's adherence to the rule of law.

d. If urgency is taken for more than one stage at a time, the stand-down periods between the legislative stages are eliminated. Stand-down periods play an important role in the legislative process by enabling bills to proceed at a measured pace that allows members of the House and the public the opportunity for careful scrutiny.[156]

"When lawmaking becomes a rushed job, those with money, influence, or insider knowledge are poised to take advantage, while ordinary citizens are left in the dust. In sum, urgency without safeguards equals opacity, and opacity is the friend of the already powerful. It's a recipe for weaker democratic control over policy and a greater risk of special-interest riders finding their way into law."[157]

152 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 1 and 141.
153 Letter from Hon Judith Collins KC (Attorney-General and Minister responsible for the Parliamentary Counsel Office and the Legislation Design and Advisory Committee) to Rt Hon Christopher Luxon and all Ministers regarding delivering effective legislation and regulatory schemes (25 March 2024).
154 23 bills were passed through all stages under urgency in the 54th Parliament (as at 30 April 2025).
155 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 1.
156 House of Lords Select Committee on the Constitution, "Fast-track Legislation: constitutional implications and safeguards" (HL Paper 116-I, 2009) at 142.
157 Bryce Edwards "Integrity Briefing: Pay equity urgency and vested interests" *Substack* (online ed, 11 May 2025).

6.7 Notwithstanding these concerns, successive governments have continued to resort to rushed policy development and legislative processes to deliver on election promises and government priorities. For example, in recent times:

a. Time constraints have continued to impact government policy responses and, in many cases, hamper officials' ability to consult with those outside of government agencies.[158] Even where consultation occurs, they do not always allow adequate time for interested parties to provide meaningful and considered feedback.

b. An increasing number of bills have been passed under urgency, affecting not only stand-down periods as earlier discussed, but also involving the use of urgency to truncate or entirely dispense with the select committee submissions process. The 54th Parliament has:

   i. In its first 100 days, declared urgency eight times to pass 21 bills through 61 stages. Thirteen of these bills were passed entirely under urgency, without a select committee process. These statistics exceed those of the preceding five Parliaments in their first 100 days.[159]

   ii. Set a record going back as far as 1987 for passing the most number of bills through all stages under urgency (again, without a select committee process) in the first 540 days of term.[160]

   iii. As of 31 May 2025, introduced and passed 24 Bills through all stages under urgency.[161] This has included, for example, legislation disestablishing the Māori Health Authority,[162] legislation repealing the Fair Pay Agreements framework,[163] and retrospective legislation affecting existing pay equity claims.[164]

   iv. According to data on the Parliament website, the potential to exceed the use of urgency under each of the 49th, 50th, 51st, 52nd and 53rd Parliaments if it continues at its current pace.[165] To offer a broader perspective on these figures, between August 2002 and February 2009, only 221 bills were accorded urgency at some stage in the legislative process.[166]

158 Fox Meyer and Laura Walters "Official concerns about haste and dearth of evidence in Govt's first year" *Newsroom* (online ed, New Zealand, 27 November 2024).
159 Marc Daalder "Govt sets record for laws passed under urgency in first 100 days" *Newsroom* (online ed, New Zealand, 8 March 2024).
160 Marc Daalder "Govt on record-breaking urgency streak amid flurry of Budget laws" *Newsroom* (online ed, New Zealand, 29 May 2025).
161 See data published on the New Zealand Parliament website: www.parliament.nz/en/pb/bills-and-laws/progress-of-legislation.
162 Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill 2024 (26–1).
163 Fair Pay Agreements Act Repeal Bill 2023 (3–1).
164 The Equal Pay Amendment Bill 2025 (147–1) was introduced on 6 May 2025, and passed its third reading on 7 May 2025. The resulting Equal Pay Amendment Act 2025 came into force on 14 May 2025, and applies retrospectively to claims which had commenced well before the Bill was introduced.
165 See www.parliament.nz/en/pb/bills-and-laws/progress-of-legislation.
166 These statistics were taken from a report produced by the House of Lords following an inquiry into Parliament and the Legislative Process. As part of this Inquiry, the House of Lords contacted other legislatures to understand their experiences of 'fast-tracked' legislation – see: House of Lords Select Committee on the Constitution "Fast-track Legislation: Constitutional Implications and Safeguards" HL Paper 116-I (7 June 2009) at 77–82.

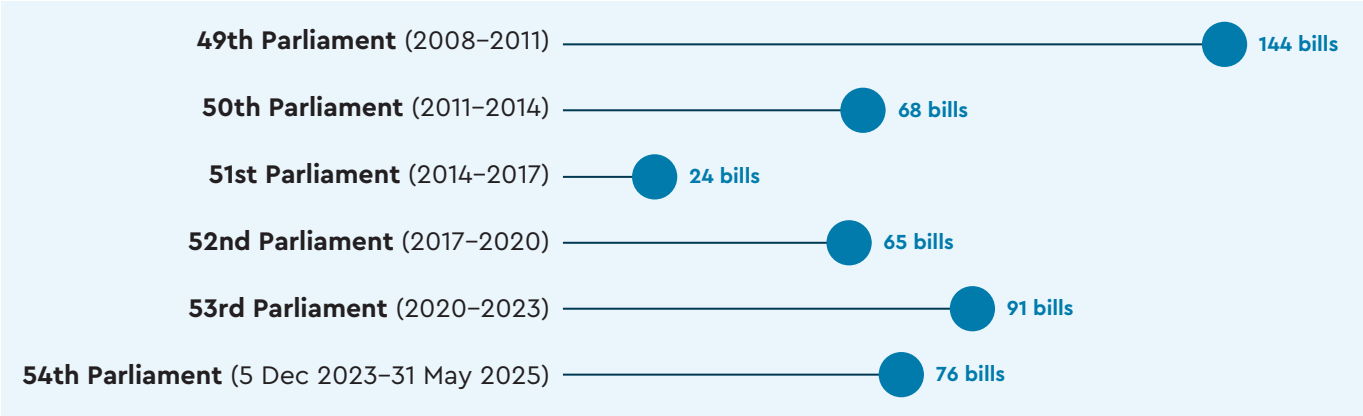


Figure 6: *Bills accorded urgency at some stage in the legislative process in the 49th, 50th, 51st, 52nd, 53rd, and 54th Parliaments*

6.8 In March 2025, the Ministry of Justice conveyed to Parliament that where governments look to progress legislation quickly, it results in trade-offs in the level of consultation and engagement the Ministry can undertake (for example, with Māori, on legislative proposals that would affect Māori if implemented).[167] However, Parliament has continued to accord urgency since those concerns were relayed (including, on multiple occasions, to the introduction and all stages of the legislative process).[168]

6.9 The Attorney-General has also raised concerns about the use of urgency. In a letter addressed to the Prime Minister and all Ministers (and copied to all Public Service Chief Executives), the Attorney-General has observed that "rushing legislation and skipping steps increase the risk that we get it wrong and the legislation is ineffective or unworkable in practice".[169] Her letter advises it is essential to follow proper processes, which work best when (among other things) select committees are used for public participation and for testing and refining the legislation.[170]

6.10 As Sir Geoffrey Palmer KC has observed:[171]

> **"The amount of urgency taken marks a departure from recent parliamentary practice and this government has set a record for the number of laws passed in the first hundred days. The number of measures enacted under urgency is excessive. One is compelled to ask what is the hurry? The answer seems to be political expediency at the expense of proper legislative process."**

167 Justice Committee *2023/24 Annual review of the Ministry of Justice* (March 2025) at 5 and 10.
168 See www.parliament.nz/en/pb/bills-and-laws/progress-of-legislation.
169 Letter from Hon Judith Collins KC (Attorney-General and Minister responsible for the Parliamentary Counsel Office and the Legislation Design and Advisory Committee) to Rt Hon Christopher Luxon and all Ministers regarding delivering effective legislation and regulatory schemes (25 March 2024).
170 Letter from Hon Judith Collins KC (Attorney-General and Minister responsible for the Parliamentary Counsel Office and the Legislation Design and Advisory Committee) to Rt Hon Christopher Luxon and all Ministers regarding delivering effective legislation and regulatory schemes (25 March 2024).
171 Sir Geoffrey Palmer KC "Lurching towards constitutional impropriety" *Newsroom* (online ed, New Zealand, 23 August 2024).

6.11 Successive governments have also, on occasion, attempted to justify the use of rushed policy and legislative processes on the basis that they had committed to making certain policy changes within certain timeframes during their election campaigns, and their policy proposals were therefore supported by a majority of voters.[172] However, for the following reasons, this argument is misconceived:

a. On election day, voters do not clearly signal their preference for any particular policy or policies but for one package of personalities and policies over another.[173]

b. Second, where a government comprises a coalition of two or more parties, it cannot be assumed that a majority of voters support or agree with a proposal (particularly if that proposal seeks to implement a minority party's campaign promise).

c. Third, following the election, the generalised pre-election policy platform is transformed by the government into detailed legislative proposals, and the "deliberative, participatory and scrutinising functions of parliamentary institutions in relation to such legislation are no less important because the underlying policy happens to have been signalled prior to the election".[174]

"The mandate you get when you assume the Government benches is the ability to promote legislation through the parliamentary process, not to subvert it."[175]

6.12 One commentator has also noted that this hurry is arbitrary. While a government may have been elected with a 'mandate' for change, it is widely understood that this does not give the incoming government "carte blanche to override democratic norms", particularly when it is rushing to accomplish certain goals by passing legislation within a self-imposed, arbitrary deadline.[176]

6.13 Aotearoa New Zealand is not alone in experiencing problems stemming from rushed lawmaking processes. In the United Kingdom, this also appears to be an issue, leading the Law Society of England and Wales and FrameWorks UK to observe that 'legislative hyperactivity' (that is, the rapid pace of legislative change) has reduced legal clarity and transparency, and weakened the rule of law and access to justice.

172 For example, the Fair Pay Agreements Act Repeal Bill 2023 (3–1) was introduced and passed through all stages under urgency in order to give effect to a commitment in the National-ACT Coalition Agreement (see *Coalition Agreement: New Zealand National Party & ACT New Zealand, 54th Parliament* at 5); the Resource Management (Natural and Built Environment and Spatial Planning Repeal and Interim Fast-track Consenting) Bill 2023 (8–1) was introduced and passed through all stages under urgency to give effect to the Government's "policy commitment" to repeal the Natural and Built Environment Act 2023 and the Spatial Planning Act 2023 (see the Explanatory Note of the Bill); similarly, the Smokefree Environments and Regulated Products Amendment Bill 2024 (22–1) was passed through all stages under urgency in order to meet a commitment in the National-NZ First Coalition Agreement (see: *Coalition Agreement: New Zealand National Party & New Zealand First, 54th Parliament* at 8). All three bills bypassed the select committee process, meaning there were no opportunities for public or select committee scrutiny of these bills.

173 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 146.

174 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 146.

175 Dean Knight, quoted in Marc Daalder "Govt smashes record for laws passed without select committee scrutiny" *Newsroom* (online ed, New Zealand, 28 January 2025).

176 Marc Daalder "Govt sets record for laws passed under urgency in first 100 days" *Newsroom* (online ed, New Zealand, March 2024).

The use of Amendment Papers as a mechanism for making significant policy changes

6.14 Amendment Papers (previously called Supplementary Order Papers) are documents used by Ministers and other members of Parliament to give notice of amendments they wish to propose to bills which have already been introduced to the House.[177] Amendment Papers are an important mechanism for correcting, improving and refining legislation before it is passed.

6.15 However, the Law Society has observed that Amendment Papers are increasingly being used to propose significant policy changes to bills.[178] This is concerning from a rule of law perspective when Amendment Papers are tabled *after* the select committee stage.[179] In such circumstances, there has been no opportunity for members of the House to raise concerns about any aspects of the Amendment Paper during the first reading debates. Unless the Amendment Paper is referred back to a select committee for consideration (as discussed at [6.30] below), this practice also precludes:

a. members of the public from making submissions to select committee on the proposed amendments; and

b. select committees from undertaking in-depth scrutiny of the proposed amendments, seeking advice from officials, calling for submissions on the Amendment Paper, and considering whether any further changes to support the amendments are needed.

6.16 Like rushed policy development and legislative processes, Amendment Papers introduced late in the legislative process have the potential to limit or prevent meaningful public consultation and scrutiny of their proposals, as well as the identification of issues relating to the proposed amendments' drafting, effectiveness or implementation, all of which can reduce the clarity and certainty of the resulting legislation and undermine the rule of law. The absence of public engagement and consultation on Amendment Papers can also reduce transparency and accountability, and erode public confidence in the legislative process.

Bill of Rights Act vetting processes

6.17 There are currently several mechanisms in place to ensure new legislation is consistent with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**):

a. Section 7 of the Bill of Rights Act requires the Attorney-General to report to Parliament on any draft legislation that appears to be inconsistent with a protected right or freedom. These reports (**section 7 reports**) are an essential mechanism within Aotearoa New Zealand's policy development and legislative process for ensuring proposed legislation is consistent with domestic and international human rights standards.

177 "Supplementary Order Papers now called "Amendment Papers"" (12 December 2023) New Zealand Parliament (see: www.parliament.nz).
178 For example: Amendment Paper 41, which amended the Local Government (Water Services Preliminary Arrangements) Bill 2024 (52–1); and Amendment Paper 49, which amended the Education and Training Amendment Bill 2024 (66–2).
179 See, for example, Amendment Paper 51, which amended the Gangs Legislation Amendment Bill 2024 (23–2). The Amendment Paper, which introduced the new 'gang insignia prohibition order' regime was tabled after the Bill had been considered by the Justice Select Committee. Following the introduction of the Amendment Paper, the Law Society wrote to the Minister of Justice to raise concerns about the process followed, as well as the substantive content of the Amendment Paper – see: letter from David Campbell (Vice-President of the Law Society) to Hon Paul Goldsmith (Minister of Justice) regarding the Gangs Legislation Amendment Bill: Amendment Paper 51 (8 August 2024). This correspondence is available on our website: www.lawsociety.org.nz.

b. The Ministry of Justice and, in the case of bills drafted by the Ministry, the Crown Law Office, support the Attorney-General in carrying out this function by providing advice on whether bills appear to be consistent with the Bill of Rights Act. Section 7 reports and the advice provided to the Attorney-General are published on the Ministry of Justice's website.[180]

c. Section 7A of the Bill of Rights Act also requires the Attorney-General to notify Parliament of declarations made by senior courts that an enactment is inconsistent with the Act.

6.18 Despite these mechanisms to bring Bill of Rights Act issues to Parliament's attention, the Law Society has continued to observe:

a. Parliament enacting legislation despite there being a section 7 report, at times without public consultation.[181]

b. Parliament passing bills which did not receive a section 7 report, but were, in the Law Society's view, inconsistent with the Bill of Rights Act.[182]

c. Reliance on Bill of Rights Act advice which fails to correctly identify and consider the full extent to which rights which will be engaged and / or infringed by a proposed bill.[183]

6.19 The Law Society has also raised concerns with the Attorney-General about the lack of processes to ensure:[184]

a. amendments which are made to bills after the select committee stage, and give rise to Bill of Rights Act issues, are brought to Parliament's attention; and

b. members of the public are given the opportunity to submit on such amendments before they are incorporated into a bill.

6.20 These concerns were also relayed to the United Nations Human Rights Council during Aotearoa New Zealand's Fourth Universal Periodic Review.[185]

180 See www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/the-bill-of-rights-act.
181 See, for example, the Taxation (Income Tax and Rate and other Amendments) Act 2020, which was introduced and passed within 7 days, without public consultation; the Returning Offenders (Management and Information) Amendment Act 2023, which was passed under urgency with no select committee process; and the Parole Amendment Act 2023, which was similarly passed under urgency and with no select committee process. The Gangs Act 2024 was also enacted despite there being a section 7 report, and concerns being raised during the select committee process about inconsistencies with the Bill of Rights Act.
182 See, for example, the Law Society's submissions on the Immigration (Mass Arrivals) Amendment Bill 2023 (214–1) (26 April 2023), Firearms Prohibition Orders Legislation Bill 2021 (106–1) (29 March 2022), and the Counter-Terrorism Legislation Bill 2021 (29–1) (25 June 2021); these are available on the Law Society's website: www.lawsociety.org.nz.
183 See, for example, the Law Society's submissions on the Firearms Prohibition Orders Legislation Bill 2021 (106–1) (29 March 2022), and the Corrections Amendment Bill 2023 (264–1) (10 August 2023).
184 Letter from Frazer Barton (President of the Law Society) to Hon Judith Collins KC (Attorney-General) about the Law Society's key law reform priorities (5 December 2023).
185 Law Society "Report of the New Zealand Law Society Te Kāhui Ture o Aotearoa For Aotearoa New Zealand's Universal Periodic Review 2024" (11 October 2023).

Other shortcomings within the policy and legislative process

6.21 The Law Society has also observed other shortcomings within the policy process, which appear to be driven by desires to deliver on election promises and coalition agreements within arbitrarily set timeframes:

a. Legislation continues to be passed despite there being no evidence or insufficient evidence to show the legislation will have the desired effect.[186]

b. In 2023, Cabinet agreed to suspend the requirement for officials to prepare Regulatory Impact Statements (**RISs**) for certain classes of legislation. RISs typically contain useful information about policy problems and responses, along with cost-benefit analyses of policy options.[187]

c. Significant amendments are being made to bills at the committee of the whole House stage of the legislative process (that is, after the select committee process, and after public submissions).[188]

Addressing these problems

6.22 The Law Society is well placed to identify and speak out against poor policy and legislative processes, and will continue to advocate for good legislation and improved policymaking processes. The Law Society will also continue to monitor and, where possible, raise concerns about reform proposals that do not appear to be supported by evidence, or that appear to be inconsistent with the Bill of Rights Act.

6.23 We also discuss below some other improvements that can be made to our policymaking and legislative processes.

Adhering to principles of good legislation

6.24 Claudia Geiringer, Polly Higbee and Elizabeth McLeay have identified 10 principles which are fundamental to a democratic legislative process and against which the democratic and constitutional legitimacy of urgency ought to be assessed:[189]

a. Legislatures should allow time and opportunity for informed and open policy deliberation.

b. The legislative process should allow sufficient time and opportunity for the adequate scrutiny of bills.

c. Citizens should be able to participate in the legislative process.

186 Fox Meyer and Laura Walters "Official concerns about haste and dearth of evidence in Govt's first year" *Newsroom* (online ed, New Zealand, 27 November 2024). The Law Society has also raised concerns about such proposals in submissions to select committee: see, for example, the Law Society's comments in its submission on the Gangs Legislation Amendment Bill 2024 (23–1) (5 April 2024), the Oranga Tamariki (Repeal of Section 7AA) Amendment Bill 2024 (43–1) (2 July 2024), and the Sentencing (Reinstating Three Strikes) Amendment Bill 2024 (65–1) (23 July 2024). These submissions are available on the Law Society's website: www.lawsociety.org.nz.

187 Thomas Coughlan "Government rocked by second leak in five days, ministers suspend analysis of repeal proposals" *The New Zealand Herald* (online ed, New Zealand, 8 December 2023).

188 For example, Amendment Paper 51 on the Gangs Legislation Amendment Bill 2024, which prohibits individuals from having gang insignia in their usual place of residence in certain circumstances, and gives police the power to search those residences, and Amendment Paper 216 on the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill 2023, which prohibits the courts from ordering name suppression for defendants in sexual violence cases in certain circumstances.

189 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 139–140.

d. Parliaments should operate in a transparent manner.

e. The House should strive to produce high quality legislation.

f. Legislation should not jeopardise fundamental constitutional rights and principles.

g. Parliaments should follow stable procedural rules.

h. Parliament should foster, not erode, respect for itself as an institution.

i. The government has a right to govern, so long as it commands a majority in the House.

j. Parliament should be able to enact legislation quickly in genuine emergency situations.

6.25 We agree the application of these principles could address some of the concerns we have discussed above. However, the identification of principles and processes alone is insufficient. In our view, bipartisan support across successive governments is needed to put these principles and processes into practice and improve policy development and legislative processes.

More meaningful consultation and engagement with stakeholders and the public

6.26 Goddard J, writing extra-judicially, has highlighted the need for public participation in the legislative process.[190] In his book, *Making Laws That Work: How Laws Fail and How We Can Do Better*, his Honour observes that the most common causes of failed laws include, among other things, failure to gather relevant information, and to ask relevant questions. In other words, there are concerning failures of analysis, rather than failures to act.[191]

"If a law is intended to protect the rights and interests of individuals, but is so slow or costly to invoke that they cannot use it to solve the problems that it purports to address, then the law is a failure from the only perspective that counts. Legal designers – and the politicians they serve – need to pay much more attention to this issue. It goes to the heart of the rule of law, and equality before the law. It is central to the integrity of the law-making process."[192]

6.27 To allow time for meaningful consultation on proposed policies and legislation, attention should be given to improving Aotearoa New Zealand's policy development and legislative processes:

a. Policy development processes should be improved (where appropriate) by building in additional time to conduct thorough cost-benefit analyses and rights assessments of law reform proposals (including in relation to legislative proposals which give effect to election campaign promises or commitments in coalition agreements). Ideally, the policy development process should allow public consultation on what is being proposed prior to drafting and introducing legislation. At the very least, it should:

   i. enable targeted engagement with experts and groups who are likely to be affected by the proposed policy;

190 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022).
191 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 149.
192 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 128.

ii. give submitters adequate time to engage with the policy proposals and provide feedback;

iii. allow modifications to the law reform proposal (including significant policy changes) to address legitimate concerns raised during the consultation process; and

iv. require the publication of information about feedback received during the consultation process, as well as policy changes which respond to concerns raised by submitters.

b. In some instances, analytical work of this kind may already have been undertaken: for example, by Te Aka Matua o te Ture | Law Commission.[193] Where that is the case, government departments should refer to any reports produced by the Commission, and take into account any evidence, and legal and policy analyses contained in those reports when developing policy and legislative proposals.

c. We note there are a number of local resources which discuss the guiding principles and benefits of community engagement and offer insights into undertaking genuine and meaningful engagement.[194] We do not repeat those insights here, but urge Ministers and officials to meet the expectations outlined in such guidance documents where possible, and to attempt to engage with stakeholders and the wider public in a meaningful way.

d. Officials should ensure key documents relating to government bills (such as any RISs, Departmental Disclosure Statements (**DDSs**), rights analyses and Cabinet papers) are publicly available at the time the bill is introduced to the House.

e. Policy implementation timeframes should account for all bills being referred to a full six-month select committee process,[195] unless the circumstances justify a shorter period (for example, where legislation is needed to enable an emergency response).

f. The use of urgency should otherwise be rare, and justified by a genuine need for haste in relation to the particular measure.[196] It should not be used as a tool for meeting arbitrary deadlines or operational deadlines which are known in advance, or for enhancing the 'performance' of a government.[197] The Standing Orders Committee could look to revise the Standing Orders to expressly limit the use of urgency to these narrow circumstances.

g. Select committees should have the ability to invite and consider public submissions on bills, and, where possible, give submitters adequate time to provide feedback.

h. The timeframes given to select committees to report back to the House must enable the select committee to consider all of the submissions it receives in relation to a bill. Where a large volume of submissions is anticipated, the reporting timeframes should be adjusted accordingly to facilitate consideration of all submissions.[198]

193 Te Aka Matua o te Ture | Law Commission carries out independent reviews of specific areas of the law (which are referred to the Commission by the Minister of Justice). The Commission undertakes both targeted and public consultation to inform its reviews, and makes recommendations on whether and how to reform the law. The Commission's website contains more information about its role, as well as copies of previously published reports: www.lawcom.govt.nz.

194 For example, Department of the Prime Minister and Cabinet (**DPMC**) *Cabinet Manual 2023* (2023); DPMC *CabGuide – Writing a paper* (issued 5 June 2017, updated 2 October 2024); DPMC *Policy Methods Toolbox*; The Treasury New Zealand *Guidance Note: Effective Consultation for Impact Analysis* (December 2019); and Te Tari Taiwhenua | Department of Internal Affairs *Online Engagement Guidance* (3 September 2015).

195 Standing Orders of the House of Representatives 2023, SO 303(1).

196 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 139–140.

197 For example, the media has recently reported that Prime Minister Christopher Luxon "has been outspoken about the speed at which his coalition Government has moved through its policy and legislative agenda in the last year", and noted: "While there's a lot more work to do, I'm pleased with the progress we've made in just one year to deliver the outcomes Kiwis deserve." See: Fox Meyer and Laura Walters "Official concerns about haste and dearth of evidence in Govt's first year" *Newsroom* (online ed, New Zealand, 27 November 2024).

198 Noting, for example, that the media has recently reported that Justice Select Committee members would not have read "tens of thousands of submissions" on the Principles of the Treaty of Waitangi Bill 2025 (94–1) ahead of the Committee reporting back to the House – see: Laura Walters "Treaty principles report will exclude thousands of public submissions" *Newsroom* (online ed, New Zealand, 28 March 2025).

i. Select committees and departments should not rely solely on artificial intelligence (or other software or algorithms) to analyse submissions they receive during a consultation process, as this can remove the incentive for submitters to share their views and feel heard by select committees and officials.[199]

j. If significant policy amendments are proposed to a bill after the select committee stage, the bill should be referred back to the select committee so submitters can comment on the amendments.

6.28 The Law Society understands the Attorney-General has directed the Parliamentary Counsel Office to monitor potential instances of rushed lawmaking, urgency, and truncated select committee periods, and directed both the Parliamentary Counsel Office and the Legislation Design and Advisory Committee to escalate matters where they have "significant concerns that poor process will result in poor legislative outcomes for the Government".[200] However, it is currently unclear what measures will be taken to address concerns which are escalated to the Attorney-General. Further clarity on measures for dealing with policy and legislative processes which fall short of best practice could be helpful.

Consultation on Amendment Papers

6.29 Amendment Papers are not problematic in themselves and remain an important mechanism for making necessary changes to bills prior to their enactment. Amendment Papers can in fact *strengthen* the rule of law when used, for example, to improve the drafting of a clause in a bill, or to correct an oversight in order to improve the overall clarity and certainty of the legislation.

6.30 Rule of law concerns only arise where Amendment Papers are used to make significant policy changes to a bill without any opportunities for meaningful public consultation or scrutiny.[201] Where this occurs while a bill remains before a select committee, the select committee should reopen for public submissions on the Amendment Paper.[202] This would then enable the select committee to invite submissions on the contents of the Amendment Paper and report back to the House about any concerns, or other necessary amendments. If the select committee recommends any significant changes to the provisions in the Amendment Paper, the bill could then be recommitted to a committee of the whole House for debate.

199 We note the media recently reported that the Ministry for Regulation did not read the majority of the 22,821 submissions it received on a proposed Regulatory Standards Bill before taking proposals on next steps to Cabinet – see: Marc Daalder "Thousands of Regulatory Standards Bill submissions not read by ministry" *Newsroom* (online ed, New Zealand, 19 May 2025).

200 Letter from Hon Judith Collins KC (Attorney-General and Minister responsible for the Parliamentary Counsel Office and the Legislation Design and Advisory Committee) to Rt Hon Christopher Luxon and all Ministers regarding delivering effective legislation and regulatory schemes (25 March 2024).

201 Noting Parliamentary practice already dictates that amendments should not change bills in significant and unexpected ways: see David McGee *Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, Wellington, 2023) at [39.3.1].

202 This was the case with Amendment Papers 215 and 216, which sought to amend the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill 2023 (274–1), and were published while the Bill remained before the Justice Select Committee. The Law Society was pleased to see the Select Committee reopen public submissions on the Amendment Papers, and consider those submissions in its report to the House (see Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill 2023 (274–2).

Post-legislative scrutiny

> **"One of the roles of parliament is to create laws that meet the needs of the country's citizens. … However, it is also a parliament's role to evaluate whether the laws it has passed achieve their intended outcome(s). Post-Legislative Scrutiny refers to the moment in which a parliament applies itself to this particular question: whether the laws of a country are producing expected outcomes, and if not, why not. … Despite its importance for the respect of the rule of law, it is not uncommon that the process of reviewing the implementation of legislation be overlooked."**[203]

6.31 Post-legislative scrutiny involves scrutiny of laws that have been passed by Parliament (and, in some instances, have already come into force), in order to understand whether a particular piece of legislation is meeting its stated policy objectives, whether it has had any significant unexpected side-effects, and whether its implementation has caused unfairness or disadvantage to any sector of the community. Such scrutiny could be undertaken, for example, by select committees, government departments responsible for administering legislation, or independent bodies such as Te Aka Matua o te Ture | Law Commission, and completed within a certain period after legislation is passed.

6.32 Post-legislative scrutiny can help strengthen the rule of law by:

a. enabling oversight of Executive action (and inaction), and the extent to which the Executive is managing the effective implementation of its policies and abiding by its statutory obligations;[203]

b. discouraging the arbitrary or unlawful exercise of Executive powers; and

c. assisting in identifying amendments which would improve the accessibility, clarity, and certainty of the law.

6.33 Aotearoa New Zealand's Parliamentary processes only provide for very limited post-legislative scrutiny of legislation, and in-depth reviews of legislation are typically carried out when policy reforms are being contemplated, or because of a requirement specified in legislation.[204] Post-legislative scrutiny by Parliament occurs only on an ad-hoc basis, and, if it does occur, it is often as a result of legislated review requirements or in the context of broader policy reviews.

6.34 As a result, there is little systematic monitoring of the implementation of legislation, or evaluation of whether laws have achieved their intended outcome and whether they remain fit for purpose. While the Executive has taken some steps to focus on its role of departmental stewardship and to ensure there are systems in place for departments to monitor and review their legislation,[205] there remains room for improvement.

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203 Franklin De Vrieze and Victoria Hasson *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance* (Westminster Foundation for Democracy, 2017) at 11.

204 See, for example, s 235 of the Intelligence and Security Act 2017, and s 448B of the Oranga Tamariki Act 1989, which provide for periodic reviews of those statutes.

205 For example, public service principles now require "stewardship" by government departments, including promoting stewardship of legislation administered by agencies: see Public Service Act 2020, s 12(1)(e)(v).

6.35 This is in contrast to the approach taken by the UK Parliament, where a good portion of select committee activity involves post-legislative scrutiny supplemented by a requirement that the government publish a memorandum on the implementation of legislation 3–5 years after Royal assent.[206] One report found that 23 post-legislative scrutiny inquiries were undertaken by the UK Parliament between 2008 and 2019, showing that post-legislative scrutiny is being undertaken, and is possible, even when legislatures have capacity limitations.[207]

6.36 With Aotearoa New Zealand's unicameral system and unwritten constitutional arrangements, there are strong reasons for suggesting that, as a minimum, legislation passed under urgency should be subject to post-legislative scrutiny within a specified timeframe.

6.37 There are mechanisms or models within the current Standing Orders which could be developed further to carry out Parliamentary post-legislative scrutiny of the legislation the House has passed:

a. The Standing Orders Committee should develop a list of triggers or criteria for carrying out post-legislative scrutiny at the right time (which includes legislation that is passed under urgency).[208] On this point, it is worth noting that the Canadian Standing Committee on the Scrutiny of Regulations has established triggers for reviewing secondary legislation, and one trigger is that the regulation or statutory instrument "appears for any reason to infringe the rule of law".[209]

b. The Standing Orders Committee should also collate a list of questions to guide select committees in carrying out effective post-legislative scrutiny.[210]

c. The Standing Orders could also be amended to set out the key objectives of post-legislative scrutiny.[211]

d. The approach taken by select committees in conducting post-legislative scrutiny could then be similar to the role given to the Regulations Review Committee in examining secondary legislation against the grounds set out in the Standing Orders.[212]

e. Select committees could develop and publish a programme for post-legislative scrutiny to be undertaken during each Parliamentary session.

f. Select committees could also ask departments to identify possible pieces of legislation for post-legislative scrutiny (perhaps as part of any reviews on the activities and performance of government agencies). Select committees could then initiate post-legislative scrutiny inquiries, call for public submissions, and report to the House on their findings, with a requirement for the Executive to respond to a committee's report within a specified timeframe.

206 Franklin De Vrieze and Victoria Hasson *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance* (Westminster Foundation for Democracy, 2017) at 7 and 17.
207 Tom Caygill *Post-Legislative Scrutiny in the UK Parliament, The Post-Legislative Scrutiny Series, 1* (Nottingham Trent University, November 2021) at 7.
208 Franklin De Vrieze *Post-Legislative Scrutiny: Guide for Parliaments* (Westminster Foundation for Democracy, 2017) at 17–18.
209 Franklin De Vrieze and Victoria Hasson *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance* (Westminster Foundation for Democracy, 2017) at 41.
210 For further discussion about appropriate triggers, as well as questions which could be addressed during post-legislative scrutiny, see the Law Society's submission on the *Review of Standing Orders 2023* (16 September 2022).
211 See the Law Society's submission on the *Review of Standing Orders 2023* (16 September 2022) for further discussion about potential objectives.
212 SO 327(2).

6.38 We acknowledge that a systematic programme of post-legislative scrutiny would inevitably increase the workloads of select committees, and existing committees may find it difficult to prioritise post-legislative scrutiny. An alternative option would be to establish a separate specialist committee akin to the Regulations Review Committee, which would be responsible for conducting post-legislative scrutiny. A specialist post-legislative scrutiny committee could take a different focus to the scrutiny of bills and avoid post-legislative scrutiny being used to relitigate policy arguments for or against the legislation.

6.39 We note government departments also have stewardship obligations under section 12 of the Public Service Act 2020. This requires departments to exercise a proactive duty of care for any legislation they administer (for example, by proactively monitoring, reviewing and updating legislation to ensure they are being implemented as intended, and remain fit for purpose).[213] Post-legislative scrutiny could therefore be undertaken as part of this stewardship exercise. Any recommendations (from either a select committee or government department) to amend the legislation should be informed by expert and public feedback about the operation and impacts of the legislation.

Improvements to the Bill of Rights Act vetting process

6.40 Officials who prepare advice on whether a bill appears to be consistent with the Bill of Rights Act must ensure all relevant Bill of Rights Act issues engaged by a proposed bill are identified and properly considered in advice to the Attorney-General (regardless of whether any limits on rights or freedoms can be demonstrably justified in a free and democratic society).

6.41 Advice provided to the Attorney-General should also be made publicly available at the time the bill is introduced to the House so relevant rights issues can be debated and properly canvassed during the first reading debates and the select committee process.

6.42 Officials should also consider the potential Bill of Rights Act implications of law reform proposals earlier in the policy development process. Where possible, this should occur before Ministerial and Cabinet approval is sought on key policy matters. While most bills are eventually scrutinised for consistency with the Bill of Rights Act, that scrutiny too often occurs after key policy decisions have been made and Cabinet approval has been sought. Our observations at [6.18] suggest there is little appetite for changing key policy settings once a law reform proposal has passed that stage in the policy development process. Earlier identification and examination of Bill of Rights Act issues (for example, involving targeted engagement with experts) could help influence the overall design of policy before key decisions are made, and ensure reform proposals are consistent with the Bill of Rights Act.

6.43 Changes beyond operational improvements may also be needed to strengthen the overall Bill of Rights Act vetting process. For example:

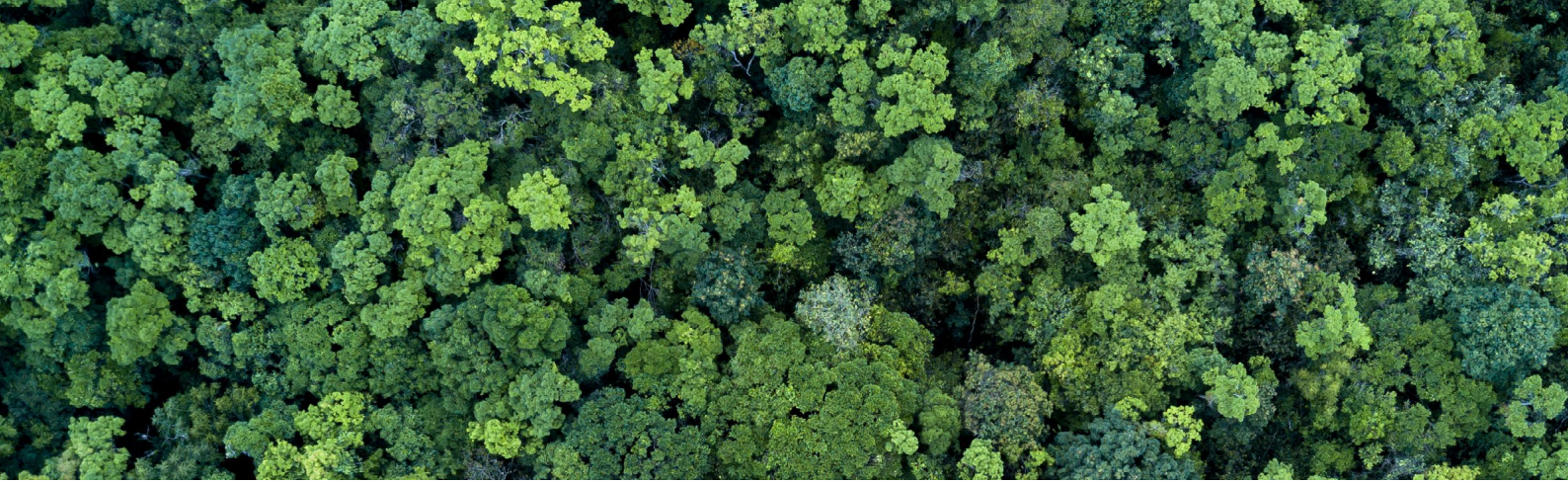
a. The Standing Orders could be amended to provide for a process for Parliament to receive annual government reports on the number and the types of inconsistencies with the Bill of Rights Act, and the effect of those inconsistencies (which could then be considered as part of a post-legislative scrutiny process).[214]

213 See Te Kawa Mataaho | Public Service Commission's website for more information about this stewardship obligation: www.publicservice.govt.nz.
214 This was suggested to the Standing Orders Select Committee in the Law Society's submission on the Review of Standing Orders 2023 (16 September 2022). This suggestion was not discussed in the Standing Orders Committee's report (see: Standing Orders Committee *Review of Standing Orders 2023* (August 2023)).

b. The Standing Orders could also provide for a mechanism for reviewing declarations of inconsistency by a Parliamentary committee (such as the Justice Select Committee) once a Parliamentary term.

c. Aotearoa New Zealand could also benefit from having a bespoke Parliamentary select committee which is responsible for scrutinising bills at the select committee stage for consistency with the Bill of Rights Act. The committee's tasks could include reviewing section 7 reports, Bill of Rights Act advice prepared by officials, and annual reports proposed at (a) above, and recommending amendments to bills to address concerns. The committee could also undertake post-legislative scrutiny of legislation to ensure it is consistent with the Bill of Rights Act. Such a committee could (for example) be modelled on the Joint Committee on Human Rights in the United Kingdom Parliament.[215]

215 The Joint Committee on Human Rights consists of members appointed from both the House of Commons and the House of Lords, and examines matters relating to human rights within the United Kingdom. The Committee's work includes scrutinising every Government bill for its compatibility with human rights, and consideration of whether the bill presents an opportunity to enhance human rights in the United Kingdom – see: committees.parliament.uk/committee/93/human-rights-joint-committee/role.



7 Issues arising from the substantive content of legislation

7.1 This chapter considers how the substantive content of legislation can undermine the rule of law by reducing the clarity, certainty and predictability of the law. We have focused on the following four types of legislation which we have identified over the years (for example, in our submissions to select committees) as raising rule of law concerns:[216]

- ***retrospective legislation;***
- ***legislation containing 'Henry VIII clauses';***
- ***legislation that gives the Executive absolute discretion to act or make decisions; and***
- ***legislation that prevents or limits judicial review or appeal rights.***

Retrospective legislation

7.2 Legal certainty is a fundamental requirement of the rule of law.[217] If the rule of law requires compliance with the law, it then follows that individuals subject to those laws know (or are able to find out) about those laws, and can be certain how those laws apply to them at a particular point in time. This is supported by a well-established and longstanding common law presumption (now codified in section 12 of the Legislation Act 2019) that legislation generally has prospective and not retrospective effect.

7.3 Retrospective legislation[218] can undermine the rule of law by making it impossible for affected individuals to foresee and plan how they can comply with the law, and to adjust their behaviour and actions accordingly.[219] As Jeremy Waldron explains:[220]

> *"How can a rule guide our conduct if our conduct is today and the rule is made tomorrow? … A retrospective law is like a secret law or an unintelligible law; one cannot use it as a point of orientation. If there is too much retroactivity, or too many flaws along these other dimensions of the internal morality of law, the legal character of the system of governance begins to dissolve. A collapse in legality, a decline in respect for what we would call the principles of the Rule of Law …"*

216 Copies of recent Law Society submissions (including on bills and exposure drafts of legislation) are available on our website: www.lawsociety.org.nz. Please email lawreform@lawsociety.org.nz for copies of older submissions which are not available online.
217 Lord Johan Steyn *Democracy Through Law* (New Zealand Centre for Public Law, Occasional Paper No 12 (September 2002) at 7.
218 Retrospective legislation is legislation that attaches some legal consequence now and for the future to an event or transaction that took place in the past, whereas retroactive legislation is more radical: it operates on past events as though it were in force when the past event took place: see Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago L Rev 631. Both of these forms of legislation are referred to in this report as having 'retrospective' effect.
219 Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago L Rev 631 at 635.
220 Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago L Rev 631 at 640–641.

7.4 Therefore, while Parliament has the power to pass retrospective legislation,[221] strong reasons are usually required to justify a departure from the presumption against retrospective legislation in order to avoid infringing the rule of law.[222] This is particularly so where a proposed law is likely to affect substantive rights. The common law "leans against retrospective application of statutes, particularly where they take away existing rights" or give rise to a "palpable injustice".[223]

7.5 The *Legislation Guidelines* offer useful guidance about retrospective legislation for those involved in the policy development process, and include information about matters which should be considered when deciding whether retrospective legislation is appropriate.[224]

7.6 Nevertheless, the Law Society continues to observe the introduction and passing of bills which have retrospective effect.[225] In some instances:

a. Retrospective legislation was passed through all stages under urgency, and without an accompanying RIS to explain why retrospective application was necessary or appropriate in the circumstances.[226]

b. The explanatory material relating to the bill (such as the Explanatory Note of the bill, and the RIS) did not include adequate information about the retrospective nature of the bill, or provide reasons for departing from the presumption against retrospective legislation.[227]

c. Select committee reports scrutinising those bills did not expressly consider or discuss concerns about retrospectivity, despite such concerns being noted in submissions by the Law Society and others.[228]

d. The retrospective application of the legislation created inconsistencies with the Bill of Rights Act by seeking to punish individuals who has been finally acquitted or convicted of, or pardoned for, an offence.[229]

e. The retrospective effect of the legislation undermined the separation of powers and the principle of comity by interfering with the judicial process in active cases before the courts, and requiring live cases to be reheard.[230]

221 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th edition, LexisNexis, Wellington, 2021) at 819; Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed, September 2021) at 59. There is said to be "a 'sliding scale' of injustice, so that some retrospective legislation is unobjectionable": Burrows and Carter at 814.

222 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed, September 2021) at 59.

223 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th edition, LexisNexis, Wellington, 2021) at 818, 819 and 825.

224 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed, September 2021), ch 12.

225 Over the past six years, the Law Society raised concerns about 11 proposals to pass legislation having retrospective effect: see, for example, the Law Society's submissions on the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024 (83–1) (15 October 2024), Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill 2024 (73–1) (9 October 2024), Crown Minerals Amendment Bill 2022 (198–1) (23 January 2023), and the Electoral (Integrity) Amendment Bill 2017 (6–1) (15 March 2018). These are available on the Law Society's website: www.lawsociety.org.nz.

226 See, for example, the Equal Pay Amendment Bill 2025 (147–1) which was introduced and passed through all stages under urgency. The DDS for the Bill noted at 5 that a RIS was not prepared due to Ministerial time constraints.

227 See, for example, the Law Society's submissions on the Crown Minerals Amendment Bill 2022 (198–1) (23 January 2023), and the Crown Minerals (Decommissioning and Other Matters) Amendment Bill 2021 (47–1).

228 See, for example, the Economic Development, Science and Innovation Select Committee's report on the Crown Minerals Amendment Bill 2022 (198–2) (22 May 2023). The Law Society's submission on the Bill, dated 23 January 2023, raised concerns about the retrospective effect of transitional provisions in the Bill.

229 See, for example, the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill 2024 (86–1), which will retrospectively impose reporting requirements on pre-existing registrable child sex offenders. The section 7 report on the Bill notes the new reporting requirements will amount to a subsequent, additional punishment to that which was given at the time of sentencing to those who have already been sentenced. The Law Society made a submission on the Bill noting its concerns about the retrospective provisions. At the time of drafting this report, the Bill remains before the Justice Select Committee.

230 See the Law Society's submission on the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024 (83–1) (15 October 2024), which discusses this. Also see the Credit Contracts and Consumer Finance Amendment Bill 2025 (137–1), which sought to make retrospective legislative changes which would impact court proceedings that were already underway.

Addressing these problems

7.7 Where legislation is intended to override a decision of the courts, the scale, nature and retrospectivity of such a change should be given careful consideration to ensure the least risk of disturbing constitutional arrangements, particularly those relating to comity between the different branches of government.

7.8 Where there are good reasons for a law to apply with retrospective effect and alter the law as determined by a court, the public interest in having the law clarified generally needs to be weighed against the competing interest of allowing litigants to conclude their proceedings under the law as it was when they commenced their proceedings.

7.9 RISs, Cabinet papers and other documents relating to a proposed law that is to have retrospective effect should include information about:

a. why the proposed law cannot have prospective effect, or why retrospective application is otherwise considered appropriate;

b. whether any alternative policy responses were considered to address the problem the retrospective legislation seeks to solve;

c. any potential adverse impacts of retrospective application of the proposed law (including adverse impacts on specific communities or groups of people); and

d. any public or targeted consultation about the retrospective application of the proposed law (including consultation with those who are likely to be affected if the law was to be passed).

7.10 Providing this information is important even when retrospective application is considered appropriate in the circumstances.

Legislation containing 'Henry VIII clauses'

7.11 'Henry VIII clauses' are provisions in bills which, once passed, empower the Executive to amend or repeal primary legislation via secondary legislation, often without any public or Parliamentary scrutiny.

7.12 Henry VIII clauses are usually objectionable under the principles of the rule of law because they enable the exercise of discretionary and arbitrary lawmaking powers by the Executive,[231] and are contrary to the idea that only Parliament should be able to amend its own laws.

7.13 According to the Regulations Review Committee, Henry VIII clauses "give the government of the day the power to override the will of Parliament, and thus have serious implications for Parliament's ability in practice to control and oversee the delegation of its law-making powers".[232] They can also reduce the:[233]

a. predictability of the law (by making it impossible or difficult to know how the Executive plans to use the powers granted under a Henry VIII clause, or which legislation might be altered using such powers); and

b. accessibility of the law (by reducing transparency and scrutiny of the processes for amending or repealing primary legislation).

231 The European Commission for Democracy through Law "Rule of law checklist" adopted by the Venice Commission at its 106th Plenary Session at [65].
232 Regulations Review Committee Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (13 November 2012) at 3.
233 JUSTICE *The State We're In: Addressing Threats & Challenges to the Rule of Law* (September 2023) at 44–45.

7.14 Because these outcomes undermine the rule of law, Henry VIII clauses should only be used where absolutely necessary. The Law Society remains concerned that Henry VIII clauses continue to be inappropriately included in bills introduced to the House, including in circumstances where:

a. there has been limited or no meaningful public consultation about the use of the Henry VIII clause prior to the introduction of the bill;[234]

b. the Henry VIII clause is intended to be a tool for fixing 'legislative anomalies';[235] and

c. there is no ability for Parliament to review, approve or disallow the secondary legislation in question.[236]

7.15 The use of Henry VIII clauses has also raised concerns overseas. For example, commentators have observed that Henry VIII clauses are becoming an increasingly common feature of legislation in the United Kingdom, and that the breadth of powers granted to the Executive under these clauses can be significant.[237]

Addressing these problems

7.16 The recommendations set out below can help ensure Henry VIII clauses avoid infringing the rule of law:

a. Henry VIII clauses should only be included in an Act in "exceptional circumstances",[238] and those powers should only be exercised when it is objectively necessary to do so, and consistent with Parliament's intention.[239] They should not be used as a tool to routinely reform legislation.[240]

b. Decision-makers and policy officials should first carefully consider if it is feasible to modify the primary legislation via an amendment bill (rather than by relying on a Henry VIII provision). Henry VIII clauses should not be used if the purpose of the provision can be achieved by any other means.[241]

c. Henry VIII clauses should be drafted in the most specific and limited terms possible,[242] and should not enable the Executive to make substantive modifications to primary legislation or any underlying policies. If, for example, trade-offs need to be made between different legislative schemes, it would be more appropriate for such decisions to be made by Parliament.[243]

d. Officials should undertake public consultation on proposals to include Henry VIII clauses in legislation, particularly where the exercise of those powers have the potential to affect rights and benefits, or impose duties and obligations on individuals. If public consultation is not feasible, officials should, at the very least, undertake targeted consultation on the design of the legislation with those who are most likely to be impacted by the exercise of the proposed powers.

234 See the Law Society's submission on the Local Government (Water Services Preliminary Arrangements) Bill 2024 (52–1) (13 June 2024).
235 See the Law Society's submission on the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72–1) (15 August 2018).
236 See the Law Society's submission on the Taxation Principles Reporting Bill 2023 (253–1) (8 June 2023).
237 JUSTICE *The State We're In: Addressing Threats & Challenges to the Rule of Law* (September 2023) at 44–45.
238 Regulations Review Committee "Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period" [1995] AJHR I16C at 16; Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012" (13 November 2012).
239 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed, September 2021) at 80.
240 Regulations Review Committee "Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period" [1995] AJHR I16C at 16; Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012" (13 November 2012).
241 Regulations Review Committee "Activities of the Regulations Review Committee in 2013" (27 June 2014) at 23.
242 Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, Wellington, 2016) at 107.
243 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 103.

e. Materials which support the bill containing the Henry VIII clause (including any Cabinet papers, RISs and DDSs) should include information about the specific purpose that the Henry VIII power is designed to serve and how it is anticipated the power will be used. This ensures Parliamentarians are fully informed about the consequences of delegating their power.[244] The broader the delegation of power, the clearer the justification for that delegation needs to be.[245]

f. Where possible, the legislation should limit the exercise of Henry VIII powers, for example, by specifying that such powers can be exercised only by the Governor-General in Council (that is, at the highest level of delegation), or imposing a time limit on the exercise of the powers (for example, by including a sunset clause).[246]

g. Parliament must be enabled to review, approve, disallow and report on secondary legislation made by exercising Henry VIII powers.

h. Secondary legislation made by exercising Henry VIII powers should be published and notified in the *New Zealand Gazette*, regardless of whether it was drafted by the Parliamentary Counsel Office.[247]

i. A department seeking to exercise a Henry VIII power must justify why the exercise of that power is necessary before an appropriate select committee.[248]

Legislation which gives the Executive absolute discretion to act or make decisions

7.17 Absolute discretion provisions in legislation give the Executive complete discretion about whether to exercise a power granted under that provision, often without any explicit requirement to record or provide reasons for doing so. While such provisions may not grant unfettered power to the Executive, they have the potential to weaken the rule of law by:

a. enabling the arbitrary exercise of powers;

b. reducing transparency and accountability of the Executive's actions and decisions;

c. reducing clarity, certainty and predictability about how the law applies in specific circumstances; and

d. as a result, reducing the accessibility of the law.

7.18 A number of Aotearoa New Zealand's statutes currently include provisions which grant absolute discretion to the Executive,[249] and the Law Society has in the past raised concerns about several of these provisions in its submissions to select committee.[250]

244 JUSTICE *The State We're In: Addressing Threats & Challenges to the Rule of Law* (September 2023) at 44–45.
245 David Goddard *Making Laws That Work: How Laws Fail and How We Can Do Better* (1st ed, Bloomsbury Publishing, 2022) at 103.
246 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed, September 2021) at 80.
247 The Legislation Act 2019 currently only requires the publication and notification of secondary legislation drafted by the Parliamentary Counsel Office (see sections 69–77).
248 Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, Wellington, 2016) at 107.
249 Notably, the Immigration Act 2009; also see, for example, the Education and Training Amendment Act 2024.
250 See, for example, the Law Society's submissions on the Education and Training Amendment Bill 2024 (66–1) (26 July 2024), and the Immigration (COVID-19 Response) Amendment Bill 2020 (243–1) (7 May 2020).

7.19 In judicial review and other review processes, absolute discretion provisions can also raise practical challenges, because the complainant or applicant seeking judicial review cannot access information relating to the action or decision they are seeking to challenge (for example, whether relevant international obligations were considered or taken into account during a decision-making process).[251] For instance, the Law Society understands the Ombudsman has investigated a number of complaints relating to decisions made by Immigration New Zealand officials in their absolute discretion, and, in one instance, observed that "it could not be determined that all relevant considerations had been addressed and that therefore the Ministry's decisions were unreasonable".[252] In order to assure accountability, transparency and good administrative practice, and address some of these difficulties, the Ombudsman has recommended that decision-makers within Immigration New Zealand should record and retain reasons for decisions made in their absolute discretion under section 61 of the Immigration Act 2009.[253]

Addressing these problems

7.20 Where a policy proposal seeks to give Ministers and officials absolute discretion, there must be careful consideration of whether the scope of that discretion can be limited or narrowed to reduce the potential for arbitrary exercise of powers. Specifying, in either primary or secondary legislation, matters that must be considered when exercising that absolute discretion (such as Aotearoa New Zealand's international obligations) is one way of answering this concern.[254]

7.21 Ministers and officials should also be required to record and retain reasons for any decisions made or actions taken in their absolute discretion. Such reasons should demonstrate that the decision-maker has turned their mind to any relevant information and considerations, as well as showing the reasoning by which the decision was reached.[255]

Legislation which prevents or limits judicial review or appeal rights

7.22 In Aotearoa New Zealand, the courts play a fundamental role in upholding the rule of law by holding individuals, as well as the Executive, accountable to the law through judicial review and appeals mechanisms. As the Legislation Design and Advisory Committee explains:

a. Judicial review is the way courts fulfil their constitutional role of ensuring public powers are exercised in accordance with the law.[256]

b. An appeal enables the merits of a decision to be re-examined through an assessment of questions of fact and the application of judgement to those facts (rather than just an assessment of the process by which the decision was made, which is what is examined in a judicial review).[257]

251 For further discussion on this point, see: Antonia Leggat "Absolute discretion and the rule of law — uneasy bedfellows" (LLB (Hons) Dissertation, Victoria University of Wellington, 2016).
252 Judge Peter Boshier "Case note: Delegated Decision Makers — obligation to record reasons for decision" (case number 277752, 1 February 2016).
253 Judge Peter Boshier "Case note: Delegated Decision Makers — obligation to record reasons for decision" (case number 277752, 1 February 2016).
254 We note this is currently a requirement under section 177 of the Immigration Act 2009.
255 Judge Peter Boshier "Case note: Delegated Decision Makers — obligation to record reasons for decision" (case number 277752, 1 February 2016).
256 Legislation Design and Advisory Committee *Annual Report for the year ended 30 June 2018* (September 2018) at 9.
257 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 140.

7.23 Both judicial review and appeal mechanisms also strengthen the rule of law by enabling individuals to resort to the courts to resolve disputes or to exercise their rights, and by helping to maintain a high level of public confidence in the legal system.

> **"The potential availability of the judicial review procedure in respect of public authority action is essential to the operation of the New Zealand constitutional system. It provides a procedural mechanism by which the courts are able both to develop and enforce law that ensures that the government and other public authority decision-makers comply with the law as put in place by Parliament and the courts in their development of the principles of administrative law. … The availability of judicial review and the principles supporting it help to maintain the integrity of the system of government and consequently the community's confidence that the system operates in accordance with the law put in place by community-accepted law-makers."**[258]

7.24 Any attempt to prevent or limit judicial review or appeal rights therefore has the potential to weaken the rule of law.

7.25 Provisions in legislation which prevent or limit judicial review are referred to as 'ouster clauses'. Ouster clauses interfere with the courts' constitutional role as interpreters of the law, and are "seen to immunise unlawful exercise of power from judicial scrutiny".[259] They weaken the rule of law by making it more difficult to ensure the Executive has not exceeded or arbitrarily exercised its powers.[260]

7.26 In recent years, the Law Society has on numerous occasions advised against law reform proposals which would prevent or limit judicial review or the exercise of appeal rights. These have included proposals:

a. specifying in the legislation that judicial review is not available;[261]

b. setting out time limits for bringing judicial review proceedings;[262]

c. omitting to provide that appeal rights are available in certain circumstances (where such specification was required to ensure that rights could be exercised);[263]

d. limiting the scope of appeals only to questions of law,[264] thereby excluding examination of whether the decision erred in conclusions about the facts (to which they applied the law);[265] and

e. preventing appeals to certain courts (including the Supreme Court).[266]

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258 Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, Wellington, 2018) at 227.
259 Legislation Design and Advisory Committee *Annual Report for the year ended 30 June 2018* (September 2018) at 9.
260 The Constitution Unit *The rule of law: what is it, and why does it matter?* (December 2022).
261 See Law Society submission on the Hurunui/Kaikōura Earthquakes Recovery Bill 2016 (214–1) (5 December 2016) at 2–3.
262 See Law Society submission to the Ministry of Business, Innovation and Employment on: *Review of the Plant Variety Rights Act 1987 — Outstanding Policy Issues* discussion paper (17 September 2020) at 6–7.
263 See Law Society submission on the Emergency Management Bill 2023 (225–1) (3 November 2023) at 4–5.
264 See Law Society submission on the Fast-track Approvals Bill 2024 (31–1) (18 April 2024) at 9–10, and the Urban Development Bill 2019 (197–1) (14 February 2020) at 2.
265 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 142.
266 See Law Society submission on the Fast-track Approvals Bill 2024 (31–1) (18 April 2024) at 9–10, and the Urban Development Bill 2019 (197–1) (14 February 2020) at 2. The Law Society has also advocated for amending the Accident Compensation Act to allow for the right to appeal to the Supreme Court: see Law Society letter to Hon Carmel Sepuloni (Minister for ACC) about low-cost and high-impact solutions to some current ACC problems (8 July 2021).

Addressing these problems

7.27 The Rules Committee has acknowledged that "appeal rights are fundamental to the rule of law and confidence in the justice system", and recommended expanding appeal rights for Disputes Tribunal decisions if that Tribunal's financial jurisdiction is increased.[267] The Law Society has also expressed its support for an expansion of the Tribunal's appeal grounds on that basis.[268] A government bill proposing to increase the Tribunal's jurisdictional cap has since been introduced to the House.[269] It is therefore timely to undertake a comprehensive first-principles assessment of the Disputes Tribunal scheme, which considers, among other things, expansion of appeal rights to the District Court.[270]

7.28 Legislation should not inappropriately limit appeal rights. If limits are considered necessary for any reason, those reasons should be made clear in key documents relating to that proposal (including the RIS, DDS, and any Cabinet papers), and include careful consideration of the purpose of the appeal, the competence of the appellate body, and the appropriate balance between finality, accurate fact-finding, and correct interpretation of the law.[271]

7.29 Similarly, legislation should not remove the right to apply for judicial review. Restrictions placed upon the right should be rare, limited to cases where finality is critical, and be proportionate to that objective.[272] However, where an ouster clause is to be included in a bill, the supporting material for that bill (including the RIS, DDS and relevant Cabinet papers) should contain information about why the inclusion of those provisions is considered necessary and / or appropriate.

7.30 It is not generally appropriate to exclude appeals to the country's highest court, which has the constitutional role of providing a supervisory role over other courts. The Supreme Court's leave criteria are sufficient to ensure that only appeals of genuine public importance are brought before that Court.

7.31 The Law Society also agrees with the recommendations in chapter 28 of the *Legislation Guidelines*, including that:

a. new legislation should rely on existing appeals procedures unless there are compelling reasons to create new procedures;[273] and

b. first appeals should generally include a right of appeal on the facts.[274]

267 Rules Committee *Improving Access to Civil Justice* (November 2022) at 20–22.
268 Law Society submission to the Rules Committee: *Rules Committee further consultation paper: Improving Access to Civil Justice* (2 July 2021) at 3–5, available at: www.lawsociety.org.nz.
269 Disputes Tribunal Amendment Bill 2024 (98–1).
270 The Law Society included this recommendation in its submission on the Disputes Tribunal Amendment Bill 2024 (98–1) dated 13 January 2025.
271 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 142.
272 Legislation Design and Advisory Committee *Annual Report for the year ended 30 June 2018* (September 2018) at 10.
273 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 142.
274 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 140.

8 Lack of awareness and understanding of the rule of law

8.1 Those who participated in our 2024 survey identified the lack of awareness and understanding of the rule of law as a key challenge, resulting in apathy when the rule of law is threatened. Research and data supports the view that not everyone fully understands or pays close attention to the rule of law, its performance, and what is required to strengthen and protect it:

a. Our 2024 survey shows that not everyone feels confident describing the rule of law.

b. The IBA's 2024 survey found that rule of law challenges continue to receive little attention within the legal sector, with clients, people and business needs pushing rule of law issues "down the agenda in favour of challenges with a greater commercial imperative".[275] However, the survey also found the legal sector tends to take more notice when rule of law challenges start to affect the business of law itself.[276]

c. Research has found that the rule of law and access to justice are rarely thought about by the wider public, and there appear to be perceptions among members of the public that the rule of law is not relevant to daily life, and only exists to prevent social chaos.[277] Some believe the rule of law and access to justice are under threat from other cultures and moral decline — and not from government action or lack of funding.[277]

d. The rule of law has also been mischaracterised as an opponent to the public good, and claims of "lefty lawyers" and judges as "enemies of the people" endangering the national interest have entered, and remain, in public discourse.[278]

275 See International Bar Association *Future of Legal Services — White Paper 2024* (October 2024) at 5, 8 and 13.
276 See International Bar Association *Future of Legal Services — White Paper 2024* (October 2024) at 10.
277 The Law Society in partnership with FrameWorks UK *A framing toolkit: How to talk about the rule of law and access to justice* (May 2025) at 5.
278 Tamsyn Hyatt *Talking about the rule of law and access to justice* (FrameWorks UK, February 2025) at 1.

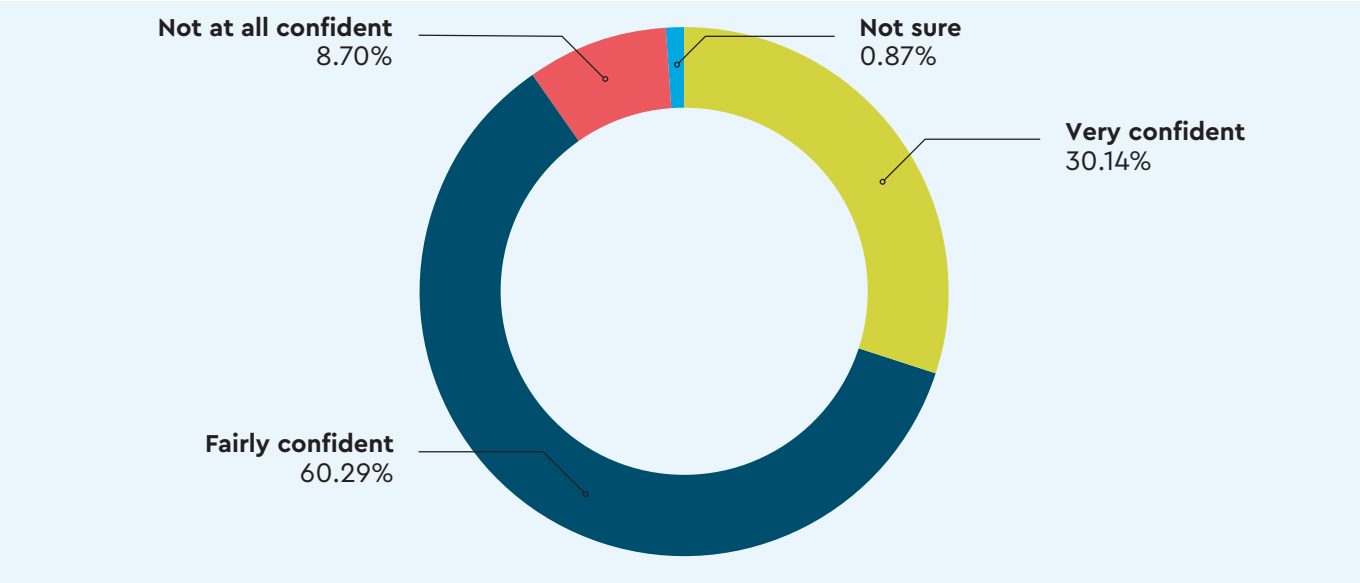


Figure 7: *survey respondents' level of confidence in describing the rule of law*

8.2 Without awareness and understanding of what the rule of law is, and why it matters, there is a risk that individuals, organisations, and the government itself, may feel less motivated to actively identify and respond to challenges to the rule of law.

Addressing these problems

8.3 Around the world, organisations are taking steps to educate the public about the rule of law, and to conduct and / or support research on rule of law issues:

a. Organisations like the IBA and LexisNexis, for example, are working to improve awareness of the rule of law by publishing accessible resources about the rule of law.[279]

b. In the United Kingdom, FrameWorks UK and the Law Society of England and Wales are working on a project to change our ways of communication and to build public support and political will to protect the rule of law and the justice system.[280] The project includes a framing toolkit which provides guidance on how to talk about the rule of law and access to justice.[281]

c. The Rule of Law Centre in Australia provides education about the rule of law through schools, universities and other engagements.[282]

d. The WJP maintains the accessible and publicly available Rule of Law Index, and supports research into the meaning and measurement of the rule of law.[283]

8.4 Here in Aotearoa New Zealand, we are hopeful this report will improve awareness and understanding of the rule of law, and contribute to ongoing dialogue on how this country can strengthen and benefit from the rule of law. The Law Society will also look to publish additional resources and guidance as we continue to play our part in protecting the rule of law.

279 The IBA has published a series of short videos which illustrate how people's everyday lives are affected when the different elements that make up the rule of law are flouted: see www.ibanet.org/rule-of-law-videos-en. LexisNexis publishes *Advancing Together*, a bi-annual bulletin which shares views and insights into the advancement, and in some cases the erosion, of the rule of law in Asia Pacific: see www.lexisnexis.com/en-nz/about-us/rule-of-law.
280 See www.lawsociety.org.uk/campaigns/reframing-justice.
281 The Law Society in partnership with FrameWorks UK *A framing toolkit: How to talk about the rule of law and access to justice* (May 2025).
282 See www.ruleoflaw.org.au/about-us.
283 See worldjusticeproject.org.

9 Other emerging challenges to the rule of law

The separation of powers and judicial independence

9.1 The separation of powers promotes the rule of law by ensuring those responsible for making the law cannot direct how that law will be enforced against themselves, and those responsible for enforcing the law cannot change the law to remove procedural safeguards.[284] It requires the three arms of the State — the legislature, Executive, and judiciary — to act independently of one another, and to avoid assuming each other's functions.

9.2 Judicial independence and public confidence in the judiciary are important for maintaining the separation of powers, and, as a result, the rule of law. A number of individuals who responded to the Law Society's 2024 survey supported this view, citing judicial independence as a key aspect of the rule of law.

9.3 Judicial independence is similarly recognised as an important feature of the rule of law in a number of international instruments, including the United Nations' *Bangalore Principles of Judicial Conduct*, and *Basic Principles on the Independence of the Judiciary*.[285]

9.4 In Aotearoa New Zealand, the judiciary's independence is maintained in a number of ways:

a. Judges cannot respond to any criticisms, or speak in defence of themselves or their judgments.[286]

b. Compared to elected officials (who are accountable to their electorate), judges are not accountable for their judgments to any institution.

c. Judges have security of tenure until death or until they reach retirement age, and their remuneration is set by the Remuneration Authority.

284 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed, September 2021) at 24.
285 United Nations Office on Drugs and Crime *The Bangalore Principles of Judicial Conduct* (Vienna, 2018); United Nations *Basic Principles on the Independence of the Judiciary* (1985). Also see: Commonwealth Bar Leaders' *Declaration on preserving and strengthening the independence of the judiciary and on ensuring the independence of the legal profession* (2023, CLC 2023 GOA); All Party Parliamentary Group on Democracy and the Constitution (UK) *An Independent judiciary —Challenges Since 2016* (2022).
286 See *Guidelines for Judicial Conduct 2019*, available on the Courts of New Zealand website: www.courtsofnz.govt.nz.

9.5 Judges are held accountable mainly through appeal or review processes and public scrutiny. As the Office of the Judicial Conduct Commissioner explains:[287]

> *"This is because Judges have to be independent, so that the justice system will be impartial. To be effective, however, Judges must have the confidence of the public. This means that although Judges do not require public support for everything they do, people must have confidence in their honesty and integrity, and in the impartiality, consistency and fairness of their decisions."*

9.6 Of late, the Law Society has observed an increasing number of comments and criticisms directed at members of the judiciary (including from government Ministers and lawyers), which go further than criticisms or discussion of the substance of judgments. When they are made by Ministers and members of Parliament, such comments and criticisms can undermine the constitutional principles of comity and the separation of powers, and erode public confidence in the judiciary. Where confidence in the judiciary is lost, the public can become hesitant to trust the courts to protect their rights, impacting on their willingness to take issues to court and to accept court decisions. When this occurs, the rule of law is undermined.[288]

"The rule of law and the administration of justice require public confidence in the judiciary. New Zealanders must trust in the honesty and integrity of judges, and in the impartiality and fairness of their decisions. Unfair or inaccurate criticism of the judiciary erodes this public confidence and weakens our justice system."[289]

9.7 It is unclear what impacts and influences such unfair criticisms, particularly from Ministers, will have on judges over time. In the United Kingdom, for example, a Judicial Independence Inquiry has found that, amidst growing disrespect for judges, there has been a "relatively high number of instances since 2020 in which the [United Kingdom] Supreme Court has departed from its previous decisions and adopted new positions which appear to fall closer into line with the Executive's political preferences".[290] Even if this is coincidental and unrelated to criticisms of the judiciary, it "creates the troubling appearance (even if it is only an appearance) of the politicisation of the judiciary".[291]

"It is fundamental for our democracy that judges are not the subject of personal attack or criticism, that may risk them being restricted in their role. Judges must be capable of being able to freely play their constitutional role in Aotearoa New Zealand. This does not mean their decisions are not open to challenge, however personal attacks on individual members of the judiciary or generalised attacks on a particular Court, undermine the importance of our courts as institutions that we all ultimately rely upon to do difficult work for our community."[292]

287 See jcc.govt.nz/complaintprocess.html.
288 Frazer Barton *Attacks on judges risk weakening the justice system* (19 April 2024), available at: www.lawsociety.org.nz.
289 Frazer Barton *Attacks on judges risk weakening the justice system* (19 April 2024), available here: www.lawsociety.org.nz.
290 All Party Parliamentary Group on Democracy and the Constitution *An Independent judiciary —Challenges Since 2016* (2022) at 55.
291 All Party Parliamentary Group on Democracy and the Constitution *An Independent judiciary —Challenges Since 2016* (2022) at 55.
292 Frazer Barton *Attacks on judges risk weakening the justice system* (19 April 2024), available at: www.lawsociety.org.nz.

9.8 Recent remarks which have caused concern include, for example, threats to reform or "shut down" the "activist" Waitangi Tribunal,[293] and criticisms of:

a. sentencing decisions made by judges;[294]

b. declarations of legislation being inconsistent with the Bill of Rights Act;[295] and

c. decisions to allow certain claims to proceed to trial, as well as decisions to recognise rights and interests protected by legislation, and to infuse tikanga into the common law.[296]

9.9 It appears these trends are not confined to Aotearoa New Zealand. In the United Kingdom, for example, a Judicial Independence Inquiry recently concluded that "ministers have, from a constitutional perspective, acted improperly in attacking judges … doing so in a way that might reduce public confidence in the judiciary", prompting the former President of the Law Society of England and Wales to call on politicians to "not castigate judges for finding that the law does not fit with their political objectives".[297]

9.10 A 2024 survey of legal professionals from around the world also identified challenges to the independence of the legal profession, including the judiciary, as one of the main challenges to the rule of law.[298]

Addressing these problems

9.11 To uphold judicial independence, judges must remain impartial and apolitical, and be perceived in that way. Unlike elected officials (whose legitimacy rests in the democratic process, and are accountable to their electorate), judges are not accountable for their judgments to any institution, and this is necessarily so in order to safeguard their judicial independence.[299]

9.12 Because judges cannot defend themselves, it falls on others, including members of the profession, and organisations such as the Law Society, to speak in defence of the judiciary where appropriate.

"The Law Society and the legal profession have a statutory obligation to promote the rule of law, and it is generally expected that this involves speaking in defence of the judiciary and our legal system, where necessary and appropriate, and it feels very appropriate right now."[300]

293 Marc Daalder "Ministers accused of Cabinet Manual breach with threats to Waitangi Tribunal" *Newsroom* (online ed, New Zealand, 19 April 2024); Te Manu Korihi "Government announces review into Waitangi Tribunal, Seymour calls it 'activist'" *Radio New Zealand* (online ed, New Zealand, 9 May 2025).

294 Adam Pearse "Sacked Labour Party minister Stuart Nash wants more accountability for judges as he exits politics" *The New Zealand Herald* (online ed, New Zealand, 17 August 2023); Jamie Ensor "Winston Peters references Auckland CBD shooting in call for 'justice, common sense' to be returned to NZ" *Stuff* (online ed, New Zealand, 23 July 2023); Rachel Maher "Bar Association voices concern after criticism of Auckland shooter sentencing" *The New Zealand Herald* (online ed, New Zealand, 23 July 2023); .

295 Anna Rawhiti-Connell "The Supreme Court's judgment on the voting age and what comes next" *The Spinoff* (online ed, New Zealand, 22 November 2022).

296 Marc Daalder "Shane Jones criticised over attack on Supreme Court ruling" *Newsroom* (online ed, New Zealand, 19 February 2024); Russell Palmer "Minister Shane Jones to get another talking to over judiciary commentary" *Radio New Zealand* (online ed, New Zealand, 29 August 2024); Jacqueline So "New Zealand Bar Association calls out 'misinformed criticism' of judges" *NZ Lawyer* (New Zealand, 21 August 2020).

297 I Stephanie Boyce *"Rule of law" or "rules of law"? Public perceptions of the law and what it means for those who uphold it* (2022) at 17.

298 See International Bar Association *Future of Legal Services — White Paper 2024* (October 2024) at 5.

299 JUSTICE *The State We're In: Addressing Threats & Challenges to the Rule of Law* (September 2023) at 69–70.

300 Frazer Barton *Attacks on judges risk weakening the justice system* (19 April 2024), available at: www.lawsociety.org.nz.

9.13 The Law Society has voiced its concerns on numerous occasions, and written to the current Attorney-General about attacks on the judiciary.[301] As set out in the Cabinet Manual, it is the role of the Attorney-General to defend the judiciary by answering improper or unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions.[302] While the Attorney-General has, on some occasions, taken steps to discuss these concerns with relevant Ministers, more could be done to defend the judiciary and to maintain the separation of powers.

9.14 Some of the criticisms directed at judges appear to stem from misunderstandings about the role of the courts and judges, particularly in common law jurisdictions such as Aotearoa New Zealand. As Justice Philip Jeyaretnam, President of the Singapore International Commercial Court, explained in a recent keynote speech:[303]

> *"When confronted with legal problems for which existing codes and statutes give no clear answers, judges are left to fill in the gaps by means of interpretation and inference. In areas governed by the common law, the rules are formulated, modified and abandoned by judges reasoning inductively from one case to another. Such creative activity reflects the normal operation of the judicial process, and the system can't function without it. This kind of law making inherent in the common law method operates interstitially and incrementally. But there are limits to this. Such judicial creativity takes precedent as its raw material and never starts with a blank canvas. It's constrained by the focus of the courts on the case at hand ..."*

9.15 More authoritative and accessible guidance about the role of Aotearoa New Zealand's courts and judges could perhaps dispel some of the misconceptions about the role of the judiciary, and reduce unfair criticisms of judges.

Automated decision-making

9.16 The use of automated decision-making (**ADM**) systems (including those which utilise artificial intelligence (**AI**)) in decision-making processes is becoming more common in Aotearoa New Zealand and beyond. John Tasioulas, Professor at the University of Oxford, has attributed this to the "political allure of the idea that AI, and digital technology more generally, might be able to deliver legal services of comparable, or even superior, quality to those provided by humans, but much more rapidly and at a significantly reduced cost, and perhaps without the support or even involvement of governments".[304]

301 See, for example, the Law Society's statements: "Criticism of Judge unfair" (27 August 2015); "Attacks on judges risk weakening the justice system" (19 April 2024); Letter from Law Society to Hon Judith Collins KC (Attorney-General) about Ministerial comments about the judiciary (23 August 2024); Letter from Law Society to Hon Judith Collins KC (Attorney-General) about new concerns regarding further comments made by Hon Shane Jones (30 August 2024). The statements are available at: www.lawsociety.org.nz.

302 Cabinet Office *Cabinet Manual 2023* at [4.8].

303 Justice Philip Jeyaretnam, President of the Singapore International Commercial Court "Keynote Panel: Small States — Disaster, Disruption & Resilience" (Small States — Disaster, Disruption & Resilience, London, 14 November 2024).

304 John Tasioulas "The Rule of Algorithm and the Rule of Law" (7 January 2023, *Vienna Lectures on Legal Philosophy*), available at SSRN: ssrn.com/abstract=4319969 at 2.

9.17 ADM systems can increase the speed and efficiency with which decisions are made and tasks are completed and, in some cases, help to strengthen the rule of law. As Lord Sales recently observed:[305]

> *"[T]hrough accuracy, ADM is capable of promoting the rule of law. One aspect of this is the elimination of capriciousness through the consistent application of rules. Where the volume of decisions is very large, as in the immigration or social welfare contexts, a human decisionmaker would not be able to check their reasoning against the reasoning of all past decisions to make sure that they are being consistent, as is possible with ADM. Humans are also liable to make decisions based upon their subjective will or whim, even if only subconsciously. Subject to allowing for problems of building in biases through programming or distortions in data bases used for machine learning, ADM can operate free of this."*

9.18 However, a global survey undertaken by the IBA has identified the use of AI in dispute resolution and the delivery of justice as a key rule of law issue affecting the profession.[306]

9.19 ADM systems can undermine the rule of law by reducing accountability and transparency around how the law has been applied to particular circumstances. For example:

a. Humans will have limited capacity to effectively scrutinise the decision-making processes of an ADM system and its compliance with the rule of law, which risks turning it into "an instrument of technocratic control over which there is limited democratic oversight".[307]

b. The use of ADM systems in government departments raises rule of law concerns about the improper delegation of any discretionary powers which must be exercised by the government by making some form of evaluative judgment. Where a public sector body is given an element of discretion in its decision-making, it must put its mind to the decision and not follow any policy it adopts blindly and inflexibly.[308] The use of ADM systems, which are incapable of exercising evaluative judgement and making merit-based decisions and instead adopt a 'one-size-fits-all' approach (which fetters discretion), could amount to an improper delegation of such discretionary powers.[309]

c. Even where discretion is built into the machine-learning algorithm, that is done by data scientists and engineers who are unlikely to have the necessary experience and training to adopt administrative enactments, or to specify how a law should be applied[310] – this could be problematic where, for example, ADM systems are to be used to determine and impose sanctions on individuals, in circumstances where there are discretionary elements or judgment that could be exercised.[311]

305 Lord Sales "Judicial Review Methodology in the Automated State" (Presentation for the *Conference on Automation in Public Governance — Theory, Practice and Problems*, September 2024) at 3.
306 International Bar Association *Future of Legal Services — White Paper 2024* (October 2024) at 5.
307 John Tasioulas "The Rule of Algorithm and the Rule of Law" (7 January 2023, *Vienna Lectures on Legal Philosophy*), available at SSRN: ssrn.com/abstract=4319969.
308 Lord Sales "Judicial Review Methodology in the Automated State" (presentation for the *Conference on Automation in Public Governance — Theory, Practice and Problems*, September 2024) at 9.
309 Improper delegation includes putting a decision "into the hands of a third person or body not possessed of statutory or constitutional authority": see *Ellis v Dubowski* [1921] 3 KB 621.
310 Nathalie A Smuha (ed) *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence* (Cambridge University Press, February 2025, online ed) at 396.
311 While New Zealand statutes currently permit the use of ADM within government departments, they do not allow its use for the imposition of sanctions or penalties: see for example Biosecurity Act 1993, s 124F; Immigration Act 2009, ss 28 to 29A; Food Act 2014, s 374.

The Law Society recently expressed concerns about such a proposal. In December 2024, a Social Security Amendment Bill was introduced that would allow the Ministry of Social Development to use ADM systems to make decisions about sanctions (including sanctions on young persons and young parents). In a submission to the Social Services and Community Select Committee,[312] the Law Society raised significant concerns about whether the proposed ADM systems can accurately and appropriately operate where evaluative judgement is required, or where the potential for sanction arises following the exercise of evaluative judgement. The submission also raised concerns about the absence of safeguards and parameters to constrain and guide the proposed use of ADM in this context, and broad drafting of the enabling provision despite a stated intention for much narrower use. The Select Committee did not recommend any amendments to the ADM provisions in the Bill to address these concerns, and the legislation was enacted in May 2025.[313]

Around the same time, the Government introduced a second Bill to authorise the use of ADM to administer mandatory reviews of welfare benefits.[314] Parliament has agreed to introduce and pass the Bill through all stages under urgency, without any opportunity for public input or select committee scrutiny of the proposal.[315]

d. ADM systems which use machine learning algorithms can create impenetrable systems which are often referred to as 'black boxes'. The workings of black boxes are mysterious: we can examine their inputs and outputs, but we are unable to explain how one becomes the other.[316] Where black box ADM systems are used by government departments, they can create challenges in the judicial review process by making it difficult to understand how and why a certain decision was made, whether relevant powers were properly exercised in making that decision, whether relevant factors were considered, and whether bias or discrimination in the learning input for the algorithm influenced that decision.[317] Even where the internal workings of an ADM system can be accessed, those workings may not be accessible to others — for example, because of restrictions imposed by intellectual property rights in the algorithm, or concerns about security (such as that publicising the algorithm will allow gaming of the system by malevolent actors).[318]

e. ADM systems could also encounter unforeseen obstacles that impair their effective operation. There is a risk, for instance, that parties may be able to 'game the system', using strategies such as selectively suppressing information or making false or irrelevant factual claims to skew the operation of the ADM system unfairly in their favour.[319]

f. The use of ADM systems as adjudicative tools could cause disillusionment and alienation among individuals, and influence them to cease participating in the legal system.[320]

312 Law Society submission on the Social Security Amendment Bill 2024 (103-1) (8 January 2025), available on the Law Society's website: www.lawsociety.org.nz.
313 Report of the Social Services and Community Select Committee, Social Security Amendment Bill 2024 (103-2) (14 April 2025).
314 Social Security (Mandatory Reviews) Amendment Bill 2025 (158-1).
315 (22 May 2025) 784 NZPD (Urgency, Hon Chris Bishop).
316 This may be because it uses data which is not accessible to the data subject, and/or it deploys algorithms which are either similarly inaccessible, or are so complex that they cannot be reduced to a series of comprehensible rules and rule applications: see Frank Pasquale *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press, England, 2015) at 3; Frank Pasquale "Normative Dimensions of Consensual Application of Black Box Artificial Intelligence in Administrative Adjudication of Benefits Claims" (2021) 84(3) LCP 35 at 36.
317 Lord Sales "Judicial Review Methodology in the Automated State" (presentation for the *Conference on Automation in Public Governance — Theory, Practice and Problems*, September 2024) at 5-8.
318 John Tasioulas "The Rule of Algorithm and the Rule of Law" (7 January 2023, *Vienna Lectures on Legal Philosophy*), available at SSRN: ssrn.com/abstract=4319969 at 14.
319 John Tasioulas "The Rule of Algorithm and the Rule of Law" (7 January 2023, *Vienna Lectures on Legal Philosophy*), available at SSRN: ssrn.com/abstract=4319969 at 8.
320 R Re and A Solow-Niederman "Developing Artificially Intelligent Justice" (2019) 22 *Stanford Technology Law Review* 240.

Addressing these problems

> **"... it would be naïve to suppose that the spread of ADM through government will necessarily bring us closer to an ideal of administrative decision-taking. The risks of automation are as important as the potential benefits. The increasing demand for administrative efficiencies may overwhelm an appreciation of the value of achieving substantive justice for the individual. This may give rise to a new variation on the theme of the impatience of administrators (their "eternal contempt") regarding law and legal process, for whom respect for human rights, individual-focused procedural protections and any requirement to give reasons or justify actions to a court are impediments to effective decision-making ..."**[321]

9.20 It is imperative that there are constraints and prerequisites for the use of ADM systems, particularly within government departments, the courts and other adjudicative or decision-making bodies. For example:

a. Those who are looking to use AI and ADM should be aware of the risks involving hallucinations and bias.

b. Black-box ADM systems should not be used in government departments.

c. Decisions which require evaluative judgement, or the exercise of some discretion, or which result in a sanction, penalty or other punishment, should not be delegated to ADM systems.

d. Where possible, there should be human oversight of other decisions made by ADM systems, as well as the ability for affected individuals to request a human review or reconsideration of an issue previously decided by using an ADM system.

e. If ADM is to be used, its use should be expressly recognised and regulated by primary legislation, and constrained by appropriate safeguards and guidance on its appropriate use.

f. Officials who are involved in drafting bills should also be mindful that Parliament will not usually have ADM systems in mind when debating and passing legislation which permits delegation of Ministers' or officials' decision-making powers. It would be helpful to include information about the reasons for allowing such powers to be delegated, either within the legislation itself or in separate guidance or policy material relating to the bill in question, to assist in determining whether such powers can be lawfully delegated to ADM systems.

9.21 The Law Society has written to Te Aka Matua o te Ture | Law Commission suggesting the Commission undertake a project on the impacts and the risks associated with AI use, how well current laws work for regulating AI, and the significant legal and ethical issues which remain to be addressed.[322]

9.22 However, independent of this, current and future governments must also undertake further work (including through consultation with experts, key stakeholders and the public) to prescribe clear rules and best practices for the safe, ethical and responsible use of ADM in a way that does not undermine the rule of law.

321 Lord Sales "Judicial Review Methodology in the Automated State" (presentation for the *Conference on Automation in Public Governance — Theory, Practice and Problems*, September 2024) at 3.

322 Letter from Aimee Bryant (Law Society Acting General Manager Policy, Courts and Government) to Linda McIver (General Counsel at Te Aka Matua o te Ture | Law Commission) about the Law Commission's 2024/25 work programme (14 October 2024).

10 Implementing our recommendations to promote and protect the rule of law

10.1 This report has explored key challenges identified by lawyers and academics to the rule of law in Aotearoa New Zealand. The challenges include:

a. difficulties with accessing and understanding the law;

b. poor awareness and understanding of the rule of law;

c. difficulties with accessing lawyers and legal advice;

d. difficulties with accessing the courts, tribunals and other dispute resolution services;

e. legislation which reduces the clarity, certainty and predictability of the law;

f. legislation which prevents or limits judicial review or appeal rights;

g. rushed policy development processes, and the use of urgency;

h. the use of Amendment Papers as a mechanism for making significant policy changes;

i. Bill of Rights Act vetting processes;

j. the use of automated decision-making systems; and

k. actions which undermine the separation of powers and judicial independence.

10.2 A number of recommendations for addressing these challenges (summarised in Appendix 1 of this report) will require government action. However, there is also scope for lawyers as well as the Law Society to take steps to help promote and uphold the rule of law.

Actions for the government

10.3 Our research has highlighted that limited funding and resources have a significant impact on the performance of the rule of law in Aotearoa New Zealand. Given this, it is not surprising that the implementation of many recommendations in this report will require additional and ongoing government support, funding and resources.

10.4 We invite the current and future governments and Parliaments[323] to consider how to allocate and use the limited resources and funding at their disposal to tackle the challenges we have identified, and strengthen the rule of law. Care must be taken to do so in a way that allows for ongoing long-term government funding and support, and does not exacerbate the impacts of other challenges.[324]

"A strong rule of law and full access to justice not only ensures our society can function, but that it can function well."[325]

Actions for the Law Society

10.5 Our research has also highlighted that the Law Society is particularly well-placed to promote and strengthen the rule of law, for example, by:

a. Carefully scrutinising law reform proposals and bills introduced to Parliament, and identifying any rule of law and access to justice concerns they raise.

b. Advocating for improved access to justice, including by engaging with the judiciary, the Executive, the legal profession, and other stakeholders, and facilitating engagement across these groups.

c. Continuing, where appropriate, to defend the judiciary from inappropriate criticisms, and supporting the mechanisms in place to address legitimate concerns about judicial conduct.

d. Advocating for better policymaking and legislative processes (including by engaging with select committees and officials).

e. Preparing resources and educational material for members of the profession and the public, such as: a rule of law checklist to assist those involved in drafting and scrutinising legislation; guidance on the rule of law; and guidance on how to participate in law reform.

f. Where possible, reporting on our law reform and advocacy work to promote transparency and public awareness of current rule of law issues.

g. Working with other legal bodies such as the New Zealand Bar Association | Ngā Ahorangi Motuhake o te Ture and Te Hunga Rōia Māori o Aotearoa to take a coordinated approach to promoting and increasing awareness of the rule of law.

323 That is, to the extent Parliament is involved in the budget process, and in scrutinising the government's spending.
324 As suggested by the IBA – see: International Bar Association *Future of Legal Services – White Paper 2024* (October 2024).
325 Tamsyn Hyatt *Talking about the rule of law and access to justice* (FrameWorks UK, February 2025) at 1.

Actions for lawyers

10.6 Lawyers have an important role to play in upholding the rule of law. We agree with the IBA that:[326]

> *"Lawyers' efforts are essential to the implementation of the Rule of Law and the provision of access to justice. The UN Basic Principles on the Role of Lawyers emphasize that lawyers have a vital role to play in upholding the Rule of Law by informing the public about their rights and duties under the law and in protecting their fundamental freedoms. Lawyers' advocacy work provides the public with access to the courts to enforce their rights and resolve disputes, often without court intervention. Lawyers with expertise in human rights promote justice through taking on cases in the defense of people facing grave deprivation of their basic human rights and liberties, often putting their own safety at risk in the process. … The legal profession also pursues justice by restraining the executive and protecting the separation of powers within the state. These are both essential tenets of the Rule of Law. … The profession's independence acts as a check on the executive power, which serves to strengthen the institutions."*

10.7 The profession is uniquely well placed to advocate for the rule of law where opportunities arise, and to proactively address challenges to the rule of law, for example, by:

a. Drawing attention to threats to the rule of law, and instances where the rule of law has been undermined. Practitioners who are unsure where or how to escalate a rule of law concern are welcome to raise concerns with the Law Society by emailing: lawreform@lawsociety.org.nz.

b. Stepping in to defend the judiciary from unfair criticisms which undermine judicial independence and the separation of powers.

c. Engaging with law reform processes to help identify and deal with potential threats to the rule of law during policy development and legislative processes.

"The work of the legal profession contributes to weaving the tapestry for the Rule of Law to operate at its best, spurring social impact and triggering the advancement of democracies and the development of societies."[327]

326 International Bar Association *The IBA report on the social and economic impact of the legal profession* (2024) at 11.
327 International Bar Association *The IBA report on the social and economic impact of the legal profession* (2024) at 6.

Appendix 1: Summary of recommendations

Removing barriers to access to justice

Improving the accessibility of the law

1. Legislation should be as clear and simple as possible to comply with where it imposes obligations, and as easy as possible to invoke for the people who are meant to benefit from it.
2. There must be public information campaigns and other guidance about the operation of the law, particularly for those to whom the new laws will apply.

Ensuring the long-term sustainability of the legal aid scheme

3. The government should provide appropriate remuneration for legal aid providers.
4. The government should ensure the legal aid system is adequately resourced so it is able to flex and adapt to increasing demand.
5. The upcoming review of the legal aid system should not be a cost-cutting exercise, and should result in a commitment to provide ongoing, increased investment in the legal aid system.

Improving the Duty Lawyer Scheme

6. The government should develop an action plan and set aside necessary funding to implement the recommendations in the KPMG report on the Duty Lawyer Scheme.

Other ways of improving access to legal representation and advice

7. Lawyers should reach out to Community Law Centres and Te Ara Ture if they are interested and able to provide pro bono assistance.
8. Community Law Centres and Te Ara Ture should be well funded and supported to provide pro bono services.
9. The government should consider setting up a duty lawyer scheme or roster to assist self-represented litigants in civil matters.
10. Litigants and parties to disputes should be encouraged to make greater use of legal expenses insurance schemes where they can afford to do so.

Improving access to the courts, tribunals and other dispute resolution services

11. The government should invest in more human resources across the courts, tribunals and dispute resolution bodies.
12. Funding is also needed for initiatives to ensure 'solution-focused courts' can be made available to everyone.
13. The government must invest in suitable technology for the courts, tribunals and dispute resolution bodies, as well as suitable facilities for using that technology.
14. The government must commit to providing greater and ongoing investment in courthouses, both for maintenance and improvements.
15. The government must show support and provide funding for initiatives aimed at breaking down cultural, social and language barriers – these include:
    a. The expansion of Te Ao Mārama to other District Courts across the country.
    b. The expansion of the Matariki Courts.
    c. Additional resourcing for the Rangatahi and Pasifika Courts.
    d. Increasing the use of simultaneous interpretation in courts and tribunals.
16. The government must take a holistic approach to funding and investment decisions when making improvements to Aotearoa New Zealand's dispute resolution systems.

Improving policy and legislative processes

17. The Law Society should continue to identify and speak out against poor policymaking and legislative processes, and advocate for improvements.
18. The Law Society should also continue to monitor and, where possible, raise concerns about reform proposals which appear to be inconsistent with the Bill of Rights Act.

Adhering to principles of good legislation

19. Consistent with recommendations made by others, the Law Society recommends:
    a. Legislatures should allow time and opportunity for informed and open policy deliberation.
    b. The legislative process should allow sufficient time and opportunity for the adequate scrutiny of bills.
    c. Citizens should be able to participate in the legislative process.
    d. Parliaments should operate in a transparent manner.
    e. The House should strive to produce high quality legislation.
    f. Legislation should not jeopardise fundamental constitutional rights and principles.
    g. Parliaments should follow stable procedural rules.
    h. Parliament should foster, not erode, respect for itself as an institution.
    i. The government has a right to govern, so long as it commands a majority in the House.
    j. Parliament should be able to enact legislation quickly in genuine emergency situations.

20. Successive governments must offer bipartisan support to put these principles and processes into practice.

Undertaking meaningful consultation and engagement with stakeholders and the public

21. Those looking to progress reforms should undertake meaningful consultation on what is being proposed – this should ideally involve public consultation, or, at the very least:
    a. enable targeted engagement with experts and groups who are likely to be affected by the proposed policy;
    b. give submitters adequate time to engage with the policy proposals and provide feedback;
    c. allow modifications to the law reform proposal (including significant policy changes) to address legitimate concerns raised during the consultation process; and
    d. require the publication of information about feedback received during the consultation process, as well as policy changes which respond to concerns raised by submitters.
22. Where some policy analysis has been undertaken by Te Aka Matua o te Ture | Law Commission or a similar body, government departments should refer to any reports produced by the Commission, and take into account any evidence, and legal and policy analyses contained in those reports when developing policy and legislative proposals.
23. Ministers and officials must meet expectations outlined in existing resources on genuine and meaningful engagement.
24. Officials should ensure key documents relating to government bills are publicly available at the time the bill is introduced to the House.
25. Policy implementation timeframes should account for all bills being referred to a full six-month select committee process, unless the circumstances justify a shorter period.
26. The use of urgency should otherwise be rare, and justified by a genuine need for haste in relation to the particular measure. It should not be used as a tool for meeting arbitrary deadlines or operational deadlines which are known in advance, or for enhancing the 'performance' of a government.
27. The Standing Orders Committee could look to revise the Standing Orders to expressly limit the use of urgency to these narrow circumstances.
28. Select committees should have the ability to invite and consider public submissions on bills, and, where possible, give submitters adequate time to provide feedback.
29. If significant policy amendments are proposed to a bill after the select committee stage, the bill should be referred back to the select committee so submitters can comment on the amendments.
30. The Attorney-General should provide further details about any measures in place for dealing with policy and legislative processes which fall short of best practice.

Enabling consultation on Amendment Papers

31. Where an Amendment Paper is introduced while a bill remains before a select committee, the select committee should reopen for public submissions on the Amendment Paper.

32. If the select committee recommends any significant changes to the provisions in the Amendment Paper, the bill should be recommitted to a committee of the whole House for debate.

Undertaking post-legislative scrutiny

33. The Standing Orders could be modified to enable Parliament to carry out post-legislative scrutiny of legislation passed by the House. Alternatively, post-legislative scrutiny could be undertaken by government departments when discharging their stewardship obligations.

34. Legislation passed under urgency should be subject to post-legislative scrutiny within a specified timeframe.

35. Any recommendations (from either a select committee or government department) to amend the legislation should be informed by expert and public feedback about the operation and impacts of the legislation.

Improving the Bill of Rights Act vetting process

36. Officials who prepare advice on whether a bill appears to be consistent with the Bill of Rights Act must ensure all relevant Bill of Rights Act issues engaged by a proposed bill are identified and properly considered in advice to the Attorney-General (regardless of whether any limits on rights or freedoms can be demonstrably justified in a free and democratic society).

37. Advice provided to the Attorney-General should also be made publicly available at the time the bill is introduced to the House.

38. Officials should also consider the potential Bill of Rights Act implications of law reform proposals earlier in the policy development process. Where possible, this should occur before Ministerial and Cabinet approval is sought on key policy matters.

39. The Standing Orders could be amended to provide for a process for Parliament to receive annual government reports on the number and the types of inconsistencies with the Bill of Rights Act, and the effect of those inconsistencies (which could then be considered as part of a post-legislative scrutiny process).

40. The Standing Orders could also provide for a mechanism for reviewing declarations of inconsistency by a Parliamentary committee once a Parliamentary term.

41. Parliament could establish a bespoke Parliamentary select committee which is responsible for scrutinising bills at the select committee stage for consistency with the Bill of Rights Act. The committee's tasks could include reviewing section 7 reports, Bill of Rights Act advice prepared by officials, and annual reports, and recommending amendments to bills to address concerns. The committee could also undertake post-legislative scrutiny of legislation to ensure it is consistent with the Bill of Rights Act.

Addressing rule of law issues arising from the substantive content of legislation

Retrospective legislation

42. Where legislation is intended to override a decision of the courts, the scale, nature and retrospectivity of such a change should be given careful consideration to ensure the least risk of disturbing constitutional arrangements.

43. Where there are good reasons for a law to apply with retrospective effect and alter the law as determined by a court, the public interest in having the law clarified generally must be weighed against the competing interest of allowing litigants to conclude their proceedings under the law as it was when they commenced their proceedings.

44. RISs, Cabinet papers and other documents relating to a proposed law that is to have retrospective effect should include information about:

    a. why the proposed law cannot have prospective effect, or why retrospective application is otherwise considered appropriate;

    b. whether any alternative policy responses were considered to address the problem the retrospective legislation seeks to solve;

    c. any potential adverse impacts of retrospective application of the proposed law; and

    d. any public or targeted consultation about the retrospective application of the proposed law,

    and this should be so even when retrospective application is considered appropriate in the circumstances.

Legislation containing 'Henry VIII clauses'

45. Henry VIII clauses should only be included in an Act in exceptional circumstances, and should not be used as a tool to routinely reform legislation. They should not be used if the purpose of the provision can be achieved by any other means.

46. Decision-makers and policy officials should first carefully consider if it is feasible to modify the primary legislation via an Amendment Bill (rather than by relying on a Henry VIII provision).

47. Henry VIII clauses should be drafted in the most specific and limited terms possible, and should not enable the Executive to make substantive modifications to primary legislation or underlying policies.

48. Officials should undertake public consultation on proposals to include Henry VIII clauses in legislation. If public consultation is not feasible, officials should, at the very least, undertake targeted consultation on the design of the legislation with those who are most likely to be impacted by the exercise of the proposed powers.

49. Materials which support the bill containing the Henry VIII clause should include information about the specific purpose that the Henry VIII power is designed to serve and how it is anticipated the power will be used.

50. Where possible, the legislation should limit the exercise of Henry VIII powers, for example, by specifying that such powers can be exercised only by the Governor-General in Council, or imposing a time limit on the exercise of the powers.

51. Parliament must be enabled to review, approve, disallow and report on secondary legislation made by exercising Henry VIII powers.

52. Secondary legislation made by exercising Henry VIII powers should be published and notified in the *New Zealand Gazette*, regardless of whether it was drafted by the Parliamentary Counsel Office.

53. A department seeking to exercise a Henry VIII power must justify why the exercise of that power is necessary before an appropriate select committee.

Legislation which gives the Executive absolute discretion to act or make decisions

54. Proposals to give Ministers and officials absolute discretion require careful consideration of whether the scope of that discretion can be limited or narrowed to reduce the potential for arbitrary exercise of powers.

55. Ministers and officials should record and retain reasons for any decisions made or actions taken in their absolute discretion, and these reasons should demonstrate that the decision-maker has turned their mind to any relevant information and considerations, and how the decision was reached.

Legislation which prevents or limits judicial review or appeal rights

56. The Government must undertake a comprehensive first-principles assessment of the Disputes Tribunal scheme, which considers, among other things, expansion of appeal rights to the District Court.

57. Legislation should not inappropriately limit appeal rights. If limits are considered necessary for any reason, those reasons should be made clear in key documents relating to that proposal, and include careful consideration of the purpose of the appeal, the competence of the appellate body, and the appropriate balance between finality, accurate fact-finding, and correct interpretation of the law.

58. Legislation should not remove the right to apply for judicial review. Restrictions placed upon the right should be rare, limited to cases where finality is critical, and be proportionate to that objective.

59. If an ouster clause is to be included in a bill, the supporting material for that bill should contain information about why the inclusion of those provisions is considered necessary and / or appropriate.

60. It is not generally appropriate to exclude appeals to the Supreme Court.

61. As noted in the *Legislation Guidelines*, new legislation should rely on existing appeals procedures unless there are compelling reasons to create new procedures, and first appeals should generally include a right of appeal on the facts.

Increasing awareness and understanding of the rule of law

62. The Law Society should publish additional resources and guidance about the rule of law for the profession and the public.
63. Where possible, the Law Society should report on its law reform and advocacy work to promote transparency and awareness of current rule of law issues.
64. The Law Society should work with other legal bodies to take a coordinated approach to promoting and increasing awareness of the rule of law.

Maintaining the separation of powers and judicial independence

65. Members of the profession, and organisations such as the Law Society, must step in to defend the judiciary from unfair criticisms which undermine judicial independence and the separation of powers.
66. More authoritative and accessible guidance about the role of Aotearoa New Zealand's courts and judges should be produced to dispel misconceptions about the role of the judiciary, and reduce unfair criticisms of judges.

Constraining the use of ADM

67. Those who are looking to use AI and ADM should be aware of the risks involving hallucinations and bias.
68. Black-box ADM systems should not be used in government departments.
69. Decisions which require evaluative judgement, or the exercise of some discretion, or which result in a sanction, penalty or other punishment, should not be delegated to ADM systems.
70. Where possible, there should be human oversight of other decisions made by ADM systems, as well as the ability for affected individuals to request a human review or reconsideration of an issue previously decided by using an ADM system.
71. If ADM is to be used, its use should be expressly recognised and regulated by primary legislation, and constrained by appropriate safeguards and guidance on its appropriate use.
72. Those involved in drafting legislation should include information about the reasons for allowing such powers to be delegated, either within the legislation itself or in separate guidance or policy material relating to the bill in question, to assist in determining whether such powers can be lawfully delegated to ADM systems.
73. Current and future governments must undertake further work to prescribe clear rules and best practices for the safe, ethical and responsible use of ADM in a way that does not undermine the rule of law.

And, more generally:

74. The current and future governments and Parliaments must consider how to allocate and use the limited resources and funding at their disposal to tackle the challenges identified in this report, and strengthen the rule of law. Care must be taken to do so in a way that allows for ongoing long-term government funding and support, and does not exacerbate the impacts of other challenges.

75. The Law Society should continue to advocate for improvements to access to justice through:

    a. law reform submissions and participation in consultations;

    b. ongoing engagement with the legal profession and key stakeholders; and

    c. continued support and involvement in current and upcoming initiatives to improve access to justice.

76. The Law Society must continue to scrutinise law reform proposals as well as individual provisions in bills introduced to Parliament, and alert Parliament and the Executive to any rule of law concerns they may raise.

77. Lawyers must continue to draw attention to threats to the rule of law, and instances where the rule of law has been undermined.

78. Lawyers are encouraged to engage with law reform processes to help identify and deal with potential threats to the rule of law during policy development and legislative processes.

Appendix 2: Additional information about the Law Society's 2024 survey

Overview of the survey

The survey was conducted online via *SurveyMonkey*. It was open from 6 to 30 June 2024, and advertised to members of the legal profession through LawPoints, LinkedIn, and the Law Society's website.

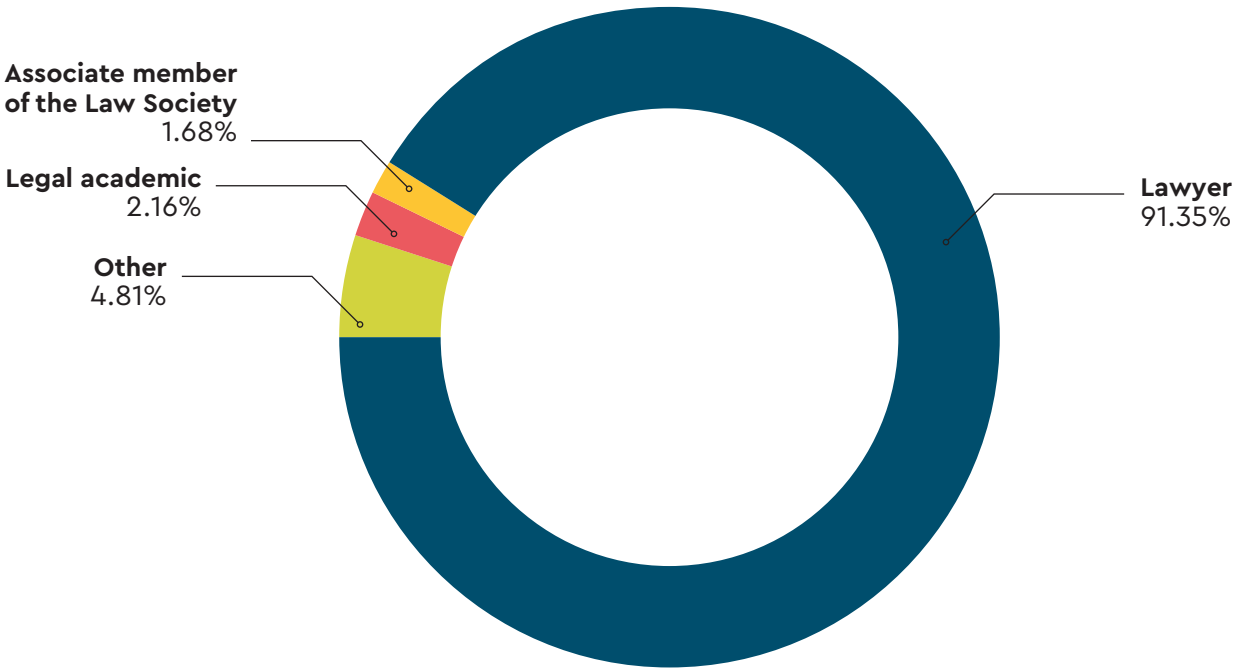
The Law Society received a total of 416 survey responses. Participants were invited to have further discussions with the project team or participate in workshops.

The survey was primarily aimed at, and advertised to, lawyers; however, a number of non-lawyers also responded to the survey (as shown below).

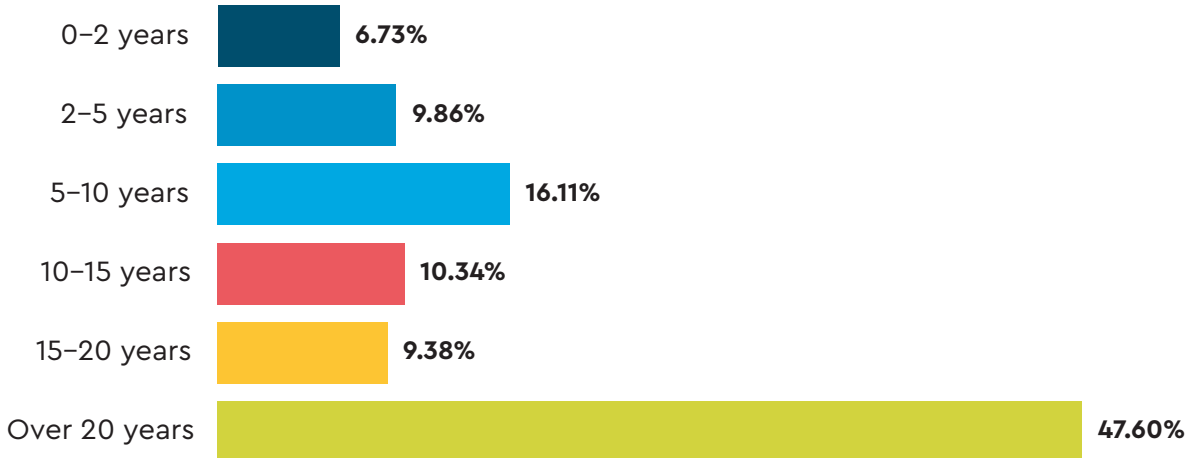
List of survey questions

1. Which of the below best describes you?
2. If you are a lawyer, please select the area(s) you practice in: [options provided]
3. How long have you been working in your profession?
4. How confident are you that you could describe the rule of law?
5. What do you think are the key aspects of the rule of law?
6. In its simplest expression, the rule of law is the principle that the law applies equally to everyone — both the government and its citizens. It is the basic idea that governors, officials and citizens alike should comply with the law, and that ministers, officials and public bodies must follow law when executing their functions. This is the 'thin' conception of the rule of law. The rule of law includes an independent judiciary, and clear and enforceable laws. A 'thick' conception of the rule of law expands to include the protection of human rights, and effective access to justice and redress for individuals. For more information, visit: www.lawsociety.org.nz / for-the-public / the-rule-of-law-in-aotearoa-new-zealand / Does the above definition change what you think are the most important aspects of the rule of law?
7. Do you think the rule of law operates — or should operate — differently in Aotearoa New Zealand today?
8. On a scale of 1 to 10, how would you rate the strength of the rule of law in Aotearoa New Zealand today?
9. What do you think are the key challenges to the rule of law in Aotearoa New Zealand today?
10. If you'd like to talk to us more about your thoughts on the rule of law, please enter your email address (please note this will mean your response is not anonymous).

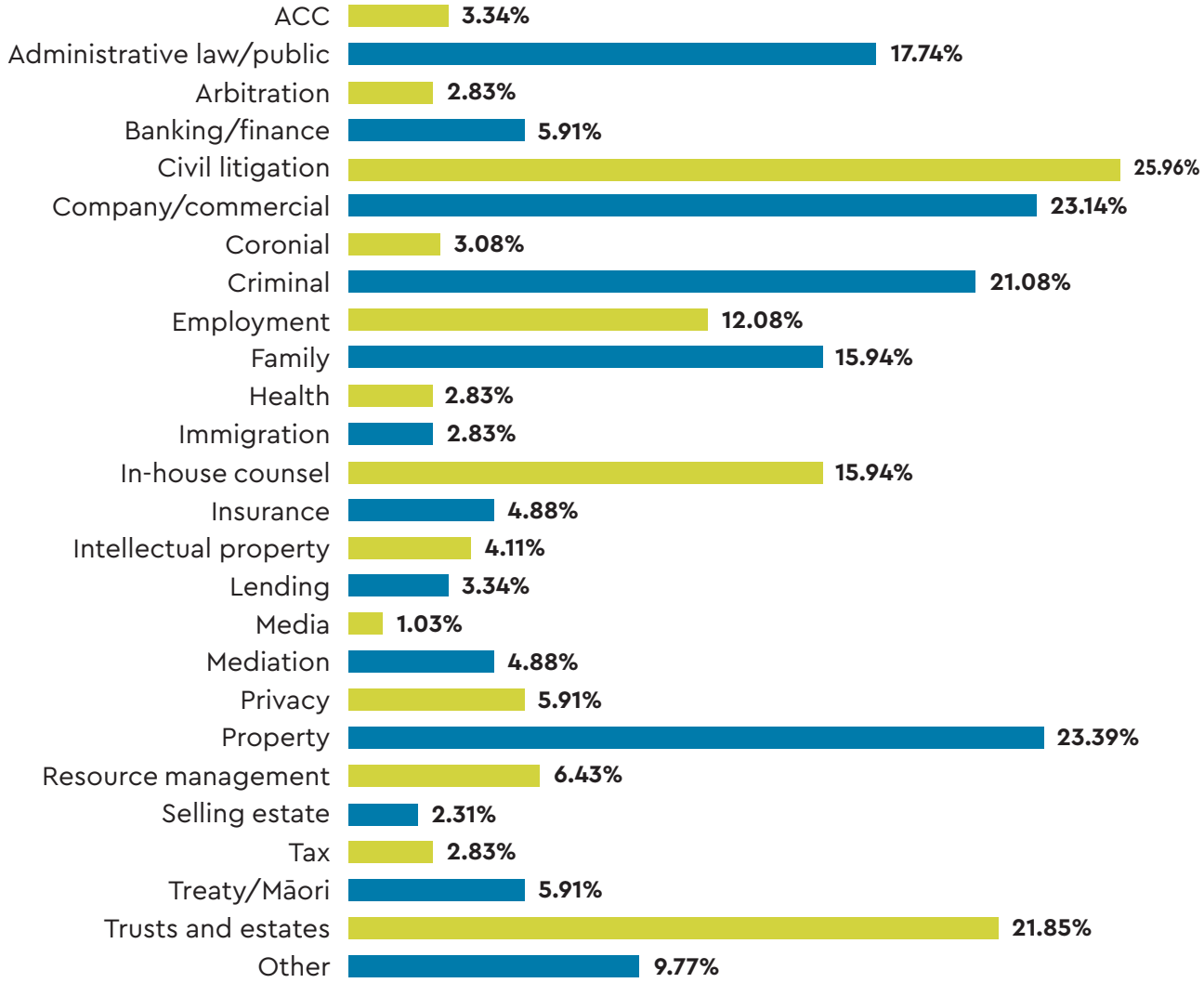
Survey participants



Survey participants' time in practice



Survey participants' areas of practice



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