

# Access to justice for children and young people in Aotearoa New Zealand

## Part Two - Justice problems and barriers for all children and young people

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# Introduction

## Rationale for research

In recent years there has been an increased focus on access to justice in New Zealand including comments from the judiciary,<sup>1</sup> work by the New Zealand Bar Association,<sup>2</sup> and the Otago Legal Issues Centre (now Civil Justice Centre),<sup>3</sup> as well as recent consultations by the Rules Committee,<sup>4</sup> the New Zealand Law Society,<sup>5</sup> and the Wayfinding for Civil Justice Working Group supported by the Ministry of Justice.<sup>6</sup> Internationally there is also an increasing focus on access to justice reflected in the UN Sustainable Development Agenda, particularly Sustainable Development Goal (SDG) 16, “access to justice for all”. As a recent OECD report explains, access to justice is an important part of the well-being of individuals and societies and “[u]nmet justice needs can lead to social, physical and mental health problems, lost productivity, and reduced access to economic opportunity, education, and employment”.<sup>7</sup>

Internationally there is recognition that unmet legal needs tend to affect some groups more than others, and that children and youth are one of the groups in greater need. For example, a 2018 report by the Law Council of Australia reviewed existing literature and undertook extensive consultation about different groups’ access to justice in Australia before concluding:<sup>8</sup>

*Children and young people often experience age-related legal problems but are reluctant to take action in response to a legal problem due to limited financial resources, poor knowledge of their legal rights, uncertainty about available avenues to address legal problems and possible legal remedies, and a perception that the legal system is intimidating, complicated, expensive and biased against them.*

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<sup>1</sup> For example Winkleman, H. (2019). [Speech of The Rt Hon Dame Helen Winkelmann at her swearing in as Chief Justice of New Zealand](#). Courts of New Zealand; Goddard, L. (2021). [A fair go at access to justice](#). Royal Society Te Apārangi.

<sup>2</sup> New Zealand Bar Association Working Group on Access to Justice. (2018). [Access to Justice Āhei ki te Ture](#). New Zealand Bar Association.

<sup>3</sup> See Toy-Cronin, B. (2016). [New Business Models for Legal Services \(Working Paper\). Paper prepared for the New Zealand Bar Association Access to Justice Working Group](#). University of Otago Legal Issues Centre; Stewart, K., & Toy-Cronin, B. (2018). [The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services Pilot Report \(Civil Justice Insight Series\)](#). University of Otago Legal Issues Centre; Stewart, K., Toy-Cronin, B. & Choe, L. (2020). [New Zealand lawyers, pro bono, and access to justice](#). University of Otago Legal Issues Centre; Toy-Cronin, B., & Stewart, K. (2022). [Expressed legal need in Aotearoa: From Problems to Solutions](#). Civil Justice Centre, University of Otago.

<sup>4</sup> Rules Committee. (2022). [Improving Access to Civil Justice](#). Rules Committee Te Komiti Mō Ngā Tikanga Kooti. For information about the earlier stages of this consultation see: Ngā Kōti o Aotearoa Courts of New Zealand. (n.d.). [Improving Access to Civil Justice](#). <https://www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/access-to-civil-justice-consultation/>

<sup>5</sup> New Zealand Law Society. (2020). [Access to Justice: Stocktake of initiatives](#); Kantar Public. (2021). [Access to Justice Research 2021](#). New Zealand Law Society.

<sup>6</sup> See & Ministry of Justice (n.d.). [Wayfinding for Civil Justice - Imagining a better way of working together to improve access to civil justice in Aotearoa New Zealand](#). <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/wayfinding-for-civil-justice/> and Toy-Cronin, B., Asher, R., Mita W.P., O’Brien, G. & Waapu, A. (2022). [Wayfinding for Civil Justice: Draft National Strategy](#). Ministry of Justice.

<sup>7</sup> OECD (2019). [Equal Access to Justice for Inclusive Growth: Putting People at the Centre](#). OECD Publishing at 15.

<sup>8</sup> Law Council of Australia. (2018). [The Justice Project: Final Report Part 1 Children and Young People](#). at 4. For other international research see Emerson, L., Lloyd, K., Lundy, L., Orr, K., & Weaver, E. (2014). [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#). Queens University Belfast; Kilkelly, U. (2010). [Listening To Children About Justice: Report Of The Council Of Europe Consultation With Children On Child-Friendly Justice](#). Council of Europe, Directorate General of Human Rights and Legal Affairs; Davidson, J.; Foussard, C.; Goudie, A.; Hope, K.; Shields, S. (2022). [Justice for Children: Agenda for Change](#). University of Strathclyde.

*These children and young people, such as those who are experiencing homelessness, economic disadvantage, family violence and/or are Aboriginal and Torres Strait Islander, have heightened vulnerability to legal problems and often have complex needs due to a background of trauma and disadvantage.*

Despite this recognition overseas, children and young people's access to justice needs have received little attention in the legal and policy work on access to justice in Aotearoa New Zealand described above. My initial research prior to commencing this study also failed to identify any other studies focussing on children and young people's access to justice in this country.<sup>9</sup> However, the Kids Rights Foundation ranked New Zealand 171 out of 185 countries in their 2022 global ranking of how countries worldwide are adhering to children's rights.<sup>10</sup> New Zealand's lowest ranking (181-185) was in relation to the extent to which countries had operationalized the general principles of the UN Convention on the Rights of the Child (non-discrimination, best interests of the child, the right to survival and development, and respect for the views of the child).<sup>11</sup> New Zealand was also ranked 35th out of 41 EU and OECD countries in UNICEF Innocenti's league table of child well-being outcomes,<sup>12</sup> raising serious questions about just how away far New Zealand is from being the best place in the world for children and young people.<sup>13</sup>

More recently, in February 2023 the United Nations Committee on the Rights of the Child released its Concluding Observations on Aotearoa New Zealand's compliance with the UN Convention on the Rights of the Child which raised concerns that a "significant proportion of children live in poverty and experience food insecurity and severe housing deprivation...resulting in poorer health and education outcomes, disproportionately affecting Māori and Pasifika children."<sup>14</sup> The Committee also raised concerns about the persistently high rates of abuse, neglect and violence against children and the limited access to "child-friendly reporting channels, physical and psychological rehabilitation and health services, including mental health services, available to children who have suffered violence, trauma or abuse."<sup>15</sup>

These studies suggest that children and young people in Aotearoa New Zealand experience many justice related challenges, and that some groups of children and young people are affected more than others. However, we need to better understand these challenges and the barriers to accessing justice experienced by children and young people in order to be able to

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<sup>9</sup> There are a number research studies in relation to specific issues in the youth justice, child protection and Family Court systems but an absence of research in relation to children and young people's justice needs in other areas of the law or interrelated issues in multiple areas of the law.

<sup>10</sup> Kids Rights Foundation. (2022). *KidsRights Index* <https://www.kidsrights.org/research/kidsrights-index/>

<sup>11</sup> Kids Rights Foundation. (2022). *KidsRights Index Methodology* <https://www.kidsrights.org/research/kidsrights-index/methodology/>. These scores are based on the 2016 Concluding Observations of the UN Committee on the Rights of the Child. See Kids Rights Foundation, *KidsRights Index Methodology*. At the time the Kid Rights Index was prepared the most recent Concluding Observation were those from 2016. The UN Committee on the Rights of the Child have now released their Concluding Observations in relation to the sixth reporting round: United Nations Committee on the Rights of the Child. (2023). [Concluding observations on the sixth periodic report of New Zealand](#). The Office of the High Commissioner for Human Rights. However, the KidsRights analysis for 2023 is unlikely to be available until later in 2023.

<sup>12</sup> UNICEF Innocenti. (2020). ['Worlds of Influence: Understanding what shapes child well-being in rich countries'](#), *Innocenti Report Card 16*. UNICEF Office of Research at 11. The most recent Innocenti Report Card focussed on the environment and does not update the information used in this assessment.

<sup>13</sup> This is the overall aim of the Child and Youth Wellbeing Strategy see: The Department of the Prime Minister and Cabinet. (2019). *Our aspirations*. <https://www.childyouthwellbeing.govt.nz/our-aspirations>

<sup>14</sup> United Nations Committee on the Rights of the Child. [Concluding observations on the sixth periodic report of New Zealand](#) at 11.

<sup>15</sup> *Ibid* at 6.

identify what needs to be done to close the justice gap, and ensure that Aotearoa New Zealand is a fair and just society for all children and young people.

## Summary of research study

The overall aim of this research project was to explore the extent to which children and young people are able to access to justice in Aotearoa New Zealand. It considered all areas of the law with a focus on identifying the barriers children and young people experience in accessing justice, including those faced by particular groups of children and young people. The study involved key informant interviews with adults with expertise on the justice system and/or working with particular groups of children and young people who are likely to experience additional barriers in accessing justice, and an online survey with children and young people aged between 14 and 24.

This study also involved reviewing the research and literature from Aotearoa New Zealand and overseas in relation to access to justice for children and young people as well as that relating to access to justice for particular groups. As the research and literature on access to justice for children and young people in this country is fairly limited, I also reviewed research relating to children and young people more generally, and in relation to access to justice for adults and groups of adults facing additional barriers. I also undertook a document review including reviewing information obtained under the Official Information Act 1982 and publicly available data.

I was able to do this study thanks to a Justice Fellowship from the Michael and Suzanne Borrin Foundation: <https://www.borrinfoundation.nz/>

## Report structure

The findings of my research study are presented in three parts:

**Part One** contains my analysis of data from key informant interviews with adults with expertise in the justice system and/or working with particular groups of children and young people, as well as from a survey of children and young people aged 14 to 24.

**Part Two** discusses the meaning of access to justice and other related concepts such as legal empowerment as well as the specific meaning of access to justice for children and child-friendly justice. It then discusses the justice problems experienced by children and young people generally, as well as common barriers to accessing justice. The analysis in this report is based on my review of the research and literature in New Zealand and overseas together with information obtained from the government and Crown entities.

This report is supported by a series of ten working papers discussing the justice problems and barriers to accessing justice experienced by particular groups of children and young people identified as likely to experience differing justice problems or barriers to access. These working papers are:

1. Children and young people in care or with care experience;
2. Disabled and neurodiverse children and young people;
3. Tamariki and rangatahi Māori;
4. Pacific children and young people;
5. Rainbow and takatāpui children and young people;
6. Girls and young women;
7. Boys and young men;
8. Children and young people in poverty or socio-economic disadvantage;

9. Children and young people who have experienced trauma; and
10. Intersectionally disadvantaged children and young people.

**Part Three** explores possible solutions or ways to close the justice gap for children and young people in Aotearoa New Zealand. This part of the study is also supported by a series of working papers in relation to possible solutions. At the time of writing these working papers consider the following topics with additional working papers likely to follow:

11. Strategic litigation;
12. Legal service delivery, non-lawyer services, and integrated services;
13. Data, evidence and measuring change;
14. Technology;
15. Training for professionals;
16. Legal education and continuing professional development for lawyers and judges; and
17. Law-related education for children and young people.

The reports and working papers are available at: <https://www.cypaccesstojusticenz.com/>.



# Executive Summary

## What is access to justice?

I take an expansive interpretation of justice as including both procedural and substantive justice, wider issues of social justice, and other differing conceptions of justice such as culturally specific meanings and access to justice for children and young people and child-friendly justice. In particular, I do not see access to justice as limited to access to the law or to the court system. I have chosen this approach because I am concerned with people's lived experiences rather than institutional structures. While it is important to have access to such structures, if they do not provide justice in the sense of a just society in which children and young people's rights are respected and fulfilled, they have failed to provide access to justice.

I define justice and access to justice for the purpose of this research project as follows:

- Justice for children and young people includes criminal, civil and administrative justice, procedural and substantive justice, as well as social justice and differing cultural understandings of justice.
- Access to justice for children and young people means that children and young people are empowered and supported to prevent justice problems arising, and to resolve those problems that do arise both inside and outside the formal system in a child and youth friendly environment adapted to their rights and needs.

I have also chosen to use the term 'justice problems' instead of narrower or more focussed terms such as 'legal needs' or 'justiciable problems' as this reflects my interest in wider conceptions of justice. The term justice problems means problems relating to justice as it is defined above including criminal, civil and administrative justice, procedural and substantive justice, as well as social justice and differing cultural understandings of justice.

## Children and young people's justice problems

Data in relation to the justice problems experienced by children and young people in Aotearoa New Zealand is very limited with the Ministry of Justice conceding that they held no specific information about the assessment of children and young people's legal needs or their inclusion in wider assessments of legal needs.<sup>16</sup> The information that I have gathered from other sources suggests that the most commonly experienced justice problems for children and young people relate to their experiences in the education system including both disciplinary issues, bullying and issues with complaints processes, discrimination including racism and sexual harassment, care and protection issues, employment issues including minimum wage issues and discrimination in employment, and criminal justice system involvement as both victims and alleged offenders. Information from legal needs surveys also suggests that young people are more likely to have unmet legal needs and are less likely to access legal services. However, given the limitations of the available data further information and research is required.

Overseas research and literature in relation to children and young people's justice problems identifies similar issues with research indicating that age is significantly related to the experience of justice problems and the prevalence of particular justice problems. In part this reflects changes to people's life experiences as they age. For example, most children and young people will be living at home with their parents and attending compulsory education from the ages of 5 or 6 to 16 to 18 years old meaning that the justice problems that they experience are likely to include school discipline, intrafamilial conflict, and for some, entering part-time employment. As

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<sup>16</sup> [Letter from Ministry of Justice to Jennifer Braithwaite dated 28 April 2021.](#)

a young person leaves home and obtains full time employment they will experience additional issues such as tenancy, debt and consumer issues. Young people are also more likely to be out and about on the street meaning that they are more likely to be exposed to interpersonal conflicts outside the home including problems relating to interactions with the police. Overseas studies have also found that young people are more likely to experience substantial and multiple legal problems and to have unmet legal needs.

## **Children and young people's barriers to access**

The research and literature demonstrates that children and young people experience a range of additional barriers to accessing justice including attitudinal barriers, structural and systemic barriers, and practical barriers.

Attitudinal barriers include not children and young people not being seen as rights' holders or having the capacity to take action in their own rights. Another significant barrier is children and young people not being believed when they disclose abuse or seek help and related misconceptions about children's memory, reliability, and suggestibility. The fear of not being believed also operates as a barrier preventing or discouraging children and young people from seeking help. Research and literature across jurisdictions discusses children and young people's lack of trust in the police and other authority figures in the justice system including lawyers. This lack of trust can create a significant barrier to reporting and/or seeking support and therefore, to accessing justice. Other psychological barriers can also discourage children and young people from making complaints or seeking redress including a view that court processes are intimidating and overwhelming, a general lack of confidence, feelings of helplessness, fears of being disbelieved or not taken seriously by authorities, and past experience of violence and trauma.

Children and young people experience a series of systemic or structural barriers many of which come back to their lack of social and political power. Power dynamics can also operate to the disadvantage of families and whānau who are supporting children and young people. For example, lawyers acting for children hold considerable power as do schools and others in authority making decisions about children's lives. Children and young people's lack of power and related lack of legal capacity also leaves them largely dependent upon adults to take action to enforce their rights. Another related barrier is that systems and processes are largely focussed on adults – they are designed by and for adults often leaving children and their needs invisible. Justice system processes and the language used in those processes are also complex and difficult for children and young people to understand.

I identified two main practical barriers to children and young people's access to justice. The first is a lack of knowledge on the part of both children and young people and adults. Lack of knowledge can operate as a barrier in multiple ways including where a child or young person is not aware of their rights or how to take action, where they or others assisting them do not understand the process or have a lesser understanding than those on the other side, and where system actors have a lack of knowledge or understanding about the child or young person at the centre of the issue.

The other key practical barrier is the lack of data. More generally, there is also a lack of data that is disaggregated by different demographic characteristics including age, disability status, ethnicity, gender and sexuality as well as other characteristics such as care experience is a considerable barrier to understanding children and young people in Aotearoa's experience of justice problems and barriers to access.

## Diversity of experiences

Research overseas has also found that much as there are age related differences between children and young people and adults, there are also considerable differences between different groups of children and young people. In particular, vulnerable or at risk groups of children and young people have different experiences of legal problems in terms of volume, severity and nature including higher rates of victimisation. Different groups of children and young people also experience different barriers depending on their individual circumstances with many of the same barriers experienced by particular groups of adults also experienced by children and young people. This can include simply differing from the 'default' individual for whom systems have been designed.

As discussed in the introduction, I have produced a series of working papers discussing the experiences of different groups of children and young people including the particular justice problems they many experience and barriers to access. I have summarised my findings in those reports at pages 81-105.

# What is Access to Justice?

## Introduction

When we talk about access to justice it is important to consider what we are actually seeking or as Sandefur asks, access to what?<sup>17</sup> The meaning of justice has been debated since at least 375 BC when Plato recorded the discussions of Socrates others regarding various definitions of justice,<sup>18</sup> and continues to be contested today.<sup>19</sup> As Sackville has argued “like other catchphrases, such as ‘fairness’ or even ‘democracy’ itself, part of the attraction of ‘access to justice’ is that it is capable of bearing different meanings, depending on the perspectives or values of the commentator”.<sup>20</sup> How justice is defined can depend on many things such as whether greater value is given to individual liberties and freedom of choice or to more collective, majoritarian approaches.<sup>21</sup>

However, when people talk about access to justice often they are really talking about access to the law.<sup>22</sup> This is particularly so for lawyers. As Economides notes, the daily experiences of lawyers and their proximity to ‘justice’ in the sense of the law, can blind them to more profound conceptions of justice (internal or social).<sup>23</sup> Cunneen & Tauri argue that colonisation has led to equating justice with the law of the colonising power both in the eyes of the general public, and at times in those of indigenous peoples themselves.<sup>24</sup> Doing so obscures the reality that both justice and the law are culturally specific creations which can mean different things to different peoples and at different times. It is also common to conflate justice with the court system including the assumption that if someone can get to court, and afford to be there, justice will follow.<sup>25</sup> However, as Sealy-Harrington argues “where courts are unjust, access to them can perversely lead, not to access to justice, but access to injustice.”<sup>26</sup> Justice can also be found outside the courts as discussed in more detail below.

In this section I briefly outline the history of access to justice scholarship before considering some of the different ways justice and access to it have been defined including children and young people’s access to justice and the concept of child friendly justice. I will conclude by explaining how I have defined access to justice for the purpose of this study and my reasons for this approach.

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<sup>17</sup> Sandefur, R. (2019). [Access to What? Dædalus, the Journal of the American Academy of Arts & Sciences](#), 148(1), 49-55.

<sup>18</sup> Hemi, K.V. (2017). [Maori Education as Justice and Reckoning](#). *Yearbook of New Zealand Jurisprudence. Special Issue Indigenous Access to Justice*. 15, 79-101 at 79.

<sup>19</sup> Mayo, M., Koessl, G., Scott, M., & Slater, I. (2014). Concepts of justice and access to justice. In M., Mayo, G., Koessl, M., Scott & I. Slater (Eds.), *Access to justice for disadvantaged communities* (pp. 19-34). Bristol University Press at 19-21.

<sup>20</sup> Sackville, R. (2004). [Some Thoughts on Access to Justice](#). *New Zealand Public and International Law Journal* 2, 85 at 86.

<sup>21</sup> Mayo et al., Concepts of justice and access to justice at 21.

<sup>22</sup> Cotterrell, R. (2020). [Access To Justice, Moral Distance And Changing Demands On Law](#). *Windsor Yearbook of Access to Justice*. 36, 193-209 at 194.

<sup>23</sup> Economides, K. (2003). [2002: Justice Odyssey](#). *Victoria University of Wellington Law Review*, 34(1), 1-16 at 12.

<sup>24</sup> Cunneen, C. & Tauri, J. (2016). *Indigenous criminology* (1st ed., Vol. 1, New Horizons in Criminology). Policy Press at 51.

<sup>25</sup> Sealy-Harrington, J. (2021, 24 March) Access to (In)justice: A critical race reflection. *Lawyer’s Daily*. <https://www.thelawyersdaily.ca/articles/25551/access-to-in-justice-a-critical-race-reflection-joshua-sealy-harrington>

<sup>26</sup> Ibid.

## The evolution of access to justice

Just as debates about justice often conflate this term with the law, discussions about access to justice often focus on access to the law or the legal system. As the Law & Justice Foundation of New South Wales explains, “[t]raditionally, access to justice was defined rather narrowly as access to lawyers and redress through the courts. Accordingly, early justice system reforms focused on ensuring equal access to lawyers and the courts”.<sup>27</sup> This initial phase was followed by efforts to improve the court and legal aid systems, demystify the law through the plain language movement and the provision of public legal information and education, providing alternative dispute resolution processes, and increasing public participation in law reform.<sup>28</sup>

Commentators beginning with Cappelletti and Garth’s original analysis in 1978<sup>29</sup> have described the evolution of access to justice reform as a series of waves.<sup>30</sup> The first wave emerging in the 1960s was the development of legal aid schemes to provide access to legal services to those of limited means.<sup>31</sup> The second wave reflected the recognition that many legal rights are of low value at an individual level but have significant impacts for society as a collective,<sup>32</sup> and therefore provided for the representation of group and collective or ‘diffuse’ interests other than those of the poor.<sup>33</sup> This wave included the creation of mechanisms for class actions, changes to rules on standing, and the establishment of Ombudsmen’s offices.<sup>34</sup>

The third wave represented an acknowledgement that courts should not necessarily be the dominant forms for resolution of disputes and involved the expansion of tribunals and various forms of alternative dispute resolution.<sup>35</sup> However, the quality of justice achieved in these alternative justice mechanisms has been subject to critique in relation to the withering away of consent, lack of information for parties, rushed mediation sessions, and questionable mediator behaviours.<sup>36</sup>

Various commentators have identified a fourth wave although there does not seem to be a clear consensus as to what the fourth wave involves. For example, Sackville describes the fourth wave as being made up of competition policy reform which seeks to strike down restrictive practices in the legal services market in order to make them available more cheaply and in a more accessible form.<sup>37</sup> In contrast, Toohey et al. describes the fourth wave as technological change in the justice system including through the delivery of legal services in new ways such

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<sup>27</sup> Mirrlees-Black, C. (2019). [Conducting legal need surveys in the Australian context: challenges and options](#). Law & Justice Foundation of NSW at 3.

<sup>28</sup> Coumarelos, C., Macourt, D., People, J., McDonald, H.M., Wei, Z., Iriana, I. & Ramsey, S. (2012). [Legal Australia-Wide Survey: legal need in Australia](#), Law and Justice Foundation of New South Wales at 3.

<sup>29</sup> Cappelletti, M. & Garth, B. (Eds) (1978) *Access to Justice: Vol I: A World Survey*. Sijthoff and Noordhoff, Alphen aan den Rijn.

<sup>30</sup> Sackville, [Some Thoughts on Access to Justice](#); Toohey, L., Moore, M., Dart, K. & Toohey, D.J. (2019). [Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centered Design](#). *Macquarie Law Journal*. (19) 133-156; Nolan-Haley, J.M. (2019). [Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here](#). *Fordham Law Review Online*, 87, Article 15.

<sup>31</sup> Toohey et al., [Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centered Design](#) at 137.

<sup>32</sup> *Ibid.*

<sup>33</sup> Sackville, [Some Thoughts on Access to Justice](#) at 92.

<sup>34</sup> *Ibid* at 92-93; Toohey et al., [Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centered Design](#) at 137-138.

<sup>35</sup> Toohey et al., [Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centered Design](#) at 139.

<sup>36</sup> Nolan-Haley, [Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here](#) at 2-3.

<sup>37</sup> Sackville, [Some Thoughts on Access to Justice](#) at 90.

as electronic filing, audio-visual links and electronic discovery; the use of technology to better distribute legal information through free or low cost online tools like court forms, videos and legal information; unbundled generators of legal documentation such as contracts and letters of demand; chat bots and the use of artificial intelligence driven technology; and automation platforms which provide services to institutions that advance access to justice but do not themselves provide legal services (e.g. open source code for the creation of public legal information websites).<sup>38</sup>

As Sackville argues, each of these waves of access to justice reform appear to rest on a number of assumptions in relation to justice and/or how it might be achieved.<sup>39</sup> I will not discuss all of these assumptions but the first is particularly relevant to this discussion about how justice and access to it is defined. That is the assumption that courts can be expected to deliver just outcomes provided that sufficient resources are applied to ensuring that the litigants are on a level playing field.<sup>40</sup> Sackville describes this assumption as an oversimplification that fails to recognise that courts adjudicate only a small proportion of cases that come before them and that very few disputes even get that far.<sup>41</sup> The reality is that for most people, justice is not experienced in the courts but in their day to day dealings as consumers, employees, members of communities or social groups.<sup>42</sup>

The relative number of disputes resolved through the formal justice mechanisms such as the court system, as compared with informal mechanisms such as alternative dispute resolution, and what is described as 'everyday justice' is depicted in the Figure 1 which is an adapted version of the diagram developed by the Australian Government Attorney-General's Access to Justice Taskforce.

The resolution of justice issues through a range of mechanisms outside the courts is not necessarily a bad thing, the key factor is whether justice is achieved as Matthews and Wiseman explain:<sup>43</sup>

*In our view, people should be able to access both justice and the formal legal system, but access to justice may be achieved even where a person does not or cannot access the formal legal system. Legal norms—consistency with fair legal standards and processes, and just outcomes—must always be the reference point for defining when justice has been accessed.*<sup>56</sup>

Sandefur makes a similar argument explaining that how we define access to justice matters because it will determine how it can be achieved:<sup>44</sup>

*When the relevant substantive and procedural norms govern resolution, that resolution is lawful and we have access to justice, whether or not lawyers are involved in the resolution and whether or not the problem comes into contact with any kind of dispute-resolving forum.... Access is equal when the probability of lawful resolution is the same for all groups in the population: for example, men, women, and transgender; rich and poor; every race and ethnicity; each religion and those*

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<sup>38</sup> Toohey et al., [Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centered Design](#) at 139-144.

<sup>39</sup> Sackville, [Some Thoughts on Access to Justice](#) at 95-98.

<sup>40</sup> Ibid at 96.

<sup>41</sup> Ibid at 98.

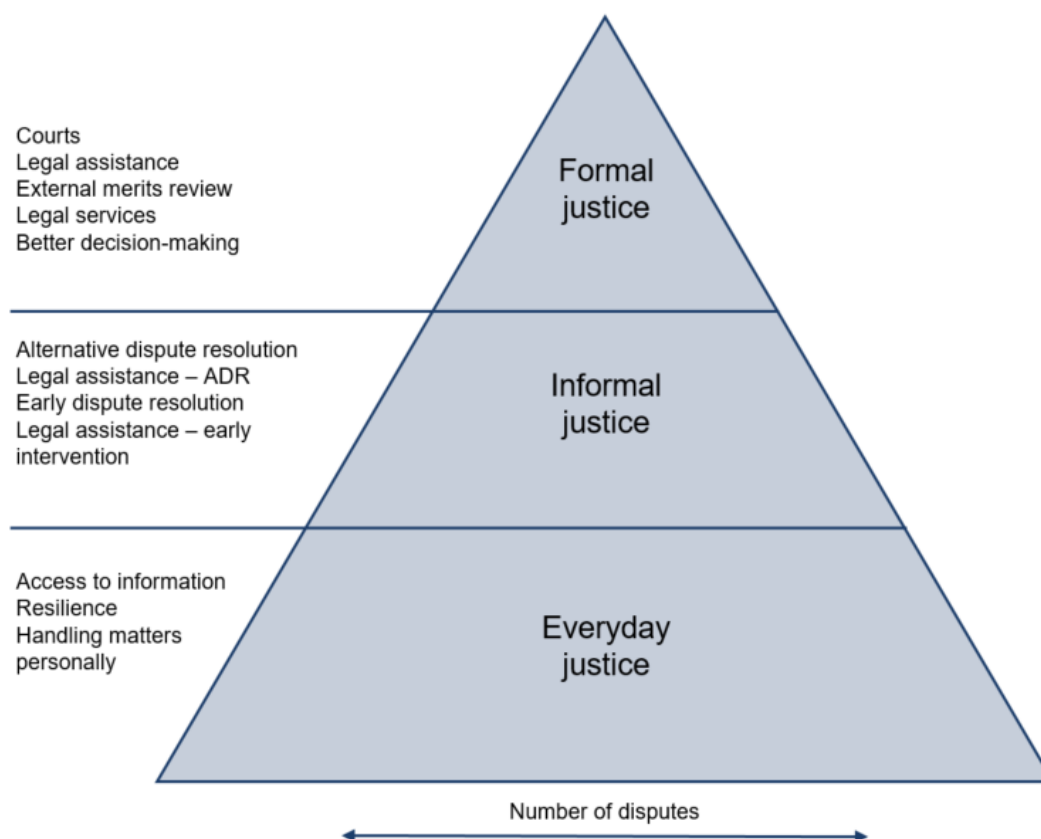
<sup>42</sup> Ibid at 99.

<sup>43</sup> Matthews, J. & Wiseman, D. (2020). [Community Justice Help: Advancing Community-Based Access to Justice A discussion paper](#). Community Legal Education Ontario, The Law Foundation of Ontario at 29.

<sup>44</sup> Sandefur, [Access to What?](#) at 51.

*with none. When defined this way, the focus becomes creating wide and equal access to the lawful resolution of justice problems, rather than any specific route through which such resolution might be achieved.*

**Figure 1: The relationship between justice types and the number of disputes resolved<sup>45</sup>**



The report of a recent panel discussion organised by the Hague Institute for Innovation of Law brings in another element to access to justice – the prevention of justice problems:<sup>46</sup>

*Accessing justice is not equivalent to accessing courts. Instead, accessing justice is about people being able to prevent and resolve their justice problems by achieving the outcomes they need and desire.*

Another aspect of the assumption that courts will deliver justice comes back to what we mean by justice. If justice is defined as the law, it may be reasonable to assume that this will be found in the courts. However, if justice is defined more widely and incorporating conceptions such as fairness or social justice, it is easy to imagine scenarios where the courts will not (or cannot) deliver.

<sup>45</sup> This diagram is a slightly modified version of a diagram in Access to Justice Taskforce. (2009). [A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action](#). Australian Government Attorney-General's Department at 68.

<sup>46</sup> Taylor, R. (2022). [Shifting towards people-centred justice programming](#). The Hague Institute for Innovation of Law.

## Legal needs or justice problems?

Like early work on access to justice, early legal needs research also focussed on access to lawyers and the courts.<sup>47</sup> This approach was criticised for ignoring legal issues that are either resolved outside the courts or left unresolved as well as implying that not seeking traditional forms of legal resolution meant that there was an absence of legal need when there could be a range of other reasons such as a lack of awareness that the problem is a legal one or failings in the legal system itself.<sup>48</sup>

The move away from this approach began in the 1990s with the ABA examining resolution via mechanisms outside the judicial system.<sup>49</sup> Genn's seminal *Paths to Justice* study in 1999 further expanded legal needs research by examining a range of non-legal advisors and introducing the concept of 'justiciable problems' which she defined as a: "matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken ... to deal with the event involved the use of any part of the civil justice system".<sup>50</sup>

However, as Sandefur and others have explained, experiencing a justiciable problem does not necessarily mean that someone has a legal need:<sup>51</sup>

*[A] legal need is a justice problem that a person cannot handle correctly or successfully without some kind of legal expertise. Not all justice situations are legal needs in this sense. People are perfectly capable of handling some situations on their own without understanding the legal aspects of those problems, in the sense that the problem is resolved in a way that is roughly consistent with the law but without reference to it or contact with it.... The research challenge is figuring out when these informal solutions are consistent enough with formal norms not to threaten the rule of law and social order, and when they are badly unlawful. Sometimes we do want to make sure that people resolve their justiciable problems with explicit reference to law. For those situations where we do, people's justice situations become legal needs.*

The terminology we use also matters because characterising all problems with a legal element as 'legal problems' or 'legal needs' can limit responses to these problems to formal legal services and processes.<sup>52</sup> In contrast, if the problem is defined as unresolved justice problems, this opens up a wider range of possible solutions.<sup>53</sup> Using the term 'justice problems' also makes it possible to consider problems relating to justice in the broader sense as opposed to just those problems relating to the law or legal issues.

## Procedural & substantive justice

In legal settings justice is traditionally equated with fairness, equality and respect for individual rights and encompasses procedural justice ideals (measured by perceptions of fairness in the processes used), and substantive justice ideals (measured by perceptions of fairness in the

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<sup>47</sup> Coumarelos et al., [Legal Australia-Wide Survey: legal need in Australia](#) at 3.

<sup>48</sup> Ibid at 3.

<sup>49</sup> American Bar Association (ABA). (1994). *Legal needs and civil justice: a survey of Americans. Major findings from the comprehensive legal needs study.*

<sup>50</sup> Genn, H. (1999). *Paths to Justice: What People Do and Think About Going to Law*, Oxford: Hart at 12.

<sup>51</sup> Sandefur, R. L. (2016). [What We Know and Need to Know about the Legal Needs of the Public](#). *South Carolina Law Review*. 67, 443-460 at 454.

<sup>52</sup> Matthews & Wiseman, [Community Justice Help: Advancing Community-Based Access to Justice A discussion paper](#) Ontario at 30.

<sup>53</sup> Sandefur, [Access to What?](#) at 50.



outcome achieved).<sup>54</sup> Tyler explains that procedural justice has four elements: voice (decision-makers provide people with opportunities to explain their point of view), neutrality (decision makers are neutral, unbiased, and consistent in their application of rules), respect (decision-makers are courteous to people and respectful of people and their rights), and trustworthiness (decision-makers explain the reasons for their actions in ways that communicate a concern for the people they are dealing with).<sup>55</sup>

The argument is that when people are treated fairly according to these criteria, the ultimate outcome may not matter to their assessment of the justice system and willingness to accept its outcome.<sup>56</sup> Certainly research studies have consistently found that people who feel that they were treated fairly are more likely to view decision-makers as legitimate and be willing to defer to their decisions.<sup>57</sup> In particular, research has found that defendants reporting a high level of procedural fairness are more likely to comply with court orders, perceive laws and legal institutions as legitimate, and to obey the law in the future.<sup>58</sup> Procedural justice may also be important for victims of offending with some research showing that perceptions of procedural justice have an impact on how quickly someone recovers, the likelihood of secondary victimisation, and how the victim views the criminal justice system going forward including their willingness to report crime in the future.<sup>59</sup>

In another study Van der Valk et al considered procedural justice in the prison context concluding that “core aspects of procedural justice matter to people in prisons and it is of value to them to have quick, reasoned responses to their complaints, with access to independent review”.<sup>60</sup> However, others such as Calavita and Jenness have reached contrary findings reporting that for the prisoners in their study, the outcome of a grievance was more important to their satisfaction and their perception as to whether it had been fairly managed.<sup>61</sup>

Other research has also shown that the outcome of a case also plays a part in assessments of court experience (although being treated well could limit the impact of a negative outcome and vice versa).<sup>62</sup> Overall it seems that both process and outcome are important to the perception of justice. Judge McElrea gives the example of a rape case in which a man raped a woman but was found not guilty and asks if that could be justice. He argues, and I agree, that we must consider the fairness of the process as well as whether it has led to “a just result, a fair outcome

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<sup>54</sup> Flynn, A. & Hodgson J. (2017). Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes. In A. Flynn & J. Hodgson (Eds.) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (pp. 1-21). Hart Publishing at 3.

<sup>55</sup> Tyler, T. (2013). Legitimacy and compliance: the virtues of self-regulation. In A. Crawford & A. Hucklesby (Eds.), *Legitimacy and compliance in criminal justice* (pp. 29-50). Routledge at 21-22.

<sup>56</sup> Hughes, T. (2020) [Justice, Wellbeing and Social Capital: Discussion Paper 20/01](#). Ministry of Justice and the Treasury at 94.

<sup>57</sup> Tyler, Legitimacy and compliance: the virtues of self-regulation at 22-23.

<sup>58</sup> Transition to Adulthood. (2015). [Young Adults in Court: Developing a tailored approach](#). T2A Alliance & Centre for Justice Innovation at 5.

<sup>59</sup> Wemmers, J.A., Parent, I., & Lachance Quirion, M. (2022). [Restoring victims' confidence: Victim-centred restorative practices](#). *International Review of Victimology*, 0(0) at 5.

<sup>60</sup> Van der Valk, S., Aizpurua, E. & Rogan. M. (2022) [“\[Y\]ou are better off talking to a f\\*\\*\\*\\*\\* wall”: The perceptions and experiences of grievance procedures among incarcerated people in Ireland](#). *Law & Society Review*. 56, 261–285 at 279. See also Hughes, [Justice, Wellbeing and Social Capital: Discussion Paper 20/01](#) at 99.

<sup>61</sup> Calavita, K. & Jenness, V. (2018). [Race, Grievance Systems and Prisoners Perceptions of Justice in Three California Prisons](#). *Du Bois Review: Social Science Research on Race* 15(1), 153–165 at 162-163

<sup>62</sup> Hunter, G. & Jacobson, J. (2021). [Exploring procedural justice and problem-solving practice in the Youth Court](#). Her Majesty's Inspectorate of Probation at 6.

for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong”.<sup>63</sup>

## Social Justice

In addition to consideration of procedural and substantive justice in the legal system, there are also many calls to look more widely when seeking to define justice and access to it. As Judge Doogue put it: “[t]o deliver justice effectively, there needs to be a more holistic view of what justice looks like”.<sup>64</sup> Ching et al. explain:<sup>65</sup>

*[A]ny mobilization around access to justice fails if it does not center the vision and strategies of larger social justice movements. We share here our collective calls to action to the legal community—and the allies that support and resource legal services—to expand our mission beyond chasing a standard of fairness that is impossible to achieve as long as we have deeply embedded structural and systemic inequity. Instead, let us reimagine what our communities actually need to be safe, free, and to live in our fullest humanity.*

The concept of social justice has also had different meanings over time with those different meanings sometimes being linked to wider socio-political issues. For example, Fineman, raises concerns about the increasing association between the concept of social justice “with specific individuals or groups and concerned with discrimination, exclusion, and economic inequality” or as he puts it, “an individually focused human rights agenda that emphasizes formal equality and celebrates individual liberty and choice”.<sup>66</sup> He argues for a vulnerability approach to social justice that recognises the synergistic relationship between the individual and society where “no individual can successfully stand apart from the state and its institutions” and “the destiny of the state ultimately relies on the actions of the individuals within it”.<sup>67</sup> Others focus on the “the fair distribution of health, housing, wealth, education, and legal resources on an affirmative action basis to disadvantaged members of the community”,<sup>68</sup> whereas Young takes this one step further proposing an enabling conception of social justice: “[j]ustice should refer not only to distribution, but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation”.<sup>69</sup>

Weinburg summarises this debate by concluding with what he identifies as the key elements of social justice.<sup>70</sup>

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<sup>63</sup> McElrea, F.W.M. (1996). [Accountability in the Community: Taking Responsibility for Offending](#). (A paper prepared for the Legal Research Foundation's Conference Re-thinking Criminal Justice: a Conference on New Initiatives in Criminal Justice) at 5.

<sup>64</sup> Doogue, J.M. (2018). [Generations of Disadvantage: A View from the District Court Bench](#). 22nd Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address, Dunedin at 3.

<sup>65</sup> Ching, H., Jagannath, M., Shah, P. & Strode, B. (2018). [A Few Interventions and Offerings from Five Movement Lawyers to the Access to Justice Movement](#). *Fordham Law Review Online*, 87, 186-195 at 186.

<sup>66</sup> Fineman, M. (2019). [Vulnerability and social justice](#). *Valparaiso University Law Review*, 53(2), 341-370 at 346.

<sup>67</sup> Ibid at 368.

<sup>68</sup> Weinburg, J. (2021). [Preparing Students For 21st Century Practice: Enhancing Social Justice Teaching In Clinical Legal Education](#). *International Journal of Clinical Legal Education*, 28(1), 5-67 at 10 citing McQuoid-Mason, D., ‘Teaching Social Justice to Law Students Through Clinical Legal Education and Community Service: A South African Experience’.

<sup>69</sup> Young, I., & Allen, Danielle S. (2011). *Justice and the Politics of Difference*. Princeton University Press at 39.

<sup>70</sup> Weinburg, [Preparing Students For 21st Century Practice: Enhancing Social Justice Teaching In Clinical Legal Education](#) at 12-13.

*Whatever definition of social justice one adopts, certain distinguishable elements are evident: equality, human dignity, freedom, basic education, healthcare and justice. The notion that society should redistribute wealth and accept some responsibility for the wellbeing of disadvantaged members of society is also fundamental to any such definition.<sup>31</sup> Further, social justice means that able members of society should challenge political, economic, societal, legal and other structures that oppress the less advantaged.*

## Justice as prevention

Another related concept is justice as prevention, or the idea that rather than responding to individual legal needs or acts of violence, we should take a proactive focus on increasing justice for populations or groups.<sup>71</sup> The Centre on International Cooperation identifies three interrelated types of prevention outcomes <sup>72</sup>

- *For individuals, outcomes include fewer or less serious disputes, lowered risk of violence in all its forms, and lowered risk of a rights abuse. More broadly, prevention should provide a platform for human development, with impacts felt across sectors (health, education, prosperity, etc.).*
- *For societies, outcomes include decreased risk of violent conflict, the more peaceful management of disputes, and higher trust in governments and institutions. Governments should also see a fiscal return, if they “prevent or reduce the escalation of legal problems, which in turn can mean reduced costs to other taxpayer funded services.”<sup>244</sup>*
- *For the justice system itself, outcomes include improved confidence that the system is fair, and an increased capacity to devote scarce resources to responding to the most serious risks and abuses. Effective prevention, in other words, should support a more effective response to legal needs and problems.*

One example of justice as prevention for children and young people is the World Health Organisation's INSPIRE programme which is focussed on preventing and responding to violence against children and adolescents.<sup>73</sup> Davidson et al. describe how children can benefit from a preventative approach to justice:<sup>74</sup>

*[C]hildren benefit from justice systems when these are focussed not only on resolution, but on prevention and protection. .... Prevention provides the platform for human development, impacting areas such as health, education and social protection, which play a pivotal role in delivering better outcomes for children<sup>6</sup>.*

For me this approach has considerable resonance – a just society is one in which rights abuses do not occur rather than simply one we respond to injustice when it happens.

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<sup>71</sup> Center on International Cooperation. (2018). [Challenge paper: Justice as Prevention](#). Task Force on Justice at 21.

<sup>72</sup> Ibid at 21-22.

<sup>73</sup> World Health Organization. (2016). [INSPIRE: seven strategies for ending violence against children](#). WHO Press at 8.

<sup>74</sup> Davidson, J., Foussard, C., Goudie, A., Hope, K. & Shields, S. (2022). [Justice for Children: Agenda for Action](#). University of Strathclyde at 4.

## Culturally specific meanings of justice

As Dame Lowell Goddard noted in a recent paper on access to justice, the law is a unique cultural creation and so too is justice.<sup>75</sup> As a result, we must also consider the culturally specific nature of different conceptions of justice and in particular, that the extent to which the law in settler colonial societies like Aotearoa New Zealand reflects justice, it is largely a Western conception of justice which differs from how justice is defined by others both according to cultural norms and having regard to collective experiences such as colonisation.

Māori academic and Dean of AUT Law School, Khylee Quince describes the differences between Māori and Pākehā understandings of justice:<sup>76</sup>

*There are significant difference in philosophy and practice at every stage between Māori and Pākehā justice. Whereas the cornerstone of modern Pākehā justice is arguably backwards-looking, retributive justice, a Maori approach is strongly forward-focussed, in terms of repairing disrupted relationships, and achieving mediated outcomes acceptable to all parties, including victims of wrongdoing.*

Similarly, Tunufa'i discusses the experiences of Samoan youth in Aotearoa New Zealand by reference to elements of 'fa'a Samoa' which is variously described as 'customary law' and 'sense of justice'.<sup>77</sup> However, Tunufa'i also notes that "[w]hile the practice of justice for young people might show elements of a Samoan sense of justice and patriotism, understanding their criminal intents and involvement still needs to be assessed from a New Zealand structural perspective".<sup>78</sup> That is, Samoan youth may understand or practice some aspects of Samoan justice, they also live, and in many cases were born, in Aotearoa New Zealand meaning that broader societal understandings of justice are also relevant.

Other indigenous peoples also identify the disjunct between the 'justice' available in the court and their own cultural understandings of justice. For example, writing in Canada Perrie and Song describe being told that the 'justice' that is currently accessible by Nunavummiut is one in which "Inuit do not see their values, culture and practices adequately reflected".<sup>79</sup> The Aboriginal Justice Implementation Commission both point to this difference and explain how justice is understood in Aboriginal culture:<sup>80</sup>

*At the most basic level of understanding, justice is understood differently by Aboriginal people. ...The purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good order.*

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<sup>75</sup> Goddard, *A fair go at access to justice* at 2.

<sup>76</sup> Chief Victims Advisor to Government. (2019). *Strengthening the Criminal Justice System for Victims: Workshop Playback Report*. Ministry of Justice at 5.

<sup>77</sup> Tunufa'i, L. (2017). Samoan Youth Crime. In A. Deckherth & R. Sarre. (Eds.) *The Palgrave handbook of Australian and New Zealand criminology, crime and justice*. Cham: Palgrave MacMillan.

<sup>78</sup> Ibid at 179.

<sup>79</sup> Perrie, V. & Song, G. (2021, 5 November). Access to Justice: What it should mean in Nunavut. *The Lawyer's Daily*. <https://www.thelawyersdaily.ca/articles/31121>

<sup>80</sup> Aboriginal Justice Implementation Commission. (1999). Aboriginal Concepts of Justice. In Aboriginal Justice Implementation Commission, *The Justice System and Aboriginal People*. <http://www.ajic.mb.ca/volumel/chapter2.html>

Different understandings of justice also stem from the experience of colonisation. For example, Hemi describes the justice sought by indigenous peoples as a ‘reckoning’ meaning “a straightforward accounting in terms of access to justice for indigenous peoples which is inherently historically aware, balances actual wrongs and rights, and requires a certain degree of self-determination”.<sup>81</sup> Writing in Australian, Allison makes a similar point explaining that for Aboriginal and Torres Strait Islanders, justice includes being able to exercise the rights to self-determination and culture. However, the law often fails to recognise these rights, or their denial, as discrimination which means that they are unenforceable and that application of the law does not result in justice.<sup>82</sup> She argues:<sup>83</sup>

*The concept of access to justice is worthwhile, including because of its intention to address inequality. Its conceptualisation, however — that is, the way in which processes required to attain justice and what form this justice takes are defined — is somewhat more problematic.... Not everyone defines justice, nor the issues inhibiting and/or best methods of attaining it in the same way. What presently occurs, however, is that the same form of access to justice is provided to everyone. To achieve genuine equality of access to the law (and through this, societal equity) access to justice must be substantively equal. **Access to justice must be (re-)conceptualised so as to reflect and respond to the particular issues impeding access to justice for and definitions of ‘justice’ deemed appropriate by differently marginalised groups.** Failure to do this not only leaves these groups without access to justice, it also maintains and/or exacerbates existing inequality. [Emphasis added]*

## Other related concepts

### Legal Empowerment

Another related concept is that of legal empowerment. Chapman et al. explain:<sup>84</sup>

*The United Nations Secretary General has defined legal empowerment as ‘the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors.’ It is much broader than solely seeking redress for harms; it seeks to help people and communities understand, use, and shape the law.*

The Human Rights Council makes it clear that children’s access to justice requires their legal empowerment. This means “[t]hey should be enabled to access relevant information and to effective remedies to claim their rights, including through legal and other services, child rights education, counselling or advice, and support from knowledgeable adults”.<sup>85</sup>

<sup>81</sup> Hemi, [Maori Education as Justice and Reckoning](#) at 80.

<sup>82</sup> Allison, F. (2020). [Cause for hope or despair? Evaluating race discrimination law as an access to justice mechanism for Aboriginal and Torres Strait Islander people](#). [Doctoral thesis, University of Technology, Sydney] at 372.

<sup>83</sup> Ibid.

<sup>84</sup> Chapman, P., Elana, S. & Khanna, S. (2018). [Opening Justice: Access to justice, open judiciaries, and legal empowerment through the Open Government Partnership](#). Open Government Partnership at 4.

<sup>85</sup> United Nations High Commissioner for Human Rights. (2013). [Access to justice for children: Report of the United Nations High Commissioner for Human Rights](#). United Nations General Assembly at 4.

The first of these points, access to relevant information, includes information both on their rights and how to exercise them.<sup>86</sup> The second element, access to effective remedies to claim their rights, can be problematic as children often lack legal capacity to take legal action independently from their parents or legal guardian.<sup>87</sup> The third element, access to legal assistance is important because “children are strongly in need of legal or other appropriate assistance in order to enjoy their right to access justice and such assistance should be free of charge (or subsidised) and effective.”<sup>88</sup> The fourth element, other services and support from knowledgeable adults, focusses on other forms of support such as psychological assistance for child victims as well as more proactive support to children who wish to access justice.<sup>89</sup>

## Access to Justice for Children

The United Nations Human Rights Council passed a resolution in 2014 access to justice for children which called on all States to take action to remove barriers to access to justice. The resolution described access to justice for children as “including obtaining a quick, effective and fair response to protect their rights, prevent or solve disputes and control abuse of power through a transparent and efficient process in which mechanisms are available, affordable and accountable”.<sup>90</sup> However, the long list of actions sought from States demonstrates the breadth of the concept of access to justice for children:<sup>91</sup>

*(a) Ensuring that their national legal systems provide effective remedies to children for violations and abuses of their rights, and that children have the possibility to initiate legal proceedings in cases of violations of their rights;*

*(b) Ensuring equal access for children to non-judicial complaints mechanisms and alternative dispute resolution mechanisms;*

*(c) Ensuring that counselling, reporting and complaints mechanisms are accessible to all children, effective, safe and child-sensitive, that they pursue the best interests of the child at all times and that they comply with international human rights standards;*

*(d) Addressing additional barriers and adopting special protective measures to safeguard the rights of children in particularly vulnerable situations to access justice and participate in proceedings;*

*(e) Making information on the rights of the child, on the legal system and on access to legal aid widely available to children in a language they understand and in a manner appropriate for their age and maturity, as well as to parents and legal guardians, teachers and people working with and for children;*

*(f) Ensuring that information and support are equally available and, when necessary, adapted to the needs of children with disabilities, children belonging to national or ethnic, religious and linguistic minorities and children belonging to other vulnerable groups, and accessible to children in detention and other closed facilities;*

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<sup>86</sup> Liefwaard, T. (2019). [Access to Justice for Children: Towards a Specific Research and Implementation Agenda](#). *The International Journal of Children's Rights*, 27(2), 195-227.

<sup>87</sup> Ibid at 205.

<sup>88</sup> Ibid at 209.

<sup>89</sup> Ibid.

<sup>90</sup> Human Rights Council. (2014). [Resolution A/HRC/25/L.10 Rights of the Child: Access to Justice for Children](#). United Nations General Assembly at 3.

<sup>91</sup> Ibid at 6-8.

- (g) Ensuring universal birth registration and age documentation without discrimination of any kind, irrespective of the legal status of the child;*
- (h) Ensuring children's informed consent to decisions in line with their evolving capacities;*
- (i) Increasing public awareness of the rights of the child and, in particular, of their right to express their views freely in all matters affecting them;*
- (j) Developing and strengthening multidisciplinary capacity-building and training initiatives to ensure that all persons working with and for children have the necessary knowledge and skills relating to children's rights and needs;*
- (k) Ensuring that all children have access to legal and other appropriate assistance, including by supporting the establishment of child-sensitive legal aid systems;*
- (l) Encouraging the use of safe, non-intimidating and child-sensitive settings for dealing with cases involving children;*
- (m) With full respect to the child's privacy, encouraging close cooperation between different professionals, where appropriate, in order to obtain a comprehensive understanding of the child, including an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation;*
- (n) Ensuring that decisions are explained to children in a way and in a language they understand, in a manner appropriate to their age and maturity, and that an interpreter is provided free of charge if the child cannot understand or speak the language used in the proceedings;*
- (o) Ensuring that the child's right to appeal is not more restricted than that of adults;*
- (p) Ensuring systematic enforcement of decisions through a predictable process, thus enhancing confidence in the justice system;*
- (q) Addressing social and cultural norms and customs that may prevent children from accessing justice and claiming redress;*
- (r) Taking into consideration the need to ensure that statutes of limitation periods do not apply for gross violations of international human rights law and are not unduly restrictive for other types of violations, including by ensuring, where appropriate, that they do not begin running before the child has reached majority;*
- (s) Considering, wherever possible, reparations for child victims of rights violations, in order to achieve full redress and reintegration, and that procedures for obtaining and enforcing reparation are readily accessible and child-sensitive.*

## **Child Friendly Justice**

The concept of child-friendly justice reflects recognition of the child as a rights holder, and is grounded in the case law of the European Court of Human Rights and the General Comments of the UN Committee on the Rights of the Child.<sup>92</sup> The Council for Europe guidelines on child-friendly justice define child friendly justice as:<sup>93</sup>

<sup>92</sup> Liefwaard, [Access to Justice for Children: Towards a Specific Research and Implementation Agenda](#) at 215.

<sup>93</sup> Council of Europe. (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#) at 17.

*[C]reating a justice system which guarantees the respect and the effective implementation of all children's rights, giving due consideration to the child's level of maturity and understanding and to the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.*

The Council of Europe expands on this brief description and sets out its general elements:

**Information and advice:** Children and their parents should be given immediate and ongoing information about their rights, the system and procedures involved, any support services, court proceedings including availability of protective measures, mechanisms for review of decisions, and opportunities for reparation or redress. Information should be provided in a manner adapted to their age and maturity and in language they can understand. Parents and children should both receive the information directly and child-friendly information should be widely distributed.<sup>94</sup>

**Protection of private and family life.** In general no information or personal data should be published, access to records should be limited, evidence should be given in-camera, and professionals should abide by strict rules of confidentiality except where a risk of harm.<sup>95</sup>

**Safety.** Children should be protected from harm including through vetting of professionals and the use of special precautionary measures.<sup>96</sup>

**Training of Professionals.** Professionals should receive interdisciplinary training on rights and needs of children of different age groups as well as on communicating with them at all ages and stages and in situations of particular vulnerability.<sup>97</sup>

**Multidisciplinary approach.** Should be close cooperation of professionals in order to obtain a comprehensive understanding of the child and an assessment of their "legal, psychological, social, emotional, physical and cognitive situation".<sup>98</sup>

**Deprivation of liberty** should be a measure of last resort and for the shortest appropriate period of time, children should as a rule be held separately from adults and in all circumstances should be detained in premises suited to their needs.<sup>99</sup>

The process to develop the Guidelines was informed by consultation with children and young people.<sup>100</sup> The children and young people consulted placed particular emphasis on being treated with respect, being listened and provided with explanations in language they understand, and receiving information about their rights.<sup>101</sup>

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<sup>94</sup> Ibid at 20-21.

<sup>95</sup> Ibid at 22.

<sup>96</sup> Ibid at 22-23.

<sup>97</sup> Ibid at 23.

<sup>98</sup> Ibid at 23.

<sup>99</sup> Ibid at 24.

<sup>100</sup> Liefgaard, T. & Kilkelly, U. (2018). Child-friendly justice: past, present and future. In B. Goldson, (Ed.) *Juvenile Justice in Europe: Past, Present and Future* (1st ed.). Routledge at 61.

<sup>101</sup> Ibid at 62-63.



## Conclusion

Having considered these differing conceptions of justice, I have chosen to take an expansive interpretation including both procedural and substantive justice, wider issues of social justice, and other differing conceptions of justice such as culturally specific meanings and access to justice for children and young people and child-friendly justice. In particular, I do not see access to justice as limited to access to the law or to the court system. I have chosen this approach because I am concerned with people's lived experiences rather than institutional structures. While it is important to have access to such structures, if they do not provide justice in the sense of a just society in which children and young people's rights are respected and fulfilled, they have failed to provide access to justice.

To summarise my definitions of justice and access to justice for the purpose of this report I have drawn from the discussion above and a recent paper by Davidson et al. in relation to justice for children in the context of the Sustainable Development Goals and, in particular, SDG 16.3 access to justice for all.<sup>102</sup>

- Justice for children and young people includes criminal, civil and administrative justice, procedural and substantive justice, as well as social justice and differing cultural understandings of justice.
- Access to justice for children and young people means that children and young people are empowered and supported to prevent justice problems arising, and to resolve those problems that do arise both inside and outside the formal system in a child and youth friendly environment adapted to their rights and needs.

I have also chosen to use the term 'justice problems' instead of narrower or more focussed terms such as 'legal needs' or 'justiciable problems' as this reflects my interest in wider conceptions of justice. The term justice problems means problems relating to justice as it is defined above including criminal, civil and administrative justice, procedural and substantive justice, as well as social justice and differing cultural understandings of justice.

## Other Definitions

Article 1 of the United Nations Convention on the Rights of the Child defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".<sup>103</sup> This report generally uses this definition. However, due to the overlap between the age ranges considered to be children and those considered to be youth, variation is sometimes required in which case I have endeavoured to provide clarity in relation to the age range being discussed.

The term "youth" is often understood as the period of transition from dependence in childhood to independence in adulthood which varies between individuals, cultures and over time, and depends on a range of socioeconomic factors.<sup>104</sup> For practical reasons including the ability to compare data, this term is frequently defined by age although not always the same ages. For example, the United Nations defines "young people" as those between the ages of fifteen and twenty-four,<sup>105</sup> whereas the Oranga Tamariki Act 1989 defines a "young person" as a person over the age of fourteen and under eighteen<sup>106</sup> and the Ministry for Youth Development define

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<sup>102</sup> Davidson et al., *Justice for Children: Agenda for Action* at 5.

<sup>103</sup> United Nations General Assembly. (1989). *Convention on the Rights of the Child*. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

<sup>104</sup> United Nations Educational Scientific and Cultural Organisation. (n.d.). *Definition of youth*. <https://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-definition.pdf>

<sup>105</sup> Ibid

<sup>106</sup> [Oranga Tamariki Act 1989, s2](#).

both “youth” and “young people” as those between the ages of 12 and 24.<sup>107</sup> For the purposes of this research, I have generally describe those aged from 14 to 24 as young people or youth but the overlap with the definitions of child and children, as well as the different uses of this term in different contexts mean that is not always appropriate. As with my use of the term child, I have endeavoured to provide clarity in relation to which age group is being discussed.

## Childhood and Youth

### Introduction

In this section I firstly set the scene by discussing some of the research and literature in relation to children and young people’s development through childhood and adolescence then into young adulthood as well as how these experiences can differ between different groups of children and young people. I then move on to explore the justice problems and barriers to accessing justice experienced by children and young people collectively, before concluding by returning to the differing justice problems and barriers experienced by different groups of children and young people.

### Childhood & Adolescence

Childhood is a socially constructed concept that has differed over time and between societies in accordance with changing views about the family, gender roles, the labour market, crime and punishment, and religion.<sup>108</sup> Social attitudes to children and childhood both shape the legal treatment of children, and are shaped by the laws relating to children.<sup>109</sup> Moreover, the legal regulation of childhood is an inconsistent blend of rules (e.g. the age of consent to sex<sup>110</sup>) which offer legal certainty but can be both under and over-inclusive, and standards (e.g. competence to consent to medical treatment<sup>111</sup>) which are more flexible but provide less certainty and are much more labour intensive as they require individual assessments in each case.<sup>112</sup> Adult perceptions of children’s capacity can also operate in different ways in different contexts. For example, the Australian National Children’s Commissioner explains how opposing assumptions about children’s capacity in family law matters and criminal matters each operate to their disadvantage:<sup>113</sup>

*In consultation, the National Children’s Commissioner noted that adult perceptions of children’s capability can work against children in terms of either underestimating their capability and consequently denying them the right to be heard, which is common in family law matters, or alternatively, assuming the child has equal*

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<sup>107</sup> Ministry for Youth Development - Te Manatu Whakahiato Taiohi. (2020). *About us*. Ministry for Youth Development - Te Manatu Whakahiato Taiohi. from <http://myd.govt.nz/about-my/>

<sup>108</sup> Peleg, N. (2019). *The Child’s Right to Development*. Cambridge University Press at 3.

<sup>109</sup> *Ibid* at 4.

<sup>110</sup> YouthLaw (n.d.) *When Can I... In Relationships?* <https://youthlaw.co.nz/rights/sex-relationships/when-can-i-in-relationships/#when-can-i-have-sex>

<sup>111</sup> See Millar, F. (2019). *Children’s Competence to Consent to Medical, Surgical and Dental Treatment: Partners in Healthcare?* [Doctoral thesis, University of Otago] at 23-44 for a detailed discussion in relation to the law relating to children’s capacity to consent to medical treatment in Aotearoa New Zealand.

<sup>112</sup> Todres, J. (2022). *Age Discrimination and the Personhood of Children and Youth*. *Harvard Human Rights Journal Online*; Moritz, D. (2023). *Children’s Developmental (Im)maturity: Aligning Conflicting Decisional Capacity Assessment Approaches in Australia*. *Laws*, 12(1), 10 at 6.

<sup>113</sup> Law Council of Australia. (2018). *The Justice Project: Final Report Part 1 Children and Young People* at 19.

*capability to an adult, in terms of their sense of responsibility and level of education, which is common in criminal matters involving youth offenders.*<sup>122</sup>

Another area of conflict is between the criminal law and minimum age of criminal responsibility and consent to medical treatment:<sup>114</sup>

*Health law and criminal law in Australia, then, have conflicting responses to children's decision-making. Criminal law does not test older children's capacity for decision-making, assuming them to be competent; younger children above the minimum age of criminal responsibility have their capacity or understanding scrutinised in a children's court. Health law supports mature children's decision-making where they are consenting to healthcare in their best interests but does not extend that autonomy to refusal of treatment decisions. These approaches are conflicting because they give differing weights to mature children's capacity for decision-making.*

It is suggested that this conflict reflects a conceptual binary for children where they are either labelled as a 'victim', and decisions are made in children's best interests or to protect them from harm, or a 'threat', in which case their inherent vulnerability is no longer relevant.<sup>115</sup> In both situations, childhood is viewed from the perspective of adults.

Questions in relation to children and young people's capacity particularly come into play during adolescence:<sup>116</sup>

*Adolescents are on a rapid curve of development. The significance of the developmental changes during adolescence has not yet been as widely understood as that which occurs in early years. Adolescence is a unique defining stage of human development characterized by rapid brain development and physical growth, enhanced cognitive ability, the onset of puberty and sexual awareness and newly emerging abilities, strengths and skills. Adolescents experience greater expectations surrounding their role in society and more significant peer relationships as they transition from a situation of dependency to one of greater autonomy.*

In 2016 the United Nations Committee on the Rights of the Child issued its *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence* recognising the significance of adolescence as a stage of development and the need to provide "an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection".<sup>117</sup> The UN Committee also recognised that some groups of adolescents may be particularly vulnerable and violations of their rights.<sup>118</sup>

In the last few years many academics and child rights advocates across jurisdictions have placed considerable emphasis on the evolving neuroscientific evidence in relation to brain

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<sup>114</sup> Moritz, [Children's Developmental \(Im\)maturity: Aligning Conflicting Decisional Capacity Assessment Approaches in Australia](#) at 13.

<sup>115</sup> *Ibid.*

<sup>116</sup> United Nations Committee on the Rights of the Child [Concluding observations on the sixth periodic report of New Zealand](#) at 4.

<sup>117</sup> *Ibid.* at 6.

<sup>118</sup> United Nations Committee on the Rights of the Child. (2016). [General Comment No. 20. On the Implementation of the Rights of the Child During Adolescence CRC/C/GC/20](#). The Office of the High Commissioner for Human Rights at 8.

maturation during adolescence.<sup>119</sup> This work began with Steinberg's 'dual systems' model.<sup>120</sup> Albert & Steinberg explain that while young people demonstrate adult-like competence in logical reasoning and information processing by their mid-teens, developmental improvements in higher-order executive functioning (response inhibition, planning ahead, weighing risks and rewards, and considering multiple sources of information at once) continue throughout adolescence and into adulthood.<sup>121</sup> This is because there is a maturational imbalance between cortical and subcortical systems which means the adolescent brain is bad at some things (impulse control) but very good at others (learning).<sup>122</sup>

These differences the development of different parts of the brain as meaning that adolescents behave differently in situations of 'hot cognition' (situations of high emotional context) and 'cold cognition' (situations of lower emotional context).<sup>123</sup> As the US National Juvenile Justice Network explain:<sup>124</sup>

*Youth decision-making is heavily influenced by context. Their intellectual capabilities can be as developed as adults; they are capable of making reasoned decisions and often will make better decisions than adults. However, when youth are placed in environments where they may be susceptible to peer pressure, where there is pressure to make a decision quickly, where there is an opportunity for risk-seeking behavior, and/or where there is high emotionality, they have increased potential for their judgment to be driven by emotion rather than by reason.*

As a result, developmental science has been used to advocate for both teenagers' right to make abortion decisions and for mitigation in criminal sentencing on the basis of immaturity.<sup>125</sup> For example, the American Psychological Association submitted amicus curiae briefs in two US Supreme Court cases: *Roper v. Simmons* (where the amicus brief was used to support an argument against the juvenile death penalty) and *Hodgson v. Minnesota* (where the brief was used to support a minor's right to obtain an abortion).<sup>126</sup> Steinberg et al. described the seemingly

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<sup>119</sup> Daly, A. (2020). [Assessing Children's Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child](#), *The International Journal of Children's Rights*, 28(3), 471-499; Haines, K., Case, S., Smith, R., Joe Laidler, K., Hughes, N., Webster, C., Goddard, T., Deakin, J., Johns, D., Richards, K., & Gray, P. (2021). Children and Crime: In the Moment. *Youth Justice*, 21(3), 275-298; Helm, R.K. (2021). [Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection](#). 48, 179-201; Office of the Children's Commissioner. (2020). *Report of the Children's Commissioner in the matter of Declarations that certain provisions of the Electoral Act 1993 and the Local Electoral Act 2001 are inconsistent with section 19 of the New Zealand Bill of Rights Act 1990*. (unpublished); and O'Rourke, S.; Whalley, H.; Janes, S.; MacSweeney, N.; Skrenes, A.; Crowson, S.; MacLean, L. & Schwannauer, M. (2020). [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts: Literature Review](#). Scottish Sentencing Council & The University of Edinburgh.

<sup>120</sup> Steinberg, L. (2008). [A Social Neuroscience Perspective on Adolescent Risk-Taking](#). *Dev Rev.* 28(1), 78-106; Albert, D. & Steinberg, L. (2011). [Judgment and Decision Making in Adolescence](#). *Journal of Research on Adolescence*, 21(1), 211-224.

<sup>121</sup> Albert & Steinberg, [Judgment and Decision Making in Adolescence](#) at 219.

<sup>122</sup> Steinberg, L. (2016). Commentary on Special Issue on the Adolescent Brain: Redefining Adolescence. *Neuroscience and Biobehavioral Reviews*, 70, 343-346 at 345.

<sup>123</sup> National Juvenile Justice Network. (2012). [Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates](#). National Juvenile Justice Network at 2.

<sup>124</sup> Ibid.

<sup>125</sup> Scott, E., & Steinberg, L. (2019). In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk. *Law & Social Inquiry*, 44(3), 780-786 at 781-782.

<sup>126</sup> Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009). [Are Adolescents Less Mature Than Adults?](#) *T The American Psychologist*, 64(7), 583-594 at 583-584.

contradictory positions before explaining that they were both consistent with the developmental evidence.<sup>127</sup>

*[W]hereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities that were referred to in the Hodgson brief—abilities that permit logical reasoning about moral, social, and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in the majority opinion in Roper—capacities such as impulse control and resistance to peer influence...Unlike adolescents' decisions to commit crimes, which are usually rash and made in the presence of peers, adolescents' decisions about terminating a pregnancy can be made in an unhurried fashion and in consultation with adults.*

Steinberg et al. conclude that “it is neither inconsistent nor disingenuous for scientists to argue that studies of psychological development indicate that the boundary between adolescence and adulthood should be drawn at a particular chronological age for one policy purpose and at a different one for another.”<sup>128</sup>

The reliance on neuroscience as a basis for distinguishing between adolescent's competence to make decisions and their criminal culpability at certain ages is not without its critics, most notably Christopher Berk,<sup>129</sup> who argues that significant amounts of law-breaking is planned, or even executed in so-called neutral cognitive settings whereas choices about sex, consent, and reproduction often occur in non-neutral settings.<sup>130</sup> Beck also argues that grouping all adolescents together is both over and under inclusive as the pace of development varies among same-aged individuals, and girls often mature faster than boys of the same age.<sup>131</sup> In my view, while both Beck's classification argument and that relating to differing rates of maturation have some merit, neither mean that developmental neuroscience should be disregarded entirely. Rather, they simply point to the need for nuance rather than drawing hard boundaries.

Much of the debate about the science of development was largely put to bed by a 2019 study comparing two aspects of development relevant to the treatment of young people under the law—cognitive capacity (the main influence on cold cognition) and psychosocial maturity (the main influence on hot cognition) using an 11-country sample of more than 5,200 individuals between the ages of 10 and 30.<sup>132</sup> The authors concluded that:<sup>133</sup>

*Findings from the present study are consistent with previous reports that cognitive capacity (cold cognition), the ability of an individual to reason and consider alternative courses of action—undergirded by executive functions—reaches adult*

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<sup>127</sup> Ibid at 586.

<sup>128</sup> Ibid at 592.

<sup>129</sup> Berk, C.D. (2019). Children, Development, and the Troubled Foundations of Miller v. Alabama. *Law & Social Inquiry*, 44(3), 752-770; Berk, C.D. (2019). In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk Reply. *Law and Social Inquiry*, 44(3), 787-790.

<sup>130</sup> Berk, In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk Reply at 788.

<sup>131</sup> Scott & Steinberg, In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk at 782.

<sup>132</sup> Icenogle, G., Steinberg, L., Duell, N., Chein, J., Chang, L., Chaudhary, N., Di Giunta, L., Dodge, K. A., Fanti, K. A., Lansford, J. E., Oburu, P., Pastorelli, C., Skinner, A. T., Sorbring, E., Tapanya, S., Uribe Tirado, L. M., Alampay, L. P., Al-Hassan, S. M., Takash, H. M. S., & Bacchini, D. (2019). [Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a “maturity gap” in a multinational, cross-sectional sample](#). *Law and Human Behavior*, 43(1), 69–85. NB page references are to the published version but the link is to the author manuscript which is available open access.

<sup>133</sup> Icenogle et al., [Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a “maturity gap” in a multinational, cross-sectional sample](#) at 79.

*levels during the midteen years, whereas other elements of maturity, specifically those indexing aspects of psychosocial functioning (hot cognition), such as self-restraint, tend to reach adult levels into adulthood. That these constructs reach adult levels on different timetables suggests a 'maturity gap' between these elements of psychological development.*

The authors conclude by agreeing with Steinberg et al. that the answer to questions regarding when young people become 'mature' is that it depends which aspect of maturity is in question and therefore, what the context for any decision is. In particular, they found evidence that "basic cognitive processes undergirding higher-order, goal-directed behavior (cold cognition) reach adult levels relatively early—around age 16".<sup>134</sup> This means that if the decision, and the context in which it is being made, is one that lends itself to deliberation such as voting, participating in legal proceedings, and giving consent to medical treatment or to participate in research, 16 might be a reasonable age of majority. The authors noted that this doesn't mean that all 16-year-olds will make good decisions, but that their decisions in these contexts, on average, would be as logical as adults' decisions. However, the age at which young people reach psychosocial maturity reaches is beyond age 18 which suggests that adolescents and young adults are still developing in ways that should influence their culpability in criminal proceedings and, perhaps, some of the privileges we extend to them.<sup>135</sup> Although if we consider Beck's argument, the circumstances of any offending may be relevant to how much influence developmental stage should have.

A 2020 literature review conducted by Professor Suzanne O'Rourke and colleagues from the University of Edinburgh for the Scottish Sentencing Council synthesised and evaluated the current neurobiological, neuropsychological and psychological literature on adolescent cognitive maturation.<sup>136</sup> The authors explain that in addition to the brain's continuing maturation during adolescence, a rise in dopamine (associated with increased sensitivity to incentives and rewards) peaks between the ages of 14 and 16 and brain regions associated with emotional responses become more active and sensation-seeking is observed to increase.<sup>137</sup> Together, these factors means that decision making is impaired in the presence of rewards particularly for males where higher levels of sensation-seeking and lower levels of impulse control are observed.<sup>138</sup> They also found that the presence of peers could also influence decision-making although how it does so is not clear.<sup>139</sup>

These other social and biological factors are also discussed by other authors. For example, the National Juvenile Justice Network describe the impact of hormonal changes related to developing sexual maturity and inter-related psycho-social changes such as the development of self-identity, increasing desire for autonomy from parents and guardians, and the importance of peer relationships.<sup>140</sup> Steinberg also describes the "emerging consensus that adolescence is a period of heightened brain plasticity, certainly in comparison to adulthood, and probably (although not definitely) in comparison to middle childhood."<sup>141</sup> This plasticity is sometimes used as a further justification for diversion from the formal criminal justice system, a focus on

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<sup>134</sup> Ibid at 82.

<sup>135</sup> Ibid.

<sup>136</sup> O'Rourke et al., [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts: Literature Review](#).

<sup>137</sup> Ibid at 56-57.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> National Juvenile Justice Network, [Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates](#) at 2.

<sup>141</sup> Steinberg, Commentary on Special Issue on the Adolescent Brain: Redefining Adolescence at 345.

restorative processes or rehabilitation,<sup>142</sup> and to underline the importance of procedural justice as discussed further below. O'Rourke et al. also explain that ordinary brain maturation during adolescence can be affected by a number of factors including traumatic brain injury, alcohol and substance use, psychological and neurodevelopmental disorders, and adverse childhood experiences with adverse childhood experiences being a particularly potent and significant risk factor.<sup>143</sup>

Some commentators identify another reason for treating children differently to adults – the fact that they do not have any say over the law. For example, Yaffe argues:<sup>144</sup>

*Since kids have less say over the law than adults do, and since the authority of the law, especially the criminal law, derives from the fact that those subject to it have a say over it, the legal reasons for kids to refrain from crime are weaker than the legal reasons for adults to refrain. And so the standards of culpability are lower.*

Others argue that the developmental differences between children, adolescents and adults mean that children and young people's experiences of justice (or injustice) are particularly important as they shape how they see the world. For example, Granot & Tyler explain that adolescents differ from adults in three important ways: they are more malleable, with their identities still being formed; they are more sensitive to social cues; and they are more susceptible to peer influences. They argue that these "features suggest that adolescents may be especially influenced by whether they are treated with or without procedural justice".<sup>145</sup>

Murphy and Gaylor make a similar argument, suggesting that procedural fairness is more important to young people than adults because they are particularly attuned to perceptions of unfairness and signs of respect.<sup>146</sup> Murphy's study comparing surveys of students from Australian high schools to results from adults in the same city found age influenced the effect of procedural justice on willingness to report crime to police, with procedural justice having a greater impact on youth, perhaps due to the level of self-uncertainty that youth feel.<sup>147</sup>

Bernuz Beneitez & Dumortier<sup>148</sup> make a similar argument - as children get older they have more contact with adult rules and institutions and these experiences can shape their views of the law and those involved in the legal system. They conclude:<sup>149</sup>

*[C]hildren and young people 'develop' an orientation to the law and a sense of fairness (or unfairness) for justice from their early childhood onwards. These*

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<sup>142</sup> National Juvenile Justice Network, [Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates](#) at 4.

<sup>143</sup> O'Rourke et al., [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts: Literature Review](#) at 56-57.

<sup>144</sup> Yaffe, G. (2018). *The Age of Culpability: Children and the Nature of Criminal Responsibility*, Oxford University Press at 158-159.

<sup>145</sup> Granot, Y., & Tyler, T.R. (2019). Adolescent cognition and procedural justice: Broadening the impact of research findings on policy and practice. *Social and Personality Psychology Compass*, 13(10), e12503 at 8.

<sup>146</sup> Murphy, K. & Gaylor, A. (2010). [Policing youth: Can procedural justice nurture youth cooperation with police?](#) Alfred Deakin Research Institute, Working Paper no. 6 at 17.

<sup>147</sup> Murphy, K. (2015). [Does Procedural Justice Matter to Youth? Comparing Adults' and Youths' Willingness to Collaborate with Police.](#) *Policing and Society: An International Journal of Research and Policy* 25(1), 53–76 at 69. This suggestion was based on findings from other research that "self-uncertainty" as an individual difference variable could have an impact on the effect of procedural justice with those who are more uncertain about their identity being more responsive to procedural justice.

<sup>148</sup> Bernuz Beneitez, M.J. & Dumortier, E. (2018). Why Children Obey the Law: Rethinking Juvenile Justice and Children's Rights in Europe through Procedural Justice. *Youth Justice*, 18(1), 34-51 at 40, 45 citing Fagan and Tyler (2005, 219).

<sup>149</sup> *Ibid* at 45.

*childhood, but also adolescent experiences, are of the utmost importance for young adults' perception on the legitimacy (or non-legitimacy) of justice. In other words, people 'develop' their perspective on justice based on their own experiences and hearsay. ... Experiencing at a young age very unfair system may have a negative impact on adulthood perceptions of the (non) legitimacy of justice.*

Bernuz Beneitez & Dumortier argue that this means that those involved in the juvenile justice system should keep the idea of being fair in mind throughout any processes. I would extend this argument to all those involved in the various systems that affect children and young people – for example, the education system and the child protection system.

## Young adults

Much of the attention given to young adults as a distinct cohort focusses on their involvement in the criminal justice system. For example, in Aotearoa Nessa Lynch from Victoria University of Wellington recently undertook a research project to develop a principled framework for reform of how the criminal justice system in Aotearoa New Zealand deals with young adults.<sup>150</sup> Her research, which was largely based on international literature, identified three themes in relation to the distinct characteristics of young adult's brain development that are of relevance to young adults in the criminal justice system:<sup>151</sup>

- Risk taking and impulse control. Young adults have reduced impulse control and may be less able to navigate the often stressful and chaotic circumstances surrounding violent offending such as reacting to threatening behaviour by others.
- Peer influence. Like adolescents, young adults are influenced by their peers. They may be able to manage well in a neutral environment, without peer influence, but will have much greater difficulty making an appropriate decision in the presence of peers or under conditions of emotional arousal.
- The age of opportunity. Young adulthood is a stage of life where behaviour change is more readily possible and as a result reintegrative and rehabilitative programmes can show better results as compared to fully functioning adults.

Lynch also reviews other contexts in which young adults are treated differently including the recent raising of the care age,<sup>152</sup> the implementation of pastoral care standards for tertiary students,<sup>153</sup> and provision for young adults in bail and remand.<sup>154</sup>

The research and literature in other jurisdictions also critiques the idea of a single, hard line at 18. The Law Council of Australia rely on neurological and psychological evidence to describe

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<sup>150</sup> Lynch, N. (2022). [Young Adults in the Criminal Justice System in Aotearoa New Zealand - a principled framework for reform](#). Wellington, New Zealand: Michael and Suzanne Borrin Foundation. This research was preceded by a paper drawing from work Woodward completed in his LLB degree supervised by Lynch: Woodward, S. and Lynch, N. (2021). ['Decidedly but Differently Accountable'? – Young Adults in the Criminal Justice System](#). *New Zealand Law Review*, Forthcoming. Victoria University of Wellington Legal Research Paper No. 23/2021. See also a recent student publication: Zhang, R. (2022). [Hanging off a Cliff Edge: The Case for a Welfare-based Approach for Young Adult Offenders with Care and Protection Backgrounds](#). *Public Interest Law Journal*, 9, 148-178.

<sup>151</sup> Lynch, [Young Adults in the Criminal Justice System in Aotearoa New Zealand - a principled framework for reform](#) at 19.

<sup>152</sup> [Oranga Tamariki Act 1989, 386AAA](#). See also 386AAA-386C for additional provisions in relation to the transition to independence.

<sup>153</sup> Ministry of Education. (2021). *Education (Pastoral Care of Tertiary and International Learners) Code of Practice 2021*. <https://www.education.govt.nz/further-education/information-for-tertiary-students/code-of-practice-pastoral-care-domestic-tertiary/>

<sup>154</sup> Lynch, [Young Adults in the Criminal Justice System in Aotearoa New Zealand - a principled framework for reform](#) at 30-32.



the legal distinction between juveniles and adults as “somewhat arbitrary” given that the “boundaries between childhood and adulthood in terms of cognitive development, rational decision-making and psychosocial factors are fluid”.<sup>155</sup> The Victorian Sentencing Advisory Council makes a similar point, noting that the neurological, psychiatric and psychological research establishes that “while maturity varies significantly from person to person, significant psychobiological development is generally still occurring until the age of 25, if not beyond.”<sup>156</sup> In *R v Clarke* the Lord Chief Justice observed:<sup>157</sup>

*It has long been understood that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence. ... Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday.*

The UK House of Commons Justice Committee describe 18 to 24 year olds as a distinct group whose needs differ from both children under 18 and adults over 25 due to the developmental maturation process that takes place in this stage of life,<sup>158</sup> when young people are “malleable and undergo significant cognitive and social changes.”<sup>159</sup>

Qualitative research prepared for the Scottish Sentencing Council in relation to the attitudes of young people to the sentencing of young people in Scotland involving 66 young people aged between 14 and 25 explored the range of ways that young people over 16 differ from adults.<sup>160</sup> Many of the young people agreed that young people may not always make good decisions or think so carefully about consequences, some referred to personal factors such as the accumulation of (self-) knowledge and life experience, and others referred to “material structural inequalities, such as their failure to (yet) achieve a range of social markers, such as stable employment and housing, reliance on others and their relative poverty”.<sup>161</sup> Young people also discussed how young people’s valued supportive relationships were increasingly outside of, rather than within, the home.<sup>162</sup>

It was also recognised that many of these personal, structural, relational and other social factors differed across young people “with some having held jobs, been parents and held their own tenancy for years whilst others have not yet experienced any of these social factors”.<sup>163</sup> The young people also differed in their views regarding which age range a sentencing guideline for

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<sup>155</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) Australia at 6-7.

<sup>156</sup> Sentencing Advisory Council. (2019). [Rethinking Sentencing for Young Adult Offenders](#). Sentencing Advisory Council at 5.

<sup>157</sup> *R v Clarke* [2018] EWCA Crim 185 at [11].

<sup>158</sup> House of Commons Justice Committee. (2016). [The Treatment of Young Adults in the Criminal Justice System Seventh Report of Session 2016–17](#). House of Commons at 9.

<sup>159</sup> Emerging Adult Justice Learning Community. (2021). [A Roadmap to Reform: Key Elements of Specialized Courts for Emerging Adults](#). Columbia Justice Lab at 2.

<sup>160</sup> Miller, J. & Anderson, S. (2021). [A qualitative exploration of the attitudes of young people to the sentencing of young people in Scotland](#). Scottish Sentencing Council at 15-16.

<sup>161</sup> Miller & Anderson, [A qualitative exploration of the attitudes of young people to the sentencing of young people in Scotland](#) at 15-16. Other research has also commented on the delay in reaching some of these social markers: “[s]ociological research demonstrates that changes to societal norms have prolonged the age at which people reach these key markers of adulthood; they typically occur five to seven years later today than they did a few decades ago.”: Centre for Justice Innovation [A fairer way: Procedural fairness for young adults at court](#) at 5.

<sup>162</sup> *Ibid* at 17.

<sup>163</sup> *Ibid*.

young people should apply to with the researchers concluding that this implicitly reflects that there is “no one age at which you turn from being a young person to an adult, and that this instead should be understood as a graduated process of moving from one phase towards another”.<sup>164</sup>

Legal needs research in the United Kingdom has also shown a range of differences between 18-24 year olds and those aged 25 or older in other contexts including:

- Problem identification: 18-24 year olds were much less likely than those aged 25 or older to view their problem as ‘legal’ - 15 per cent compared to 24 per cent for those aged 25 or older.<sup>165</sup>
- Response strategies: 18-24 year olds were more likely to consult family or friends, and less likely to consult a number of types of adviser most notably lawyers and advisers in the independent advice sector.<sup>166</sup> For example, when given a hypothetical debt problem just 14 per cent of those aged 18-24 suggested seeking advice from a lawyer as compared with 43 per cent of those aged 25 or older.<sup>167</sup>
- Legal capability: Young people also reported much higher levels of legal anxiety (which is related to passivity in the face of problems) and viewed the justice system as having much greater inequality.<sup>168</sup>

## Diversity of experiences

*Children vary in their experiences of their childhood, which in turn is shaped by their identities and the ways those identities intersect. Children develop in different ways, experience their childhoods differently, and grow up to become different people. The meaning of ‘normal’ development therefore varies in different contexts and cultures and for different children. There is a need to be aware of the differences among children with respect to gender, sexual orientation, class, race, ethnicity, disability, religion, culture, and age, and their intersections. ... All those factors mentioned above can influence children’s perceptions about their life, shape the opportunities that they can generate for themselves, and determine the opportunities that society offers them.*<sup>169</sup>

Some of these differences may be internal to an individual such as neurological differences. For example, one study found that some eight-year-old brains show greater apparent maturation than some 25-year-old brains in terms of grey and white matter volumes.<sup>170</sup> Other differences are external to the young person as Munford & Sanders explain:<sup>171</sup>

*The pathway from childhood to adulthood is now understood to be heterogeneous and influenced by macro-level factors such as political, social and economic*

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<sup>164</sup> Ibid at 18.

<sup>165</sup> Balmer, N.J. & Pleasence, P. (2018). [Young People and Legal Problems: Findings from the Legal Problem Resolution Survey, 2014-2015](#). Youth Access at 15.

<sup>166</sup> Ibid at 12-13.

<sup>167</sup> Ibid at 15.

<sup>168</sup> Ibid at 20.

<sup>169</sup> Peleg, *The Child's Right to Development* at 214.

<sup>170</sup> Sentencing Advisory Council, [Rethinking Sentencing for Young Adult Offenders](#) at 7.

<sup>171</sup> Munford, R. & Sanders, J. (2019). [The Youth Transitions Study Final Report. Pathways to Resilience and Youth Transitions Research](#), Massey University of New Zealand at 4. See also Alliance for Youth Justice. (2023). [Young people in transition in the criminal justice system: Evidence review](#) for a discussion of the differing experiences of different groups of young people as they transition to adulthood in the criminal justice system.

*environments, the relationships youth form with others as well as changes within individual young people themselves.*

Those young people with a strong safety net and other resources or advantages may experience challenges as bumps along the road or misadventures from which they can learn and develop. As Urry et al. explain, if young people have strong support networks such as family/whānau, this consistent support and caregiver stability will act as a buffer during their transition to adulthood.<sup>172</sup> However, those with fewer resources often face additional challenges with the consequences of their mistakes or misfortunes starting to add up, particularly if they also lose access to their existing support systems.<sup>173</sup> As a result, if policy and service delivery does not directly address the wider structural causes of inequality and marginalisation these young people will approach adulthood at serious disadvantage and are unlikely ever to achieve to their potential which raises serious issues around equity and fairness.<sup>174</sup>

The experience of young adulthood can also differ significantly between different groups. As Lindell & Goodjoint note, “[e]merging adults from lower socioeconomic backgrounds often encounter an abrupt end to their limited supportive services during this difficult period”,<sup>175</sup> including through leaving secondary school which can be a source of both education as well as behavioural and mental health supports. Young people in the care system also age out during early adulthood, leaving many of them homeless as discussed in more detail in *Working paper no. 1: Children in care and care-experienced children and young people*.<sup>176</sup>

Given the differential experiences of different groups (as will be discussed in much greater detail below), questions arise as to whether it is appropriate to consider children and young people as a separate group in their own right. Hammersley poses a similar question about the focus of Childhood Studies on the distinctive experiences and perspectives of children by reference to Women’s Studies, where the significance of the differences among women soon came to be recognised such as between those belonging to different racial or ethnic and social class categories, those with different sexual orientations, and those with and without disabilities.<sup>177</sup> Hammersley argues that children’s experiences and perspectives are likely to vary considerably and that most of this variation reflects characteristics that they share with adults which presents a challenge to the idea that childhood can be studied ‘in its own right’.<sup>178</sup>

While I agree in part with this critique, I also consider that there is enough that is distinct about the experiences of children and young people that they should be considered as a distinct group. That said, I also believe that we must consider the experiences of different groups of children and young people in order to fully understand the experiences of children and young people. To put this another way, I have taken a both/and approach by exploring both the experiences of children and young people as a group, as well as the experiences of different groups of children and young people.

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<sup>172</sup> Urry, Y., Sanders, J. Munford, R. & Dewhurst, K. (2014). *Turning Points in the Lives of Vulnerable Young People*. The Youth Transitions Study, NZ: Dalhousie University & Massey University at 8.

<sup>173</sup> Lindell, K.U. & Goodjoint, K.L. (2020). *Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region*. Juvenile Law Center at 7-8.

<sup>174</sup> Munford & Sanders, *The Youth Transitions Study Final Report. Pathways to Resilience and Youth Transitions Research* at 5.

<sup>175</sup> Lindell & Goodjoint, *Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region* at 7.

<sup>176</sup> See <https://www.cypaccesstojusticenz.com/reportsworkingpapers>.

<sup>177</sup> Hammersley, M. (2017). Childhood Studies: A sustainable paradigm? *Childhood*, 24(1), 113–127 at 116.

<sup>178</sup> *Ibid* at 116.

## Children and young people's justice problems

To give a picture of the justice problems experienced by children and young people in Aotearoa New Zealand I have considered evidence from a range of sources including legal needs surveys and responses of my requests for information from Government agencies and Crown entities. I then discuss data and evidence from other jurisdictions in relation to children and young people's justice problems and barriers to access. Where the terminology used in other studies differs from that I am using for this research I have generally tried to use the terminology from the original study for clarity. For example, I refer to 'legal needs' when discussing legal needs surveys because this is what the survey was exploring as opposed to the wider term 'justice problems' I am using for this research.

### Legal Needs Surveys

Legal needs surveys in New Zealand have generally included participants aged 15 and over.<sup>179</sup> However, the reports of these surveys generally provide fairly limited analysis of the differing needs of those in different age groups. For example, the 2006 legal needs survey conducted by Ignite Research involved a random selection of over 7,200 New Zealanders aged 15 years and over, including a booster sample of 350 Māori and 150 Pacific Island people.<sup>180</sup> The report does not say how many young people participated in the survey, but does say that the national dataset was re-weighted on the basis of area, age, gender, ethnicity and income.<sup>181</sup> It also makes some passing references to differences between age groups but without providing the raw data upon which the conclusions were based. For example, the report refers those over and underrepresented as clients of various types of legal services but combines different age bands together when doing so without providing the raw figures.<sup>182</sup> The very limited data the report does share also raises some concerns about the extent to which those 15-24 are accessing legal services when they need them as this age group made up only 11% of those using legal services as compared with 25-34 year olds who made up 24% of service users and 35-44 year olds who made up 28% of those accessing legal services.<sup>183</sup> Given that 15-19 year olds were one of the groups who were over-represented in those with unmet legal needs,<sup>184</sup> it seems clear that the reason for low levels of legal service use was not that this group didn't need them.

More recently, the 2018 Legal Needs Survey conducted by Colmar Brunton focussed on low income earners<sup>185</sup> and involved 1,000 people aged 15 years and over. The survey report states it involved 98 aged 15-19 and 78 aged 20-29 with the responses were weighted to reflect age

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<sup>179</sup> Ignite Research say this is on the basis that 15 is the youngest that someone can be interviewed without parental consent: Ignite Research. (2006). *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services*. Legal Services Agency at n6. However, legally there is no specific age of consent to participate in research although it is likely that the Courts would take a competence based approach if this issue arose in litigation. The Ethics Committees at different institutions also take different positions on this issue. See Loveridge, J. (2010). [\*Involving Children and Young People in Research in Educational Settings\*](#). Victoria University of Wellington at 6-7.

<sup>180</sup> Ignite Research, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* at 9.

<sup>181</sup> *Ibid* at 10.

<sup>182</sup> *Ibid* at 56-58.

<sup>183</sup> *Ibid* at 58.

<sup>184</sup> *Ibid* at 62. The other groups over-represented were females, 15-19 year olds, new migrants, home owners, and widowed people.

<sup>185</sup> The survey used screening questions to determine eligibility using a threshold of gross personal annual income of \$34,000 or less (and do not have a financially dependent partner or child under 18 years of age) or gross household annual income of \$72,000 or less (and have a financially dependent partner and/or 1 or more financially dependent children under 18 years of age).

distribution in the population.<sup>186</sup> There was some analysis in relation to variations between age groups:

- Young people were less likely to be aware of legal aid - only 30% of those under 20 and 45% of those in their 20s, compared with 66% of those aged 30-44, 94% of those aged 45-54, and 96% of those aged 55+.<sup>187</sup>
- Young people were also less likely to be aware of Community Law Centres - only 22% of those under 20 and 29% of those in their 20s, compared with 37% of those aged 30-44, 63% of those aged 45-54, 70% of those aged 55-64, and 55% of those aged 65+.<sup>188</sup>
- People aged under 30 were more likely to experience problems to do with education (25%).<sup>189</sup>
- Young people were one of the groups that were more likely than average to not seek information or advice - 32% of those aged 15-19 did not seek information or advice compared with 27% of those aged 20-29, 18% of those aged 30-54, 14% of those aged 55-64, and 27% of those aged 65+.<sup>190</sup>
- People aged 20-29 who received information or advice were less likely to find it useful - 56% as compared with 87% of the broader population.<sup>191</sup>

Both the 2006 and 2018 surveys had limitations in relation to their accessibility to children and young people and vulnerable groups more generally as they were both phone surveys which are generally accepted to be less suitable methods for engaging with marginalised groups including children and young people.<sup>192</sup> The Ministry of Justice recently commissioned another Legal Needs Survey but a review of the tender documents and a summary of the project by the successful tenderer suggests that it is likely to suffer from the same limitations as earlier surveys given it is also limited to those over 15 and will be conducted using mobile and landline interviews.<sup>193</sup>

More generally, when I sent an Official Information Act request to the Ministry of Justice I asked for “[a]ny information and documents relating to assessment of the legal needs of children and young people including information relating to the inclusion of children and young people in wider assessments of legal needs”.<sup>194</sup> The Ministry’s response was that there is “no specific information that relates to this part of your request” and they refused my request under section 8(e) of the Act.<sup>195</sup>

## Office of the Children’s Commissioner

The Office of the Children’s Commissioner (OCC) does not operate a formal complaints system but it does employ a member of staff to answer calls and respond to emails from the public through what is called the ‘Child Rights Advice Line’. I requested information from the OCC in

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<sup>186</sup> Colmar Brunton. (2018). *Legal needs among low income New Zealanders*. Ministry of Justice at 67-68.

<sup>187</sup> *Ibid* at 13.

<sup>188</sup> *Ibid* at 15.

<sup>189</sup> *Ibid* at 46.

<sup>190</sup> *Ibid* at 51.

<sup>191</sup> *Ibid* at 58.

<sup>192</sup> For example see Cunneen, C., Allison, F. & Schwartz, M. (2014). [Access to justice for aboriginal people in the Northern Territory](#), *The Australian Journal of Social Issues*, 49(2), 219-240 at 221. My own anecdotal experience is that young people almost never answer the phone making it unlikely that they would participate in research conducted in this way.

<sup>193</sup> Ministry of Justice. (2022). *Request for Proposals: Access to Justice Legal Needs Survey*. Ministry of Justice at 3; Solasta. (n.d.). *Case examples*. <https://www.solasta.co.nz/case-examples>

<sup>194</sup> [Letter from Jennifer Braithwaite to Ministry of Justice dated 17 February 2021](#).

<sup>195</sup> [Letter from Ministry of Justice to Jennifer Braithwaite dated 28 April 2021](#).

relation to the subject matter of issues raised by children who had contacted this line over the last ten years.<sup>196</sup> The OCC provided me with information in relation to 166 contacts where the 'caller type' had been identified as a child or a young person. Of these 166 contacts:<sup>197</sup>

- 37 related to care & protection issues or children in care. Of these, 8 related to placements, 18 related to support and the remaining 11 related to a range of other issues including investigation, access, transition, behaviour problems, CYFS referral and policy / guidelines.
- 17 related to child wellbeing / non-statutory of which 12 related to parent information and 5 related to child safety.
- 20 related to education issues with 11 of these relating to discipline issues such as punishments, stand-downs, suspensions, and exclusions. The remainder related to bullying, management / governance issues, policy & procedure, and special education needs.
- 76 were classified as legal advice with 54 of these relating to legal ages, 1 employment issue, 5 family court, 4 immigration and 11 recorded as 'information'.
- 14 were classified as other advice including 7 relating to child rights, 7 relating to child wellbeing, 1 finance and the last unknown.
- There were also 2 relating to police interviews and 1 relating to health.

## Office of the Ombudsman

Although the Office of the Ombudsman (Ombudsman) is not subject to the Official Information Act, I contacted them to request the same information in relation to the subject matter of complaints made by children and young people under the age of 25.<sup>198</sup> The Ombudsman responded to advise that the Ombudsman's current document management system does not provide the ability to easily collate and consolidate complaint information based on demographic information of the complainant.<sup>199</sup> Following correspondence in relation to the information that they would be able to provide, the Ombudsman provided information in relation to the complaints they had received made by or on behalf of young people in relation to children in care,<sup>200</sup> as well as those relating to Boards of Trustees and the Ministry of Education.<sup>201</sup>

There were 243 complaints by or on behalf of children in care in the period from 1 July 2019 to 30 June 2021.<sup>202</sup> Of these:

- 123 related to the conduct of staff or officials;
- 91 related to complaints procedure or complaints handling;
- 55 related to decision making or administrative processes;
- 13 related to delay; and

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<sup>196</sup> See [Letter from Jennifer Braithwaite to the Office of the Children's Commissioner dated 21 June 2021](#).

<sup>197</sup> See [Letter from Office of the Children's Commissioner to Jennifer Braithwaite dated 21 September 2021](#) and [Appendix 1: Child Rights Enquiries Data \(CRED\)](#). This is the raw data provided.

<sup>198</sup> See [Letter from Jennifer Braithwaite to Office of the Ombudsman dated 21 June 2021](#).

<sup>199</sup> See [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#).

<sup>200</sup> Information in relation to complaints in relation to children in care included all complaints made by or on behalf of children and young people since 1 July 2019 when the Children in Care team was created. See [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#).

<sup>201</sup> The information in relation to complaints against Boards of Trustees and the Ministry of Education related to those complaints received and closed in the last 3 complaint years (from 1 July 2018 to 30 June 2021). See [Email from Office of the Ombudsman to Jennifer Braithwaite dated 23 August 2021](#).

<sup>202</sup> Some complaints related to more than one issue. Where this occurred each issue was counted separately. See [Excel spreadsheet of children in care complaints for the raw data provided](#).

- The remainder related to a large range of other issues including advice or information given to the complainant, privacy interference, reasons for a decision, record keeping, and standard of service.

271 complaints against Boards of Trustees and 107 complaints against the Ministry of Education were received and closed by the Ombudsman in the last 3 complaint years (from 1 July 2018 to 30 June 2021).<sup>203</sup> More than one keyword can be recorded for each complaint.

Of the 271 complaints against Boards of Trustees:

- 34 related to advice or information given to complainant
- 95 related to complaints procedure or complaints handling
- 57 related to conduct of staff or officials
- 4 related to Covid-19
- 96 related to decision making process or administrative process
- 11 related to delay in acting or responding
- 12 related to discrimination
- 28 related to keywords with only 2 or 3 responses (including alternative dispute resolution, appeal or review rights, conflict of interest, privacy, standard of service, exercise of discretion, fees or charges, funding etc.)
- 21 complaints were recorded as “none selected” or “no suitable keywords”

Of the 107 complaints against Ministry of Education:

- 18 related to advice or information given to complainant
- 19 related to complaints procedure or complaints handling
- 35 related to decision making process or administrative process
- 3 related to delay in acting or responding
- 5 related to funding or grants
- 3 related to policy or procedure
- 19 related to keywords with only 1 to 3 responses (including alternative dispute resolution, appeal or review rights, conflict of interest, privacy, standard of service, exercise of discretion, fees or charges, tender, ex-gratia payment etc.)
- 16 complaints were recorded as “none selected” or “no suitable keywords”

In summary, significant proportions of the complaints made against both Boards of Trustees and the Ministry of Education related to either complaints (including advice or information given to complainants) or decision making processes. It is unclear what the original complaints related to, but the frequency of complaints about these processes makes it clear that improvements are required in relation to complaints processes in the education system.

## Human Rights Commission

If a child is discriminated against on one of the 13 grounds of unlawful discrimination (and several sub grounds) listed in section 21 of the Human Rights Act 1993 a complaint may be made to the Human Rights Commission (HRC).<sup>204</sup> However, s21(i) provides that the age discrimination provisions do not apply to persons under 16 years of age limiting the ability to make complaints about discrimination on the basis of age to those young people aged 16 or over.

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<sup>203</sup> As above, some complaints related to more than one issue and where this occurred each issue was counted separately. See [Excel spreadsheet of BoT and MoE complaints](#).

<sup>204</sup> [Human Rights Act 1993, s21](#).

I requested information from the HRC in relation to the subject matter of complaints made by children and young people under the age of 25 over the last ten years.<sup>205</sup> The information I received in response my request is set out below separated by the age ranges used by the HRC to record data (1-17 and 18-30).<sup>206</sup> The HRC advised that they do not provide the subject matter of individual complaints to external stakeholders due to their confidentiality obligations and as they do not wish any complainants to be able to identify themselves in the data they provide. They did however provide a general breakdown of the overall themes identified in the data.

The themes related to children and young people aged 0-17 were:

- Education issues (cultural discrimination – children prevented from wearing taonga, rules on hair; disability – school body (exams, participation), teachers, pupils, participation in sports, poorly accommodated; racial discrimination – by teaching staff, pupils, targeting minority groups over bad behaviour; gender – prevention of expression of gender identity; sexuality – discrimination from pupils, teaching staff, ban of same sex couples at school ball; sexual harassment – unwanted attentions from fellow pupils, teaching staff; and mental health – poorly accommodated, failure to make reasonable adjustments for children suffering mental health issues);
- Health conditions (religious discrimination and health/disability – time off for ongoing health conditions, terminal health conditions)
- Church (sexual harassment and disability – prevention of participation, poorly accommodated)
- Medical (sexuality – failure to provide support, medication, referrals)
- Workplace (age related discrimination; racial discrimination – comments from employer/supervisor, non-employment due to race; language – ban on speaking own language in workplace; and sexual harassment – employer, supervisor, fellow staff member, forced to wear low cut uniforms, sexualised comments)
- Police and court systems (racial – victimisation based on colour of skin; religious discrimination; disability – failure to acknowledge, poorly accommodated; and mental health – failure to make reasonable accommodations)

The themes relating to young people aged between 18-30 were:

- Workplace (sexual harassment, unscheduled drug tests, racial harassment and pre-employment discrimination);
- Racial discrimination (shops, café, bars, restaurants; police; airports; and government agencies);
- Housing (disability – poorly accommodated, refusal of guide dogs/support animals; racial bias/discrimination; religious discrimination; refusal to consider WINZ beneficiaries; gender/sexuality; and age – declined accommodation); and
- Prison (sexual harassment – fellow inmates, staff; racial harassment – staff, inmates; disability – poorly accommodated; and religious discrimination – sacred items forbidden, correct foods e.g. halal not provided).

## **Ministry of Business, Innovation and Employment**

Unfortunately the Ministry of Business, Innovation and Employment advised that both the Employment Relations Authority and the Tenancy Tribunal do not collect information in relation

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<sup>205</sup> See [Letter from Jennifer Braithwaite to Human Rights Commission dated 21 June 2021](#).

<sup>206</sup> See [Email from Human Rights Commission dated 12 August 2021](#). They did not provide all the data requested due to limitations of their data collection process see: [Email correspondence with Human Rights Commission in July / August 2021](#).



to the age of applicants.<sup>207</sup> The Labour Inspectorate was able to provide information in relation to complaints made by people between the ages of 16 and 24 from July 2018 onwards although they were not able to provide full information disaggregated by other demographic characteristics.<sup>208</sup> The most commonly experienced problem categories were minimum wage issues, annual holidays, public holidays, unauthorised deductions from wages, issues relating to employment agreements, and employers not passing on the Covid-19 wage subsidy.<sup>209</sup> However, given the role of the Labour Inspectorate is limited to enforcing and monitoring minimum employment standards,<sup>210</sup> the information provided gives only a partial picture of the employment related problems experienced by children and young people.

## Ministry of Education

I requested information from the Ministry of Education (MinEdu) in relation to complaints made by students or those acting on their behalf over the same period broken down by demographic characteristics.<sup>211</sup> MinEdu responded that they do not have any centralised data broken down into the categories requested and refused my request on the basis it would require a manual search of all complaints over this period.<sup>212</sup> They did however provide various documents outlining the complaints process. Following a further request,<sup>213</sup> MinEdu eventually provided some limited information in relation to the complaints received.<sup>214</sup>

Interestingly, MinEdu’s 2019 regulatory impact statement in relation to the establishment of disputes resolution panels stated that the Ministry does collect data on complaints about schools received by the Ministry.<sup>215</sup> The regulatory impact statement also set out the subject matter of the 2788 complaints made to the Ministry between mid-2016 and 17 September 2019 as shown in **Table 1** below. The regulatory impact statement went on to note that a common theme was schools were not doing enough to prevent bullying or to support the education needs of their child.<sup>216</sup>

**Table 1: Complaints to Ministry of Education (mid-2016 – September 2019)<sup>217</sup>**

Subject matter of complaints	Number of complaints
Health and Safety/Bullying	1265
Governance (BOT, principal, staff)	1204
Enrolments/attendance/learning support	552

<sup>207</sup> [Letter from Ministry of Business, Innovation and Employment to Jennifer Braithwaite dated 12 March 2021.](#)

<sup>208</sup> [Letter from Ministry of Business, Innovation and Employment to Jennifer Braithwaite dated 12 March 2021](#) at 2.

<sup>209</sup> [Spreadsheet of complaints made to Labour Inspectorate.](#)

<sup>210</sup> Employment New Zealand. (2023). *Labour Inspectorate*. <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/>

<sup>211</sup> [Letter from Jennifer Braithwaite to Ministry of Education requesting information under the Official Information Act dated 17 February 2021.](#)

<sup>212</sup> [Letter from Ministry of Education to Jennifer Braithwaite dated 14 May 2021.](#)

<sup>213</sup> [Letter from Jennifer Braithwaite to Ministry of Education dated 17 May 2021.](#)

<sup>214</sup> [Letter from Ministry of Education to Jennifer Braithwaite dated 29 June 2021.](#)

<sup>215</sup> Ministry of Education. (2019). *Regulatory Impact Assessment: Establishing dispute resolution panels*. Ministry of Education at 3. The RIA did also state that the MoE will not be aware of all complaints made to Boards of Trustees.

<sup>216</sup> *Ibid* at 8.

<sup>217</sup> *Ibid* at 8. The notes to this table advise that each complaint may relate to more than one category and that the ‘Other’ category is used to capture categories that are not listed. Some sample other categories are School Transport, Cultural Tensions/Conflicts, Fees, Curriculum, Network, Ministry, etc.

Stand-downs/Suspensions	278
Achievement	150
Resourcing/finance/property	146
Other	496

## Education system

### Disciplinary action

The national age-standardised rates of disciplinary action in 2021 were:<sup>218</sup>

- The stand-down rate was 26.8 per 1,000 students, an increase from 2020 and a decrease from 2019;
- The suspension rate was 3.1 per 1,000 students in 2021 which was similar to 2020 and a decrease from 2019; and
- Following the suspension process, students were excluded at the rate of 1.1 per 1,000 students and expelled at the rate of 1.0 per 1,000 students. Both exclusion and expulsion rates were similar to 2020 and lower than the 2019 rates.

There are a range in disparities in stand-down, suspension, exclusion and expulsion rates. In particular:

- Schools and kura continue to stand-down, suspend, exclude and expel ākonga Māori at significantly higher rates than any other ethnic group;<sup>219</sup>
- The age-standardised stand-down, suspension, exclusion and expulsion rates for students in decile 1-2 schools and kura were around three to four times the age-standardised stand-down rate for decile 9-10 schools and kura;<sup>220</sup> and
- Schools and kura stand-down, suspend, exclude and expel male students at higher rates than female students.<sup>221</sup>

### Bullying

A range of sources provide evidence of school bullying in Aotearoa New Zealand. For example:

- The Education Review Office survey for an evaluation of bullying prevention and response in New Zealand schools found that 46% of primary-age students and 31% of secondary-age students reported having been bullied at their current school. 61% of primary-age students and 58% of secondary-age students reported having witnessed someone else being bullied at their current school.<sup>222</sup>

<sup>218</sup> Ministry of Education. (2022) [Stand-downs, suspensions exclusions and expulsions from school](#). Ministry of Education at 3.

<sup>219</sup> Ibid at 3.

<sup>220</sup> Ibid at 8 and Time Series spreadsheets available at: <https://www.educationcounts.govt.nz/statistics/stand-downs,-suspensions,-exclusions-and-expulsions> Decile 1-2 schools and kura (low SES) were made up of students from communities with the highest degree of socio-economic disadvantage.

<sup>221</sup> Ibid at 9-10.

<sup>222</sup> Education Review Office. (2019). [Bullying Prevention and Response in New Zealand Schools](#). Education Review Office Te Tari Arotake Mātauranga at 6.

- A questionnaire for the Growing Up in New Zealand study asked participants about a range of bullying experiences:<sup>223</sup>
  - 51% (n=2475) of children reported being put down or teased at least once or twice a year and 24% reported that this happened at least once a week (n=1162);
  - 15% of children reporting that they had been excluded (n=741) or had lies told about them (n=718) at least once a week;
  - 12% reported physical bullying including being hit or hurt by others at school at least once a week;
  - 21% (n=1017) reported that they were bullied because they learned differently. For 9% of children (n=49) this bullying occurred at least weekly;
- PISA data shows that Aotearoa New Zealand has among the highest rates of bullying in the OECD.<sup>224</sup>

## Criminal justice system involvement

### Offending rates

Over the last decade offending by children and young people has decreased substantially with overall offending rates for children and young people decreasing by 63% and 64 over the period from 2011/2012 to 2021/2022.<sup>225</sup> There have also been substantial decreases in reoffending rates. However, although both offending and reoffending rates have decreased for tamariki and rangatahi Māori, Māori are still over-represented in the youth justice system.<sup>226</sup>

While fewer children and young people have offended, children that have offended have committed more offences on average. Interestingly, despite common prejudices in relation to South Auckland, the highest population-adjusted rates of offending by children were in the Tasman, Central and Bay of Plenty Police Districts and the highest population-adjusted rates of offending by young people were in the Tasman, Bay of Plenty and Northland Police Districts.<sup>227</sup>

### Connection between school exclusion and justice system involvement

Many researchers and academics have identified a connection between school exclusion or disengagement and justice system involvement.<sup>228</sup> For example, Gordon discusses the association between poverty, educational attainment, school disciplinary and youth / criminal

<sup>223</sup> Morton, S.M.B., Walker, C.G., Gerritsen, S., Smith, A., Cha, J., Atatoa Carr, P., Chen, R., Exeter, D.J., Fa'alili-Fidow, J., Fenaughty, J., Grant, C. Kim, H., Kingi, T., Lai, H., Langridge, F., Marks, E.J., Meissel, K., Napier, C., Paine, S., Peterson, E.R., Pilai, A., Reese, E., Underwood, L., Waldie, K.E. & Wall, C. (2020). *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now We Are Eight*. Growing Up in New Zealand at 124-125.

<sup>224</sup> Jang-Jones, A. & McGregor, A. (2019). *PISA2018 New Zealand Students' Wellbeing School climate & student mindsets of 15-year-olds*. Ministry of Education at 21.

<sup>225</sup> Ministry of Justice. (2023). *Youth Justice Indicators Summary Report* at 5.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid at 6.

<sup>228</sup> Sutherland, A. (2011). *The relationship between school and youth offending*. *Social Policy Journal of New Zealand*. 37, 1-19; Gordon, L. (2015). Teaching the 'Poor' a Lesson: Beyond Punitive Discipline in Schools. *New Zealand Journal of Educational Studies*, 50(2), 211-222; Sherwood, K.N. (2015). *Stuck in Detention – the Connection between Disengaging from School and Youth Offending in New Zealand*. [Honours Dissertation, University of Otago]; Reil, J., Lambie, I., Becroft, A., & Allen, R. (2022). *How we fail children who offend and what to do about it: 'A breakdown across the whole system'. Research and recommendations*. The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland; Flavell, W. (2022). *Kia tū pakari ngā māhuri: Amplifying the voices of rangatahi Māori in the criminal justice system and their educational experiences*. [Masters Thesis, Auckland University of Technology].

justice system involvement identifying what she terms the ‘school to prison pipeline’,<sup>229</sup> although her analysis suggests it may be more accurate to call it a poverty to prison pipeline. She also identifies the differential operation of this pipeline:<sup>230</sup>

*[T]here is a strong association between those living below the poverty line, having very low educational attainment and being likely to be detained within the youth or adult justice systems. This is a highly segmented, but intersecting, set of populations. Even within them, the pipeline is further constricted, so that males rather than females and Māori rather than non-Māori are most likely to end up in prison (Department of Corrections 2007).*

Research by Sanders et al. using longitudinal data to explore the impact of school exclusion on later justice system involvement<sup>231</sup> provides some quantitative evidence of this phenomenon. They found that school exclusion has a greater impact on delinquency and criminal justice system involvement than factors external to the school environment such as neighbourhood risk.<sup>232</sup> Sanders et al. suggest that their findings highlight the way that school exclusion may amplify the challenges young people face “propel[ling] them along the pipeline”, and that schools have the potential to instead be a point of intervention, by diverting children and young people from later justice system involvement.<sup>233</sup>

Reil et al.’s research using Integrated Data Infrastructure (IDI) data on 48,989 children from their birth in 2000 until 30 June 2019 to explore associations between different offending groups and a range of background factors also identified connections between school disciplinary action and criminal justice system involvement.<sup>234</sup> In particular, children who had been stood down or suspended from school before age 10 were significantly more likely to offend at all age groups and for those children who had offended, children who were suspended or stood down between age 5 and 10 were also significantly more likely to reoffend.<sup>235</sup> In addition, almost half of children expelled from school before age 14 offended as both a child and young person.<sup>236</sup> Those expelled from school before age 14 were also significantly more likely to reoffend.<sup>237</sup> Reil et al. concluded that it is critical for children to remain at school which requires schools to be properly resourced to ensure that children’s behaviour related needs are met.<sup>238</sup>

## Victimisation

The New Zealand Crime and Victims Survey (NZCVS) is a nationwide, face-to-face, annual, random-sample survey in which people aged 15 and over living in private dwellings are interviewed about their experiences of crime over the previous 12 months.<sup>239</sup> The NZCVS is described as providing a more accurate picture of levels of crime in the community than other

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<sup>229</sup> Gordon, Teaching the ‘Poor’ a Lesson: Beyond Punitive Discipline in Schools at 216.

<sup>230</sup> Ibid at 214.

<sup>231</sup> Sanders, J., Liebenberg, L. & Munford, R. (2020). The impact of school exclusion on later justice system involvement: investigating the experiences of male and female students, *Educational Review*, 72(3), 386-403.

<sup>232</sup> Ibid at 396.

<sup>233</sup> Ibid at 397.

<sup>234</sup> Reil et al., [How we fail children who offend and what to do about it: ‘A breakdown across the whole system’. Research and recommendations](#) at 7-8.

<sup>235</sup> Ibid at 7.

<sup>236</sup> Ibid at 8.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid at 14.

<sup>239</sup> Ministry of Justice. (2022). [Survey findings - Cycle 4 report Descriptive statistics. June 2022. Results drawn from Cycle 4 \(2020/21\) of the New Zealand Crime and Victims Survey](#). Ministry of Justice at 56.

sources such as police or court records as only about 25% of crime is reported to the police.<sup>240</sup> The Cycle 4 (2020/21) survey found:

- There is a strong and consistent relationship between age and victimisation with younger people (aged 15–29) significantly more likely to be victimised, especially regarding personal offences and interpersonal violence offences.<sup>241</sup>
- The overall pattern for victimisation by age is consistent across ethnic groups with younger people being more likely to be victimised and older people less likely in each ethnic group.<sup>242</sup>
- Young adults (aged 15–19) were at high risk of sexual assault with prevalence rates of sexual assault significantly higher in younger age groups, with 4.9% of those aged 15–19 affected compared with 1.0% of those aged 40+. 90,000 sexual assaults out of the total of 176,000 (or 51%) were against people aged 15–29.<sup>243</sup>
- The NZCVS did not find any significant differences in reporting rates by age,<sup>244</sup> but there were differences by offence type with only 8% of sexual assaults reported to the Police over the last four annual cycles<sup>245</sup> and the reasons for not reporting offences like interpersonal violence, sexual assault, and offences by family members being significantly more likely to involve reasons of a personal nature such as it being a ‘Private/personal/family or whānau matter’.<sup>246</sup>

The Ministry of Justice has also acknowledged that more information is needed on the prevalence of sexual violence in children under the age of 15 who are not covered by the NZCVS.<sup>247</sup>

Fanslow et al.’s population based study using data from the 2019 Family Violence Survey produced prevalence estimates of different types of child abuse by socio-demographic characteristics. They found that childhood abuse was prevalent and co-occurring, but was not evenly distributed with females reporting a greater prevalence of all types of ACEs, in particular sexual abuse where 26% of females reporting this type of abuse compared with 10.6% of males.<sup>248</sup>

**Table 1** sets out prevalence estimates of child abuse using a selection of the socio-demographic characteristics used in Fanslow et al.’s study.<sup>249</sup>

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<sup>240</sup> Ibid at 7.

<sup>241</sup> Ibid at 77.

<sup>242</sup> Ibid at 87.

<sup>243</sup> Ibid at 105.

<sup>244</sup> Ibid at 158.

<sup>245</sup> Ibid at 157.

<sup>246</sup> Ibid at 169.

<sup>247</sup> Ibid at 105.

<sup>248</sup> Fanslow, J., Hashemi, L., Gulliver, P., & McIntosh, T. (2021). Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study. *Child Abuse & Neglect*, 117, 105067 at 12.

<sup>249</sup> The full table of prevalence estimates is in Fanslow et al., Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study at 6-7.

**Table 1 Prevalence of childhood abuse<sup>250</sup>**

Characteristics	Emotional abuse	Physical abuse	Sexual abuse
Total	29.2%	17.8%	18.3%
<b>Gender</b>			
Male	30.1%	18.9%	26%
Female	28.3%	16.9%	10.6%
<b>Age group</b>			
16-24	42.5%	18%	11.1%
25-34	36.1%	17.7%	14.2%
35-44	31.8%	15.9%	16.8%
45-54	31.5%	18.5%	20.8%
55-64	29.2%	22.4%	23.3%
>64	18.1%	15.4%	18.4%
<b>Ethnicity</b>			
European	27.1%	16%	16.7%
Māori	52.1%	31.3%	31.3%
Pacific	33.5%	24.7%	21.1%
Asian	19.9%	13.3%	14.2%
MELAA	30.2%	20.9%	26.8%
<b>Area deprivation</b>			
Least deprived	22.5%	15.6%	16.8%
Moderately deprived	30.4%	16.7%	15.9%
Most deprived	33.8%	21.7%	23.4%

## Overseas studies

Legal needs surveys and other research overseas have shown that age is significantly related to both the overall prevalence of legal problems and to the prevalence of particular types of legal problems.<sup>251</sup> Commentators conclude that this reflects the fact that people’s life circumstances change with age, as does their exposure to particular types of legal problems.<sup>252</sup> That is, most children and young people will be in formal education from the age of 5 or 6 until 16 to 18 years old. Most will also be living at home with their parents during this time. As such, the legal problems they experience will reflect this stage in their lives such as those relating to

<sup>250</sup> Fanslow et al., Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study at 6-7.

<sup>251</sup> Coumarelos, C., Macourt, D., People, J., McDonald, H.M., Wei, Z., Iriana, I. & Ramsey, S. (2013). [Legal Needs of younger people in Australia](#). *Updating Justice*, 27, 1-4 at 1.

<sup>252</sup> See Coumarelos, C., Wei, Z. & Zhou, A.H. (2006). [Justice made to measure: NSW legal needs survey in disadvantaged areas](#), Law and Justice Foundation of NSW; Dignan, T. (2006). [Northern Ireland Legal Needs Survey](#), Northern Ireland Legal Services Commission; Coumarelos et al., [Legal Needs of younger people in Australia](#).

school discipline, intrafamilial conflict, and for some, entering part-time employment. As a young person enters full time employment and leaves home they will encounter different legal issues such as tenancy issues and other employment issues. The lifestyles of people in this age group may also differ from both young children and older adults e.g. being more likely to be out and about on the street, drinking and socialising with peers which may increase the risk of inter-personal conflict as a victim or offender.

Other legal needs research has also found differences between the legal needs of different cohorts of young people (albeit using slightly different age bands) both in terms of the nature and frequency or volume of legal problems. For example, the Law Council of Australia found that rights, personal injury and consumer problems were significant for people aged 15 to 17 years whereas consumer, accidents and housing problems were significant for people aged 18 to 24 years.<sup>253</sup> This research also found that the legal issues of this age group also includes some problems that may be related to criminal activity such as problems concerning unfair treatment by police and student bullying/harassment.<sup>254</sup>

Studies have also found that older young people have higher levels of legal problems.<sup>255</sup> An analysis of English and Welsh Civil and Social Justice Panel Survey (CSJPS) data found that 24% of 16 to 19 year olds reported legal issues compared to 41% of 20 to 24 year olds (and 38% of 25 to 59 year olds).<sup>256</sup> Even more starkly, analysis of Legal Problem Resolution Survey, 2014-2015 found that 21 per cent of 18 year olds reported problems versus 51 per cent for 24 year olds.<sup>257</sup> The Law Council of Australia also reported 18-25 year olds had both higher levels of legal problems and were more likely to experience “substantial and multiple legal problems” as compared to people aged 15 to 17 years.<sup>258</sup> Analysis of data from the 2010 wave of the Civil and Social Justice Panel Survey in England and Wales has also established that the needs of young people aged 16-24 group are more frequently un-met than the legal needs of the adult population as a whole with young people being the least likely to have received formal legal advice and more likely to have handled the problems alone.<sup>259</sup>

A pattern of increased victimisation of younger age groups is also seen in other countries. For example, Pleasence reported that young people participating in the 2010 CSJPS often reported having been victims of crime with 16 to 17 year olds and 18 to 24 year olds reporting “higher than normal rates of being victim to robbery (1%) and assault (5% and 3%, respectively) over the preceding 18 months”.<sup>260</sup> The Australian Child Maltreatment study found that among participants aged 16 to 24 the national prevalence of child sexual abuse was 25.7%.<sup>261</sup> Other key findings included that there is a massive gender disparity (35.2% of females versus 14.5%

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<sup>253</sup> Law Council of Australia. (2018). [The Justice Project: Final Report Part 1 Children and Young People](#) at 10.

<sup>254</sup> Coumarelos et al., [Legal Needs of younger people in Australia](#) at 2.

<sup>255</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 9; Pleasence, P., Balmer, N. & Hagell, A. (2015). [Health Inequality and Access to Justice: Young People, Mental Health and Legal Issues](#). Youth Access at 7; and Balmer, & Pleasence, [Young People and Legal Problems: Findings from the Legal Problem Resolution Survey, 2014-2015](#) at 3.

<sup>256</sup> Pleasence et al., [Health Inequality and Access to Justice: Young People, Mental Health and Legal Issues](#) at 7.

<sup>257</sup> Balmer & Pleasence, [Young People and Legal Problems: Findings from the Legal Problem Resolution Survey, 2014-2015](#) at 3.

<sup>258</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 9.

<sup>259</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 13-14.

<sup>260</sup> Pleasence, [Civil Legal Problems: Young People, Social Exclusion and Crime](#) at 4.

<sup>261</sup> Haslam, D., Mathews, B., Pacella, R., Scott, J.G., Finkelhor, D., Higgins, D.J., Meinck F., Erskine, H.E., Thomas, H.J., Lawrence, D. & Malacova, E. (2023). [The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report](#). Australian Child Maltreatment Study, Queensland University of Technology at 18.

of males) and that the perpetrator was a young person aged under 18 in 12.9% of child sexual abuse in the total sample.<sup>262</sup> The study also found that while prevalence of child sexual abuse by parents and parent-like caregivers has substantially declined, there has been a substantial increase in the prevalence of child sexual abuse by other adolescents, particularly by those who are or were in a romantic relationship.<sup>263</sup>

## Barriers

### Barriers to accessing justice generally

Before discussing the barriers to accessing justice experienced by children and young people, I will briefly summarise common barriers affecting people of all ages. The New Zealand Law Society's Access to Justice Stocktake divided barriers into two broad categories: cultural/social (poverty, discrimination, literacy, and education) and institutional (insufficient government resources, organisational structure of justice institutions, limited legal assistance and representation, and lack of enforcement).<sup>264</sup> Common barriers identified in the literature include:

- The cost of accessing the justice system which is beyond the financial capacity of many people and being deterred from taking up legal aid assistance as it would result in debt;<sup>265</sup>
- Difficulty finding a lawyer particularly one who will take on a legal aid matter;<sup>266</sup>
- Lack of resources within the legal system and lengthy delays as a result;<sup>267</sup>
- Failure to resolve legal problems and disputes in an efficient and timely manner leading to problems multiplying, negative psychological impacts, and a lack of confidence in the system;<sup>268</sup>
- Lack of legal capability including not seeing a problem as a 'legal' problem.<sup>269</sup> The meaning of legal capability and other related concepts including legal capital and legal consciousness is explained in the side bar on pages 44 – 46.

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<sup>262</sup> Haslam et al., [The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report](#) at 17.

<sup>263</sup> Haslam et al., [The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report](#) at 18.

<sup>264</sup> New Zealand Law Society. (2020). [Access to Justice: Stocktake of initiatives](#) at 10.

<sup>265</sup> Stewart, K., & Toy-Cronin, B. (2018). [The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services Pilot Report \(Civil Justice Insight Series\)](#). University of Otago Legal Issues Centre at 2 & 10-12; Law Council of Australia. (2018). [The Justice Project: Final Report Part 2 Courts and Tribunals](#) at 4-5 & 30-31; Dodge, A. (2013). [Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations](#). Canadian Bar Association at 2; Dylag, M. (2018). [Informal Justice: An Examination of Why Ontarians Do Not Seek Legal Advice](#). *Windsor Yearbook of Access to Justice*, 35, 363-378 at 366.

<sup>266</sup> Stewart & Toy-Cronin, [The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services Pilot Report \(Civil Justice Insight Series\)](#) at 12-14; Adawi, J. (2022). [Changing Every Wrong Door into the Right One: Reforming Legal Services Intake to Empower Clients](#). *Georgetown Journal on Poverty Law & Policy*, 29, 361-406.

<sup>267</sup> Law Council of Australia, [The Justice Project: Final Report Part 2 Courts and Tribunals](#) at 4.

<sup>268</sup> Ibid at 8, 9, 17 & 19; Dodge, [Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations](#) at 8.

<sup>269</sup> Dylag, [Informal Justice: An Examination of Why Ontarians Do Not Seek Legal Advice](#) at 377-378; Sandefur, R.L. (2012). [Money isn't everything: Understanding moderate income households' use of lawyers' services](#). In *Middle Income Access to Justice* (pp. 222-245). University of Toronto Press at 232-236; Sandefur, R.L., (2015). [Bridging the Gap: Rethinking Outreach for Greater Access to Justice](#). *University of Arkansas at Little Rock Law Review*, 37(4), 721-740; Wintersteiger, L. (2015). [Legal Needs](#),



- Complexity of the system including the language used in the system. Not being able to understand what is going on can also reduce trust in the system;<sup>270</sup>
- Lack of knowledge about rights, the law and the legal system especially when combined with difficulties finding information;<sup>271</sup>
- Digital exclusion including lack of access to a computer or the internet, lack of digital skills or confidence, and inability to frame problems in a way that enables them to find or use online resources.<sup>272</sup>
- Attitudes and beliefs about the law including prior experience of the law as a source of oppression or social injustice, the stigma associated with being involved in the legal system, and pessimism about whether the law will work in their interests or simply favour those in power;<sup>273</sup> and
- Lack of trust in the police and justice institutions.<sup>274</sup>

Some of these barriers are also experienced by children and young people, or some groups of children and young people as discussed further in the following sections.

## Legal capability, legal capital and legal consciousness

### *Legal capability*

Legal capability can be defined as the personal characteristics or competencies necessary for an individual to resolve legal problems effectively.<sup>275</sup> Balmer et al. describe legal capability as consisting of four distinct stages: recognition of issues, accessing information or assistance, resolving the issue, and wider influences and law reform.<sup>276</sup> They argue that an individual's capability to deal with a legal issue they may be experiencing will be shaped by their capacity across four domains:<sup>277</sup>

- Knowledge - about the law, rights and obligations, processes, and where to get information or assistance;
- Skills – ability to recognise issues, information literacy, communication, decision-making, problem solving, and digital skills;

[Legal Capability and the Role of Public Legal Education](#). Law for Life: the Foundation for Public Legal Education at 3.

<sup>270</sup> Law Council of Australia, [The Justice Project: Final Report Part 2 Courts and Tribunals](#). at 5; Dodge, [Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations](#) at 15-16.

<sup>271</sup> Ibid at 15-16 & 19-20; Wintersteiger, [Legal Needs, Legal Capability and the Role of Public Legal Education](#) at 3 & 15-17.

<sup>272</sup> Citizen's Advice Bureau. (2020). [Face to Face with Digital Exclusion](#). Citizens Advice Bureaux New Zealand Ngā Pou Whakawhirinaki o Aotearoa at 11 & 14; McDonald, H.M., Forell, S. & Wei, Z. (2019). [Uptake of legal self-help resources: what works, for whom and for what? Justice issues Paper 30](#). Law & Justice Foundation of NSW; Wintersteiger, [Legal Needs, Legal Capability and the Role of Public Legal Education](#) at 21-22.

<sup>273</sup> Wintersteiger, [Legal Needs, Legal Capability and the Role of Public Legal Education](#) at 27; Buhler, S.M., (2017) ['Don't Want to Get Exposed': Law's Violence and Access to Justice](#) 26 *Journal of Law and Social Policy* 68-89 at 69 & 82; Dodge, [Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations](#) at 3-6 & 8.

<sup>274</sup> Jackson, J., Bradford, B., Stanko, B., & Hohl, K. (2013). [Just authority? Trust in the police in England and Wales](#). Routledge.

<sup>275</sup> Coumarelos et al., [Legal Australia-Wide Survey: legal need in Australia](#) at 29.

<sup>276</sup> Balmer, N.J., Pleasence, P., Hagland, T., & McRae, C. (2019). [Law...What is it Good For? How People see the Law, Lawyers and Courts in Australia](#). Victoria Law Foundation at 7.

<sup>277</sup> Ibid at 7.

- Personal attributes - self-awareness, persistence, and confidence; and
- Resources - money, time, and social capital.

A deficiency in any of these domains may limit a person's ability to resolve legal problems. For example, a lack of awareness of legal rights, not knowing where to obtain legal advice, or believing that the justice system is too costly will all limit someone's ability to resolve legal problems.<sup>278</sup> On the other hand, certain foundational aspects of legal capability such as knowledge about legal rights, potential legal solutions, and how or where to obtain legal information and advice, can facilitate access to, and use of, the legal system more broadly.<sup>279</sup> Legal capability also correlates with other aspects of personal capability with the way people understand the law and legal processes being "framed by pre-existing beliefs and attitudes and by their social and familial settings".<sup>280</sup>

Researchers exploring the legal capability of young people aged 16-25 from particularly disadvantaged backgrounds in Canada have developed a visual model of legal capability focussed on this cohort.<sup>281</sup> The researchers identified six competencies: knowing rights and remedies, spotting a legal issue, knowing where to get help, planning how to resolve the issue, communicating effectively, and managing emotions.<sup>282</sup> They then grouped these capabilities into three areas: knowledge, skills and attitudes noting that these areas are interrelated and interdependent.<sup>283</sup> A weakness in one area can have a negative impact on someone's overall legal capability e.g. a young person needs to have both knowledge of their rights and entitlements, and the communication skills required to use that knowledge in practice.<sup>284</sup> These interrelationships are depicted in **Figure 2**.

### *Legal Capital*

Legal capital is a broadly similar concept described by Bedner & Vel as "a sub-category of cultural capital" which "comprises knowledge of and skills to use state, customary or religious law through all stages of the process".<sup>285</sup> Young & Billings found that "high cultural capital gives rise to a greater sense of self-efficacy in police-citizen interactions" and "a more salient sense of entitlement, understanding their own needs and desires as paramount".<sup>286</sup> They conclude that people with limited cultural capital are more vulnerable to investigative authority, and therefore to arrest and prosecution.<sup>287</sup> They explain: "[e]ven if knowledge of a right and the opportunity to assert that right are equally distributed, meaningful access to that right remains inequitable."<sup>288</sup>

<sup>278</sup> McDonald, H. & People, J. (2014). [Legal capability and inaction for legal problems: knowledge, stress and cost](#). Law and Justice Foundation of New South Wales at 2.

<sup>279</sup> Ibid at 7.

<sup>280</sup> Wintersteiger, [Legal Needs, Legal Capability and the Role of Public Legal Education](#) at 2-3.

<sup>281</sup> Parle, L.J. (2009). [Measuring young people's legal capability](#). Independent Academic Research Studies and PLEnet at 22-27.

<sup>282</sup> Parle, [Measuring young people's legal capability](#) at 7-8.

<sup>283</sup> Ibid at 36-37.

<sup>284</sup> Ibid at 38.

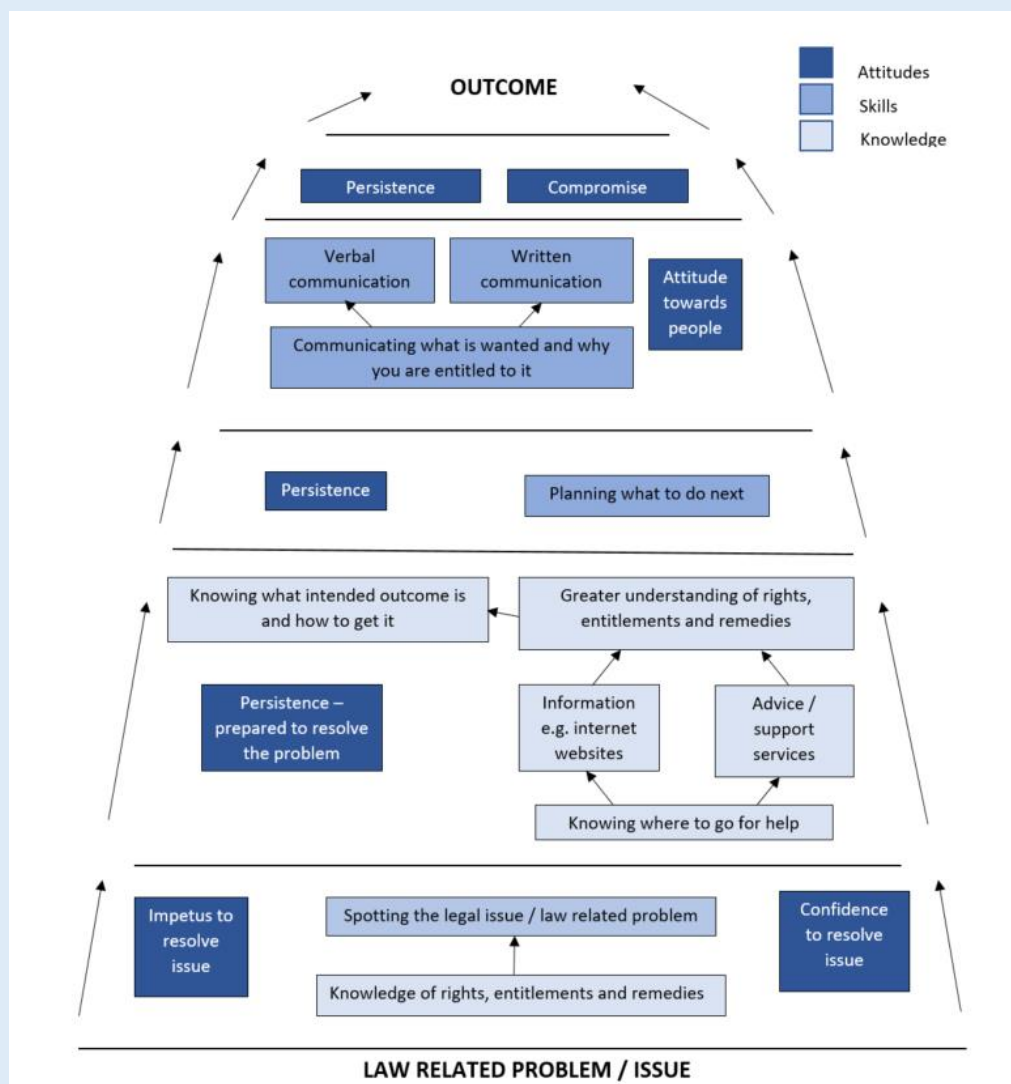
<sup>285</sup> Bedner, A.W., & Vel, J.A.C. (2010). [An analytical framework for empirical research on Access to Justice](#). *Law, Social Justice and Global Development Journal*, 15(1) at 15.

<sup>286</sup> Young, K. M., & Billings, K. R. (2020). Legal consciousness and cultural capital. *Law & Society Review*, 54(1), 33-65 at 33.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

Figure 2 – Elements of Legal Capability<sup>289</sup>



### Legal Consciousness

Felstiner et al. identify a series of stages through which individuals seek redress beginning with an ‘injurious experience’ being recognized by the injured party or someone acting on their behalf (‘naming’) and becoming a ‘perceived injurious experience’ for which another party has responsibility (‘blaming’) producing a grievance. At that point, the injured party may either choose do nothing or to communicate a claim (‘claiming’).<sup>290</sup> Van der Valk et al explain how this process is situated within social, cultural, and psychological contexts:<sup>291</sup>

*Some may fear retaliation (Bumiller, 1987), others lack the cultural power necessary to use ostensibly accessible grievance procedures (Marshall, 2005); self-blame may also be an inhibiting force (Michelson, 2007). At the same time, people who are at the margins of society may also use the law to fight back (Cowan, 2004) and to assert their identity, or their claims.*

<sup>289</sup> This image is a modified version of Parle, *Measuring young people’s legal capability* at 37.

<sup>290</sup> Felstiner, W. L., Abel, R. L., & Sarat, A. (1980). *The emergence and transformation of disputes: Naming, blaming, claiming*. *Law & Society Review*, 15(3), 631-654.

<sup>291</sup> Van der Valk et al., “[Y]ou are better off talking to a f\*\*\*\*\* wall”: *The perceptions and experiences of grievance procedures among incarcerated people in Ireland* at 263.

Many studies exploring legal consciousness focus on rights consciousness which means “individuals’ perceptions of rights, in particular their capacity to define problems and obstacles in terms of rights (see Almog & Perry-Hazan, 2011; Merry, 2003)” with developing rights consciousness considered necessary for someone to name an injury as a rights violation.<sup>292</sup> Perry-Hazan explains that rights consciousness evolves in light of previous experiences of rights giving the example of a study on battered women. In particular, if a woman’s experience is that their rights are treated as insignificant, she may choose to give up and no longer reflect on her grievances in terms of rights.<sup>293</sup>

## Attitudinal barriers to accessing justice

### Not seeing children as rights’ holders or having the capacity to act

Research in Northern Ireland in relation to children and young people’s legal needs which involved interviews with key adult stakeholders from a range of organisations found that duty bearers and service providers often failed to identify children and young people as the holders of rights which created a barrier to meeting their legal needs.<sup>294</sup> The authors reported that interviewees gave various examples including family law and child protection matters where children and young people’s needs were not separated from those of their parents, and areas of general law, such as employment, social security, housing and consumer law were it was said to be common for children and young people’s rights to be overlooked.<sup>295</sup>

Writing in the United Kingdom Smith also identifies the potential clash of rights claimed by parents/guardians, the State and children in education matters which has traditionally been seen as a balance between the duties on the State and the rights of parents with the child as the “silent receptacle of knowledge” creating obvious difficulties if a child wishes to challenge aspects of his or her own rights to education.<sup>296</sup> In New Zealand, the provisions in the Education and Training Act in relation to Disputes Panels does provide that a student over 16 has the ability to raise a dispute in their own right. Students under 16 can also raise disputes as can their parents, guardians or other caregivers.<sup>297</sup> However, other aspects of the Education and Training Act privilege the views of parents over those of children and young people for example, while schools must consult the school community which includes parents before making school rules, they only need to consult with students to the extent the Board considers appropriate.<sup>298</sup> The provisions relating to adoption of the health curriculum are even more limited in that the Board is required to consult with the parents of the students at the school but there is no reference to consultation with students.<sup>299</sup> Students could potentially come within “any other person who the board considers is part of the school community” but this is entirely up to the board.

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<sup>292</sup> Perry-Hazan, L. (2021). [Students’ Perceptions of Their Rights in School: A Systematic Review of the International Literature](#). *Review of Educational Research*. 91(6), 919-957 at 924.

<sup>293</sup> Ibid citing Merry, 2003.

<sup>294</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 59.

<sup>295</sup> Ibid.

<sup>296</sup> Smith, R. (2013). [The Third Optional Protocol to the UN Convention on the Rights of the Child? - Challenges Arising Transforming the Rhetoric into Reality](#). *The International Journal of Children's Rights*, 21(2), 305-322 at 317.

<sup>297</sup> [Education and Training Act 2020, s221\(1\)](#).

<sup>298</sup> [Education and Training Act 2020, s126](#). Similar provisions apply in relation to preparing the school strategic plan: [Education and Training Act 2020, s139](#).

<sup>299</sup> [Education and Training Act 2020, s91](#).

L'Hôte & Volmert identified a few reasons that children are not prioritised in their research exploring people's attitudes to children and policy.<sup>300</sup> The first was that people just do not think about children when considering policy questions except in relation to education and family policies and if people don't think about children, they certainly won't prioritise them when evaluating policies.<sup>301</sup> L'Hôte & Volmert also argue that policies that centre on the care of children are deprioritised because they relate to "feminine spaces and concerns" which are undervalued by the public.<sup>302</sup> Finally, they argue that when people "fail to see how social systems and environments shape outcomes" and fall back on individualism, children's wellbeing is seen as being dependant on choices made by parents rather than as a public policy issue or concern.<sup>303</sup>

## Not believing children or not seeing them as credible witnesses

A critical barrier to accessing justice for children who are victims of abuse is not being believed or the fear that they will not be believed as Randall explained in a report for the Chief Victim's Advisor to the New Zealand Government:<sup>304</sup>

*Fears of being blamed, disbelieved, upsetting others, and concern about the consequences for themselves, loved ones or family system may prevent a young person from disclosing abuse or delay their disclosure (Alaggia et al., 2019; Jensen et al., 2005; Morrison et al., 2018). In order to disclose abuse, young people need to feel confident that they will be believed, and will not be blamed by the person to whom they report (Morrison et al., 2018).*

Young people participating in a qualitative study exploring Tasmanian children and young people's perceptions and experiences of safety in the context of Tasmanian government institutions described how frustrating it was not to be believed by adults when they reported feeling unsafe with one explaining that they thought "often, children aren't believed when they say something. Their opinions aren't valued as much because they're children, because they're young. A lack of life experience."<sup>305</sup> Young people participating in this study also "argued that they may be unlikely to make complaints if they felt that adults and organisations might disbelieve them".<sup>306</sup>

There is evidence that the fear of not being believed can be well-founded with research concluding that common misconceptions about the credibility of young witnesses are pervasive among the public including among jurors and samples of the public who are eligible as jury

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<sup>300</sup> L'Hôte, E. & Volmert, A. (2021). [Why aren't kids a policy priority? The cultural mindsets and attitudes that keep kids off the public agenda](#). FrameWorks & Leading for Kids at 7-8. Their research involved a review of earlier research, a nationally representative survey of cultural mindsets and attitudes to children and policy, and a series of six virtual focus groups to explore these issues into greater depth.

<sup>301</sup> Ibid at 10.

<sup>302</sup> Ibid at 13.

<sup>303</sup> Ibid at 20.

<sup>304</sup> Randall, I. (2021). [That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants](#). Chief Victim's Advisor to Government at 13.

<sup>305</sup> Moore, T., & McArthur, M., (2022). [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#). Institute of Child Protection Studies, Australian Catholic University at 71.

<sup>306</sup> Moore & McArthur, [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#) at 74.

members in New Zealand<sup>307</sup> and Australia.<sup>308</sup> For example, Cossins et al.'s 2009 study investigated laypeople's knowledge and misconceptions about children's memory, reliability, suggestibility and children's responses to sexual abuse.<sup>309</sup> They found that "participants held the most erroneous views about children's ability to provide reliable and truthful accounts of their experiences".<sup>310</sup>

Cossins et al. identified a range of factors that affect jurors' perceptions of child witnesses including the age of the child with younger children being perceived as "less responsible and more vulnerable, trustworthy, and sexually naïve" as compared with older children including a 15 year old being perceived as more competent to recall the assault but also "less trustworthy, less vulnerable, more responsible, and more likely to lie" and having a "greater ability to resist the abuse."<sup>311</sup> Cossins also reports a discrepancy between adults' expectations that child victims will behave in an emotional manner when recounting sexual abuse experiences and the reality that children do not necessarily display strong emotions and often appear "relatively neutral".<sup>312</sup>

Cossins' later book includes a table listing the types of misconceptions about children and child sexual assault identified in various studies and documenting the extent to which jurors and/or laypeople agreed with these misconceptions.<sup>313</sup> She found that the misconceptions with the highest levels of incorrect agreement included that '[a]buse claims often prove to be false', and that "[c]hildren can be easily manipulated into giving false reports of abuse".<sup>314</sup> Even where misconceptions had a relatively low levels of agreement, there was still relatively high levels of uncertainty.<sup>315</sup> Cossins et al. note that this is a concern because juror uncertainty or lack of information could "render the jury more malleable and susceptible to suggestions by counsel. ... particularly if there is no countervailing evidence in the trial, in the form of expert opinion evidence, to explain such behaviour."<sup>316</sup>

Despite these misconceptions, Blackwell et al. explain there is actually considerable consensus about child sexual abuse reports emerging from experimental research and the experience of clinical practitioners working with children including that "[e]ven young children can provide accurate and detailed accounts of personally experienced events... children's memory for distinctive and central events may be just as accurate as that of adults".<sup>317</sup> However, how children are questioned is very important with board open-ended questions and prompts being associated with "greater accuracy, greater volume of information and fewer inconsistencies in reports" as opposed to closed or suggestive questions.<sup>318</sup> The support given to children also

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<sup>307</sup> Blackwell, S. (2007). *Child sexual abuse on trial*. [Doctoral Thesis, University of Auckland].

<sup>308</sup> Cossins, A., Goodman-Delahunty, J. & O'Brien, K. (2009). [Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System](#). *Psychiatry, Psychology and Law*, 16(3), 435-452.

<sup>309</sup> Ibid at 438.

<sup>310</sup> Ibid at 443-444.

<sup>311</sup> Ibid at 435.

<sup>312</sup> Cossins, A. (2020). [Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial](#). Palgrave Macmillan at 139.

<sup>313</sup> Ibid at 222-225.

<sup>314</sup> Ibid at 222.

<sup>315</sup> Ibid at 221 & 225.

<sup>316</sup> Cossins et al., [Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System](#) at 460.

<sup>317</sup> Blackwell, S., Seymour, F. & Mandeno, S. (2020). [Expert evidence about memory in New Zealand Sexual Violence Trials and Appellate Courts 2001 to 2020](#). New Zealand Law Foundation and the Michael and Suzanne Borrin Foundation at 125-126.

<sup>318</sup> Ibid.

matters with children's accuracy and resistance to misinformation improving when they are given emotional support.<sup>319</sup>

Another factor identified by researchers is confirmation bias which is “the phenomenon that leads people to merely look for evidence that confirms prior beliefs about a case and ignores potentially conflicting or alternative evidence”.<sup>320</sup> Sumampouw et al. give the example of where police believe an alleged victim is lying based on information obtained prior to an interview then unwittingly seek, interpret, and create scenarios to verify that belief.<sup>321</sup> Sumampouw et al.'s experiment to explore confirmation bias in interviews with alleged child victims of sexual assault found that:<sup>322</sup>

*[C]ase-related background information regarding an alleged child victim of sexual abuse can exert a biasing impact on police investigators' judgment and decision-making. Different attitudes toward child sexual abuse victims, as a result of exposure to background information, appeared to color police investigators' plans for interviewing the alleged victim. Police investigators were more likely to use biased questions in their interview plans if they were assigned to work with an older alleged child sexual abuse victim.*

The background information provided included information about the alleged victim's age (5 vs. 15 years old), and their character (bad-character, good-character, vs. no information about character).<sup>323</sup>

## Not hearing children

Some research and literature also discusses the failure to really hear what children and young people have to say. For example, the family violence study reported that young people who had disclosed family violence described the distinction between being listened to by services and actually being heard.<sup>324</sup> This included:<sup>325</sup>

*Feeling that services were interpreting what they were saying and imposing their own narrative rather than genuinely listening to them... For another young person, not being adequately listened to and heard made him distrustful of the support options subsequently provided to him (in this case medication), as well as feeling he was better off on his own, making his own decisions about what was needed to support his recovery.*

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<sup>319</sup> Ibid.

<sup>320</sup> Sumampouw, N.E. J., de Ruiter, C. & Otgaar, H. (2022). [Potential for police investigator bias: the impact of child sexual abuse victims' background characteristics on perceived statement credibility, case outcome and quality of interview questions](#), *Police Practice and Research*, 23(3), 370-387 at 371.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid at 384. The experiment aimed to investigate the impact of background information about an alleged victim of child sexual abuse on police investigators' perception of the credibility of the victim, expected outcome of the case, and the type of questions police investigators planned to ask the victim: see 373-377.

<sup>323</sup> Ibid at 375.

<sup>324</sup> Fitz-Gibbon, K., McGowan, J. and Stewart, R. (2023). [I believe you: Children and young people's experiences of seeking help, securing help and navigating the family violence system](#). Monash Gender and Family Violence Prevention Centre, Monash University at 20. The researchers also presented their findings at a webinar. The recording is available here: Monash University. (2023). [Events & Recordings. https://www.monash.edu/arts/gender-and-family-violence/community-and-media-engagement/events-and-recordings](https://www.monash.edu/arts/gender-and-family-violence/community-and-media-engagement/events-and-recordings)

<sup>325</sup> Ibid at 21.

## Lack of trust

Research and literature across jurisdictions discusses children and young people's lack of trust in the police and other authority figures in the justice system including lawyers. This lack of trust can create a significant barrier to reporting or seeking support and therefore, to accessing justice.

The latest Crime & Victim's Survey included a Police Module contained questions in relation to respondents' level of trust and confidence in the Police.<sup>326</sup> However, although the report refers to international evidence that young people have lower levels of trust in the Police,<sup>327</sup> it does not compare different age groups' levels of trust other than to note that older people (60 and over) have higher levels of trust.<sup>328</sup> It is not clear whether this is because the sample sizes were insufficient to support this comparison, because there was no statistically significant difference in levels of trust, or there was some other reason.

The Law Council of Australia explained that the "intense distrust towards police has been attributed partly a consequence of over-policing children and young people, and failing to exercise discretion...Children and young people who have negative interactions with police do not view police as legitimate sources of authority and protection and are thus less likely to report violent crimes committed against them to police."<sup>329</sup> A qualitative study exploring Tasmanian children and young people's perceptions and experiences of safety in the context of Tasmanian government institutions found that:<sup>330</sup>

*Several children and young people reported a lack of trust in adults, particularly those working in the 'systems' (i.e., police, child protection, health systems) due to failures of these professionals to protect them or respond appropriately to their safety concerns in the past.*

*Young people who had experienced past maltreatment were also more likely to report that they distrusted adults and organisations and that this may be a barrier to them raising concerns or making complaints.*

Moore & MacArthur also cite previous research which found other negative past experiences could also operate as a barrier:<sup>331</sup>

*[C]hildren and young people's confidence in adults and organisations and their willingness to raise concerns and make disclosures is influenced by their past experiences (Waterman et al., 2022). For example, young people argued in the Children's Safety Studies that if they believed that their school was unwilling to deal with issues such as bullying and harassment, children and young people would assume that they would be unwilling to deal with institutional child sexual abuse (Moore, McArthur, Death, et al., 2016; Moore et al., 2015).*

Another research study in Canada exploring young people's experiences of procedural and relational fairness during everyday interactions with the police found that the young people's reported interactions with the Police were "more than annoying", they also reduced "the likelihood that a young person will seek out police support during emergencies or when they

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<sup>326</sup> Evidence Based Policing Centre. (2022). [New Zealand Crime and Victims Survey: Police Module Results](#). New Zealand Police.

<sup>327</sup> Ibid at 12.

<sup>328</sup> Ibid at 11.

<sup>329</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 61.

<sup>330</sup> Moore & McArthur, [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#) at 70.

<sup>331</sup> Ibid at 93.



have been victimized (e.g. assaulted or robbed)".<sup>332</sup> The interactions described by young people included Police stopping them on the street and being 'carded' or stopped and searched in what Police called "intelligence-led policing" or "community outreach".<sup>333</sup> This was echoed by a study in Northern Ireland which reported that "[i]t was evident from many of the focus groups that young people's experience of negative treatment by the police service was resulting in unmet legal need and creating barriers to them accessing justice."<sup>334</sup>

A 2010 study led by Professor Ursula Kilkelly which gathered the views of children on their experience of 'justice' across the 47 member states of the European Union to inform work on European Guidelines on child-friendly justice found that one of the dominant themes in data from the both questionnaires and some of the focus groups with children was children's negative attitudes towards the police, largely as a result of their experiences in their communities and in the justice system.<sup>335</sup>

A lack of trust can also extend to lawyers and others in authority or involved in the justice system due in part to perceptions that they are part of a system that has failed to help them in the past, or worse still, has imposed things on them against their will as Curran and Taylor Barnett explain:<sup>336</sup>

*Lawyers are seen by young people as part of courts, Centrelink, etc. They are seen as a part of a system that imposes things on them, so separating lawyers out from this so they are not seen as not part of authority and viewed as a helper, like a doctor, is a positive step. Perceptions of private and legal aid lawyers were reported as problematic for young people. Participants, both professional and the young people, reported poor experiences of lawyers and the legal system with lawyer quick to judge, being too hierarchical, judgemental, using too much legal jargon, poorly explaining things, or seen as part of a system oppressing them.*

Other adults and non-legal professionals who may be assisting a child or young person can also have views about lawyers from "prior dealings with lawyers as witnesses, under cross-examination, in adversarial settings or [having] poor experiences of the law and lawyers in the past" which can mean they are reluctant to refer clients to a lawyer for fear of retraumatisation.<sup>337</sup>

Kilkelly also reported that when children were asked who they would tell if they were unhappy with how they were being treated, the answer that received the most support was parents or carers followed by friends and siblings with official or public persons - such as health workers, teachers, youth/social workers, police officers and lawyers - faring very badly indeed.<sup>338</sup> She concluded that children do "not trust public officials, even those assigned to their care or

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<sup>332</sup> Nichols, N. (2018). The Social Organization of Access to Justice for Youth in 'Unsafe' Urban Neighbourhoods. *Social & Legal Studies*, 27(1), 79-96 at 86.

<sup>333</sup> Ibid at 85.

<sup>334</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 85.

<sup>335</sup> Kilkelly, U. (2010). [Listening To Children About Justice: Report Of The Council Of Europe Consultation With Children On Child-Friendly Justice](#). Council of Europe, Directorate General of Human Rights and Legal Affairs at 37.

<sup>336</sup> Curran, L. & Taylor-Barnett, P. (2018). [Overcoming the Invisible Hurdles to Justice for Young People](#). Hume Riverina Community Legal Service at 97.

<sup>337</sup> Curran, L., (2017). [Lawyer Secondary Consultations: improving access to justice: reaching clients otherwise excluded through professional support in a multi-disciplinary practice](#)<sup>1</sup>. *Journal of Social Inclusion*, 8(1), 46-77 at 57.

<sup>338</sup> Kilkelly, [Listening To Children About Justice: Report Of The Council Of Europe Consultation With Children On Child-Friendly Justice](#) at 23.

protection, sufficiently to disclose to them any unhappiness about how they are being treated”.<sup>339</sup> This lack of trust also extended to the justice system as a whole:<sup>340</sup>

*The penultimate question gave children the opportunity to consider whether they thought the justice system was the best way to deal with the problems faced by children generally. Although a significant number (27%) had no view, a majority (43%) of those who had an opinion considered that the justice system was not the best option with 30% saying that it was. Children’s comments explaining this choice referred to the corruption among the police, the frustration of dealing with adults who do not understand them and cannot empathise or communicate with children, the failure to ensure that children are respected and that justice prevails.*

Emerson et al. 2014 study in Northern Ireland reached similar findings reporting that a number of the key informants in their study reporting that a lack of confidence in the legal system or adult services was:<sup>341</sup>

*[A] barrier to meeting the legal needs of children and young people who have had negative experiences of state care, policing, education or and / or of the legal system itself, with the result that they have become disillusioned, hostile or cynical about their prospects of fair treatment. Examples cited include children and young people who would not see it as worthwhile for them to report a crime or making a complaint against the police even where they feel strongly that they have been wronged.*

A participatory research project in relation to children’s understanding, experiences of, and aspirations for justice in Scotland which involved focus groups with different groups of children found that children in two focus groups from one large urban area “did not see how following accepted police-led forms of justice would result in positive outcomes for them or their community”.<sup>342</sup> These young people both did not trust these formal systems and felt that if they did engage in them, they would also be seen as untrustworthy and could face retaliation. One child explained:<sup>343</sup>

*[S]ay someones carrying an knife or a substance, you don’t want to tell a teacher cos if they find out, after that they’ll end up going for you so you don’t want to end up in a scenario where your getting jumped or that...*

The United Nations High Commissioner for Human Rights’ report on access to justice for children and young people also identified a lack of trust and confidence that complaints will be treated seriously as a possible barrier.<sup>344</sup> Other studies have pointed to a lack of trust stemming from the high level of turnover and professionals’ lack of specialisation in working with children.<sup>345</sup>

## Other psychological barriers

The Law Council of Australia also identified some other psychological barriers that can discourage children and young people from making complaints or seeking redress including a

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<sup>339</sup> Ibid at 24.

<sup>340</sup> Ibid at 32.

<sup>341</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 61.

<sup>342</sup> Gillon, [Thinking about justice](#) at 36.

<sup>343</sup> Ibid.

<sup>344</sup> United Nations High Commissioner for Human Rights, [Access to justice for children: Report of the United Nations High Commissioner for Human Rights](#) at 7.

<sup>345</sup> Terre Des Hommes. (2020). [JUST with children: Child-friendly justice for all children in Europe](#). Terre Des Hommes at 19.

view that court processes are intimidating and overwhelming, feelings of helplessness, fears of being disbelieved or not taken seriously by authorities, and past experience of violence and trauma.<sup>346</sup> Emerson et al. also reported that several key informants identified lack of confidence as a barrier preventing children and young people contacting solicitors for legal advice.<sup>347</sup> Other psychological barriers included embarrassment, shame, being blamed or feeling responsible for the abuse.<sup>348</sup>

## Structural / systemic barriers to accessing justice

Children and young people experience a series of systemic or structural barriers many of which come back to their lack of social and political power. Power dynamics can also operate to the disadvantage of families and whānau who are supporting children and young people. For example, lawyers acting for children hold considerable power as do schools and others in authority making decisions about children's lives. Children and young people's lack of power and resulting lack of legal capacity also leaves them largely dependent upon adults to take action to enforce their rights. Another related barrier is that systems and processes are largely focussed on adults – they are designed by and for adults often leaving children and their needs invisible. Justice system processes and the language used in those processes are also complex and difficult for children and young people to understand.

### Power dynamics

Children and young people's position in society is characterised by lack of social and political power and this lack of power permeates through the systems with which they need to interact when seeking justice. Appell explains:<sup>349</sup>

*[L]aws defining childhood reflect the views of those with the social, legal, economic, and political power to make law. As people without such power, children have at best an indirect effect on the law.<sup>39</sup> Children do not vote and do not hold office. It is the adults, with political power and access, not the children, who identify and turn into law children's existence, needs, and authority. These identifications are a function of the adults' personal values and experiences of their own childhood or the childhoods of children they know. These views also derive from the opinions of experts on childhood, such as doctors, psychologists, social workers, lawyers, and educators;<sup>40</sup> these experts, in turn, are informed by their own professional norms and personal experiences.*

Children and young people, and often their families and whānau, also experience power imbalances between them and adults in positions of authority including those who may be there to help them. This includes lawyers that acting for children and young people as Appell explains:<sup>350</sup>

*First, children's attorneys have extraordinary power in the attorney-client relationship. Second, and relatedly, the attorney-child-client relationship can serve to displace the parent as decisionmaker, moral guide, and cultural progenitor for the child. ... Fourth, and closely related, children's rights particularly those rights that*

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<sup>346</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 24.

<sup>347</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 61.

<sup>348</sup> Cossins, [Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial](#) at 24.

<sup>349</sup> Appell, A.R. (2008). [Representing children representing what? Critical reflections on lawyering for children](#). *Columbia Human Rights Law Review*, 39(3), 573-637 at 585-586.

<sup>350</sup> *Ibid* at 596.

*attorneys are retained or appointed to protect—are frequently designed precisely to reinforce and propagate dominant societal norms. Children's attorneys therefore become enforcers of these dominant norm-based rights against non-dominant families in non-dominant communities. Fifth, children's attorneys, like many attorneys, take legalistic approaches to defining and solving problems and thus do not address systemic socio-economic conditions relating to their clients.*

In Aotearoa this imbalance of power is exacerbated by the fact that appointments are made by the Court meaning that children and young people cannot choose their own lawyer for the child or youth advocate.<sup>351</sup>

Children and young people and those supporting them also experience power imbalances in non-Court processes. For example, a research study in the United Kingdom in relation to changes to the exclusion appeals process which moved from move from an Independent Appeal Panel (IAP) to an Independent Review Panel (IRP) discussed the power imbalances between parents, school headteachers and members of the appeal panel:<sup>352</sup>

*The study shows how parents and headteachers enter an uneven playing field when making their representations at the IRP. The vast majority of exclusion officers, parents and one headteacher described how this encounter was automatically weighted in the school's favour due to the different levels and types of cultural, social and economic capital parents and headteachers brought to the meeting. While the IRP certainly represents a testing day at work for headteachers, they enter these meetings better equipped than the great majority of parents who predominantly come from ethnic minority and working-class backgrounds. Heads are familiar with the format of the proceedings, how the English education system works and the exclusions guidance. Meanwhile, parents enter this situation with little prior knowledge of how an IRP works and minimal understanding of the inner workings of the education system, the exclusions guidance or how to overturn an exclusion decision.*

As Kulz argues, the IRP process involves some of the most disadvantaged members of society going head to head with education professionals over a highly emotive matter, with little insider knowledge of how the education system works, making it hard to see how the process could be described as 'fair'.<sup>353</sup>

It is timely to note that there is currently no form of appeal or review process for school exclusions in Aotearoa New Zealand. The Education and Training Act 2020 does provide for the establishment of Disputes Panels, however, work has not yet begun on the required regulations, two successive budgets have not included any funding for the panels, and the Ministry of Education website says that the date for establishing the Disputes Panels has not yet been set.<sup>354</sup> When (or perhaps if) they are established, the Disputes Panels will have many

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<sup>351</sup> The appointment and selection of lawyer for the child is made by the Court: Principal Family Court Judge. (2020). [Family Court Practice Note. Lawyer for the Child: Selection, appointment and other matters](#). Principal Family Court Judge's Chambers at 2-4. Youth Advocates are also appointed by the Court: [Oranga Tamariki Act 1989, s323](#). The Court will however appoint counsel who has previously acted for the young person where possible: s323(3).

<sup>352</sup> Kulz, C. (2021). [Mapping the Exclusion Process: Inequality, Justice and the Business of Education](#). Communities Empowerment Network at 96. See also other quotes from this report below.

<sup>353</sup> Ibid at 78.

<sup>354</sup> Ministry of Education. (2022). [Education and Training Act 2020: Enabling a new dispute resolution panel to hear complaints about State school board decisions](#). <https://www.education.govt.nz/our-work/legislation/education-and-training-act-2020/enabling-a-new-dispute-resolution-panel-to-hear-complaints-about-school-board-decisions/>

of the same limitations Kulz identifies in the IRP process including the power imbalance in favour of the school which is made worse by a ban on legal representation. This issue was identified in submissions on the Bill, including those by YouthLaw Aotearoa, Auckland Disability Law, IHC and others who raised concerns about the imbalance in power between students and their parents on the one hand, and Principals and Boards of Trustees with experience of the process and who often benefit from lawyer members or external legal advisors.<sup>355</sup>

YouthLaw Aotearoa argued for a discretion to allow legal representation where appropriate having regard to the nature and complexity of the issues under consideration or any significant disparity between the parties.<sup>356</sup> The Departmental Report on the Bill failed to address this submission just repeating its earlier advice that legal representation would “make panels less accessible, more costly and more intimidating”.<sup>357</sup> The Departmental Report also noted that officials agreed with YouthLaw Aotearoa that “the choice of support person could exacerbate the power imbalance between the parties” and suggested that this could “be addressed by giving the Chief Referee discretion not to allow a particular support person to attend”.<sup>358</sup> However, YouthLaw’s comments on the power imbalance were in support of its submission that legal representation should be allowed as opposed to disallowing a particular support person suggesting that officials either did not understand or misrepresented YouthLaw’s position in its advice to the Select Committee.

Officials’ comments in the Departmental Report largely focussed on the impact on schools and school boards’ rather than on children and their families possibly reflecting the power of the education lobby. For example, the report states that “[i]t would be unfair to impose decisions on schools when those decisions cannot be appealed”.<sup>359</sup> However, officials did not appear to have any concerns about decisions of schools being imposed on children and their families without any right of appeal. Another area of law affecting children and young people where there are considerable power dynamics is the Oranga Tamariki system as discussed in the children in care and care-experienced children report.

### *Children’s dependence on adults*

*Without political or economic power and therefore the ability to affect society or social decisions, children must rely upon the care and sponsorship of adults. They have come to be seen as incapable of complex or critical thinking, too innocent for the harsh ways of the world, and lacking the sophistication to make thoughtful and rational choices. In keeping with these perceptions, children’s views are easily and typically “put on hold,” while decisions are made on their behalf, by more knowledgeable elders, presumably with their interests in mind. Inevitably, the norm is for children’s best interests to be forwarded by (more powerful) others, and for their views to be heard in the context of adult indulgence or permission.*<sup>360</sup>

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<sup>355</sup> YouthLaw Aotearoa. (2020). [YouthLaw Aotearoa Submission on the Education and Training Bill](#), YouthLaw Aotearoa at 34-35; IHC. (2020). [Submission on the Education and Training Bill](#) at 8.

<sup>356</sup> YouthLaw Aotearoa, [YouthLaw Aotearoa Submission on the Education and Training Bill](#) at 35.

<sup>357</sup> Ministry of Education. (2020). [Education and Training Bill: Departmental Report to the Education and Workforce Select Committee](#) at 39.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid at 38.

<sup>360</sup> Lin Goodwin, A., (2011). Protecting the Rights of All Children: Using What We Know. In B.Fennimore, & A. Lin Goodwin. (2011). *Promoting social justice for young children advances in theory and research, implications for practice*. Dordrecht; Springer. See also Moritz, [Children’s Developmental \(Im\)maturity: Aligning Conflicting Decisional Capacity Assessment Approaches in Australia](#) at 14.

A key aspect of children's reliance on adults which operates as a barrier to accessing justice is children's lack of legal capacity. As Graziani has argued:<sup>361</sup>

*Children face political, socioeconomic and cultural impediments to justice, but their legal incapacity remains one of the main obstacles.<sup>46</sup> Children are generally considered to be incompetent. This conception of childhood, mostly supported by an adult-centrist approach, tends to isolate children and weaken their potential,<sup>47</sup> in addition to which it limits their access to judicial remedies.*

In Aotearoa New Zealand children and young people under the age of 18 are restricted from taking court action in their own right. Under both the District Court Rules, and the High Court Rules children and young people under 18 are deemed to be 'incapacitated' and must be represented by a litigation guardian with some limited exceptions.<sup>362</sup> Under the Family Court Rules 2022, children and young people under 18 must also be represented by a next friend, litigation guardian or an authorised approved organisation with some limited exceptions.<sup>363</sup>

A child or young person over 16 can apply for a grant of legal aid in respect of a civil matter in their own right, and if the application is granted, they are personally liable for any repayments and any costs ordered by the Court.<sup>364</sup> The exception is where rules of Court require the proceedings to be brought by a next friend or guardian ad litem in which case the next friend or guardian ad litem must apply for legal aid on their behalf.<sup>365</sup> Where a child is under 16, the application must be made on their behalf and be accompanied by an undertaking by the person making the application that he or she will pay any repayment required to be paid under the grant.<sup>366</sup>

Where an application for legal aid is made by a minor under 16, the resources of their parents must be treated as their resources unless they have a contrary interest in the proceedings.<sup>367</sup> There is also a discretion to disregard a parent's resources if they do not live with or support the child.<sup>368</sup> Where an application is made by a child or young person over 16, their resources can be treated as including any person who, under any agreement or court order, is liable wholly or partially to maintain the applicant or any parent, foster parent, or step-parent with whom the applicant is living.<sup>369</sup> As a result, even where a child can in theory apply for legal aid in their own right, in reality they are still reliant on their parents or caregivers.

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<sup>361</sup> Graziani, L. (2016). [Access to Justice: A Fundamental Right for All Children](#). In T. Liefaard & J. Sloth-Nielsen. *The United Nations Convention on the Rights of the Child: Taking Stock after 25 years and Looking Ahead*. BRILL at 133-134.

<sup>362</sup> [District Court Rules 2014](#), rr 4.29, 4.31 & 4.32; [High Court Rules 2016](#), rr 4.29, 4.31 & 4.32. The exceptions include where legislation requires the proceedings be conducted without a litigation guardian, legislation allows it to be conducted without a litigation guardian and the child or young person elects to do so, or the court authorises the child or young person to conduct the litigation without a litigation guardian under r4.32.

<sup>363</sup> [Family Court Rules 2022](#), rr 90 & 90A. The exceptions include where legislation requires the proceedings be conducted without a next friend or litigation guardian or authorised approved organisation; legislation allows it to be conducted without a next friend or litigation guardian or authorised approved organisation and the child or young person elects to do so, or the court authorises the child or young person to conduct the litigation without a next friend or litigation guardian or authorised approved organisation under r90A (FCR).

<sup>364</sup> [Legal Services Act 2011](#), s15(1).

<sup>365</sup> [Legal Services Act 2011](#), s15(3).

<sup>366</sup> [Legal Services Act 2011](#), s15(2) & (4). Both these requirements and those under s15(3) can be waived.

<sup>367</sup> [Legal Services Act 2011](#), s4(2).

<sup>368</sup> [Legal Services Act 2011](#), s4(3).

<sup>369</sup> [Legal Services Act 2011](#), s4(4).

However, it is also important to recognise that children and young people can take action in their own right in some contexts. For example:

- The Disputes Tribunal Act 1988 allows minors to be a party but may appoint someone to act as their representative.<sup>370</sup>
- Other mechanisms for enforcing rights such as making a complaint to the Ombudsman's Office, Human Rights Commission, the Independent Police Conduct Authority or the Health and Disability Commissioner or going to the Human Rights Review Tribunal are not age-restricted. However, their scope is limited by their empowering legislation as discussed below.
- Under the Contracts and Commercial Law Act, contracts against minors are generally unenforceable against the minor but are otherwise of full force and effect.<sup>371</sup> This means that a child or young person can seek to enforce a contract in the Disputes Tribunal (just not in the courts unless they have a representative to do so on their behalf).

As Jonathan Todres argues, “[u]nder international law, differential treatment must advance a legitimate aim and be proportionate.”<sup>372</sup> The state has two important functions with respect to children and young people - protecting them from harm and supporting their healthy development. Much of the differential treatment of children and young people is justified by the need to protect children and young people such as laws restricting the employment of children during school hours<sup>373</sup> which are justified as protecting them from work which would interfere with their education, and those limiting their ability to enter into enforceable contracts<sup>374</sup> justified on the basis that they have lesser capacity to engage in fair exchange.<sup>375</sup> However, laws restricting children and young people's agency, such as those relating to voting and holding public office, are more difficult to justify as protecting them from harm or ensuring their healthy development and instead, children and young people are denied access to these spaces on the basis that they are deemed incompetent or as lacking maturity.<sup>376</sup> Arguably age is a poor proxy for experience given that sixteen- or seventeen-year-olds have specific and relevant experience on those issues that directly affect them.<sup>377</sup> The developmental science also suggests that children and young people reach adult levels of maturity in relation to deliberative tasks such as voting in their mid-teens as discussed in more detail above.<sup>378</sup>

Limitations on children's ability to take action to enforce their rights arguably falls somewhere between the two. Such limitations clearly limit children and young people's agency but there is an argument that there is a need to protect children from at least some of the harms arising from litigation, for example the principle that costs follow the event which means that if unsuccessful, a child litigant would be responsible for both their own costs and those of the other party or parties. However, there are ways to protect children's interests short of preventing them from taking action to enforce their rights such as providing for limited legal standing for some purposes and/or protection from costs liability (although there may be fairness arguments against protection from costs liability given that someone has to bear the costs).

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<sup>370</sup> [Disputes Tribunal Act 1988](#), s 27.

<sup>371</sup> [Contract and Commercial Law Act 2017](#), s86.

<sup>372</sup> Todres, J. (2022). [Age Discrimination and the Personhood of Children and Youth](#). *Harvard Human Rights Journal Online*.

<sup>373</sup> [Education and Training Act 2020](#), s54.

<sup>374</sup> See the [Minors Contracts Act 1969](#) and now the [Contract and Commercial Law Act 2017](#), Part 2, Subpart 6.

<sup>375</sup> Todres, [Age Discrimination and the Personhood of Children and Youth](#).

<sup>376</sup> *Ibid*.

<sup>377</sup> *Ibid*. Todres gives the example of going attending school in a global pandemic.

<sup>378</sup> See **Childhood & Adolescence** and **Young adults**.

Whether or not such limitation can be justified, the reality is that it means that children and young people up to the age of 18 are generally reliant on adults to seek to enforce their rights. As Gran argues, this reliance means that children and young people are exposed to the failures of the parents and caretakers, national governments, and community and society with problems arising when a child or young person's interests are in opposition to those of the adult or adults upon which they rely.<sup>379</sup> In short, needing an adult to get help could stop someone from getting the help they need.<sup>380</sup>

## Focus on adults

Despite awareness of the over-representation of children and young people as victims of sexual assault,<sup>381</sup> the New Zealand Government's flagship strategy to address family and sexual

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<sup>379</sup> Gran, B. (2022). [The International Framework of Children's Rights Fosters Discrimination against Young People](#). *Harvard Human Rights Journal Online*.

<sup>380</sup> Fitz-Gibbon et al., [I believe you: Children and young people's experiences of seeking help, securing help and navigating the family violence system](#) at 19.

<sup>381</sup> See **Criminal justice system involvement**

### Offending rates

Over the last decade offending by children and young people has decreased substantially with overall offending rates for children and young people decreasing by 63% and 64 over the period from 2011/2012 to 2021/2022. There have also been substantial decreases in reoffending rates. However, although both offending and reoffending rates have decreased for tamariki and rangatahi Māori, Māori are still over-represented in the youth justice system.

While fewer children and young people have offended, children that have offended have committed more offences on average. Interestingly, despite common prejudices in relation to South Auckland, the highest population-adjusted rates of offending by children were in the Tasman, Central and Bay of Plenty Police Districts and the highest population-adjusted rates of offending by young people were in the Tasman, Bay of Plenty and Northland Police Districts.

## Connection between school exclusion and justice system involvement

Many researchers and academics have identified a connection between school exclusion or disengagement and justice system involvement. For example, Gordon discusses the association between poverty, educational attainment, school disciplinary and youth / criminal justice system involvement identifying what she terms the 'school to prison pipeline', although her analysis suggests it may be more accurate to call it a poverty to prison pipeline. She also identifies the differential operation of this pipeline:

*[T]here is a strong association between those living below the poverty line, having very low educational attainment and being likely to be detained within the youth or adult justice systems. This is a highly segmented, but intersecting, set of populations. Even within them, the pipeline is further constricted, so that males rather than females and Māori rather than non-Māori are most likely to end up in prison (Department of Corrections 2007).*

Research by Sanders et al. using longitudinal data to explore the impact of school exclusion on later justice system involvement provides some quantitative evidence of this phenomenon. They found that school exclusion has a greater impact on delinquency and criminal justice system involvement than factors external to the school environment such as neighbourhood risk. Sanders et al. suggest that their findings highlight the way that school exclusion may amplify the challenges young people face "propel[ling] them along the pipeline", and that schools have



violence largely ignored children and young people. This issue was raised by a number of submitters on the draft strategy with the need to include children and young people and those who support them being one of four key themes relating to children identified in feedback on the strategy:<sup>382</sup>

*Some people observed that children and young people were absent (i.e. not mentioned or adequately recognised) in the draft National Strategy and Action Plan. Others urged us to be more inclusive of the needs and views of children and young people to successfully address family violence and sexual violence in Aotearoa New Zealand.*

Te Puna Aonui now appears to have acknowledged this gap with a list of Family Violence and Sexual Violence Service Gaps currently open for consultation highlighting the lack of tailored services and supports for children and young people as well as that court support for children and young people is limited and is often delivered without funding.<sup>383</sup> The list also notes that most services for people using violence are designed for adults.<sup>384</sup>

As the Australian Law Reform Commission (1997) acknowledged in its seminal report *Seen And Heard: Priority For Children In The Legal Process*.<sup>385</sup>

*Even where a child has the developmental and legal capacities to participate in legal processes, appropriate participation can be extremely difficult because the processes themselves are not designed for participation by children. Laws and regulations are made and implemented by adults, and the attributes, decision-making processes and language used in legal processes reflect this fact.*

One of the five themes identified in an Australian research study which involved interviews with 17 children and young people living in Victoria who have had experience of family violence was children's invisibility in system responses to family violence:<sup>386</sup>

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the potential to instead be a point of intervention, by diverting children and young people from later justice system involvement.

Reil et al.'s research using Integrated Data Infrastructure (IDI) data on 48,989 children from their birth in 2000 until 30 June 2019 to explore associations between different offending groups and a range of background factors also identified connections between school disciplinary action and criminal justice system involvement. In particular, children who had been stood down or suspended from school before age 10 were significantly more likely to offend at all age groups and for those children who had offended, children who were suspended or stood down between age 5 and 10 were also significantly more likely to reoffend. In addition, almost half of children expelled from school before age 14 offended as both a child and young person. Those expelled from school before age 14 were also significantly more likely to reoffend. Reil et al. concluded that it is critical for children to remain at school which requires schools to be properly resourced to ensure that children's behaviour related needs are met.

Victimisation .

<sup>382</sup> Te Aorerekura. (2022). [Analysis: Children and young people](#) at 9.

<sup>383</sup> Te Puna Aonui. (2023). [List of Family Violence and Sexual Violence Service Gaps. https://tepunaaonui.govt.nz/assets/Other-Agencies/FVSV-gaps-list-for-public-consultation\\_March-2023.pdf](https://tepunaaonui.govt.nz/assets/Other-Agencies/FVSV-gaps-list-for-public-consultation_March-2023.pdf) at 2.

<sup>384</sup> Te Puna Aonui, [List of Family Violence and Sexual Violence Service Gaps](#) at 2.

<sup>385</sup> Australian Law Reform Commission. (1997). [Seen and Heard: Priority for Children in the Legal Process, Report No 84](#). Commonwealth of Australia at para 4.10.

<sup>386</sup> Fitz-Gibbon et al., [I believe you: Children and young people's experiences of seeking help, securing help and navigating the family violence system](#) at 20.

*Throughout the interviews, children and young people consistently reflected on the ways in which they had felt invisible at different points of the system response to family violence. Tellingly, this invisibility was not specific to one particular point of the system. It was experienced and expressed differently by interview participants, but there was a shared impact they described – that is, children and young people overwhelmingly believed that system responses to family violence are neither designed nor carried out with children and young people in view.*

The children and young people involved in this study described being seen as an extension of their primary carer with little consideration being given to how their needs might differ from those of their primary carer adult.<sup>387</sup> Children and young people also identified police stations as places that were “neither child-centred, nor safe for children and young people as victim-survivors in their own right” with one participant explaining “I still get upset about that, thinking about it. Like, no kid should have to go through that ... I did not feel safe talking to the police, and they really haven’t got a thing that makes us feel welcome”.<sup>388</sup>

### **Complexity and children and young people’s difficulty understanding**

One aspect of the adult-centric system is the complexity of both the language used in court and the legal system more generally. Report after report in New Zealand and overseas has made similar findings in relation to the complexity of courtroom language and in the legal system more generally as well as the impact that this has on children and young people. For example, in her report for [Te Uepu] the Chief Victims Advisor to Government raised concerns that “[c]ourtroom questioning is very difficult and stressful for children due to the use of complex and technical language, that is often beyond the comprehension of adult witnesses, let alone children”.<sup>389</sup>

Similarly, the Law Council of Australia explained the mismatch between the language used in court and the linguistic ability of children and young people:<sup>390</sup>

*The formal and technical language used in court is not child-friendly because it frequently does not match the linguistic ability of children....[children] have difficulty understanding negative rhetorical questions, multi-faceted or double-barrelled questions, tagged questions and unmarked questions, and are more likely to present inaccurate evidence in response to closed rather than open ended questions.<sup>128</sup> As a result, child witnesses can become confused, they may be more easily led during cross-examination and they may feel overpowered in the unfamiliar environment of a court. This, in turn, may result in children giving inaccurate evidence.*

Another study in Europe summarised other research which found “that children do not understand and frequently are inactive participants in court proceedings failing to understand the significance of what is decided and its consequences for them.<sup>43”<sup>391</sup> Kil Kelly referred to a perception “among judges that young people understood the requirements of bail because some of them appeared in court on a regular basis” noting that this was discounted by</sup>

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<sup>387</sup> Ibid at 23.

<sup>388</sup> Ibid at 26.

<sup>389</sup> Chief Victims Advisor to Government. (2019). [Te Tangi o te Manawanui: Recommendations for Reform](#). Ministry of Justice at 17. Research commissioned by the Chief Victims Advisor discusses these issues in more detail: Randell, I. (2021). [That’s a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants](#). Chief Victim’s Advisor to Government.

<sup>390</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 20.

<sup>391</sup> Kil Kelly, [Listening To Children About Justice: Report Of The Council Of Europe Consultation With Children On Child-Friendly Justice](#) at 17.

professionals who worked directly with young people as it didn't take into account the challenges experienced by many young people appearing before the court.<sup>392</sup> These challenges are discussed in more detail in the subsequent sections.

The United Nations High Commissioner for Human Rights also raised these concerns in his report on Access to Justice for Children:<sup>393</sup>

*The complexity of justice systems makes them difficult to understand for children. Children are often unaware of their rights and the existence of services, lacking information about where to go and whom to call to benefit from advice and assistance.<sup>22</sup> Moreover, legislation and procedures concerning the treatment and participation of children in proceedings, including criminal, administrative and civil proceedings, are often not adapted to children's rights and needs or may even be discriminatory towards children based on their age and gender. States have also highlighted that specialized judges, prosecutors, lawyers and other personnel working with children, as well as sufficient resources to provide specialized training, are frequently lacking.*

Addressing the complexity of proceedings and children and young people's resulting difficulty in understanding what is going on isn't just important because the subject of proceedings should understand what is happening, it can also affect perceptions of the proceedings / system etc. which has a flow on effect on children and young people's perception of the justice system as the Centre for Justice Innovation explain:<sup>394</sup>

*The atmosphere of the courtroom itself has also been found to be significantly related to perceptions of legitimacy: young people who "experienced an atmosphere of confusion and unprofessionalism tended to view the entire justice system as less legitimate" than young people who had a better court experience.<sup>29</sup>*

Failing to accommodate "children's age-related communication needs can prevent children participating in the legal system on equal terms with adults."<sup>395</sup>

These problems are not limited to the courtroom environment with research also raising concerns about the language used by lawyers when communicating with children. A 2014 study in Northern Ireland which involved interviews with justice system professionals and focus groups with young people found "[a]ll interviewees considered that many lawyers do not communicate appropriately with children and young people, as a result of which children and young people routinely do not understand what happens in legal proceedings in which they are involved."<sup>396</sup> Young people echoed these concerns in focus groups:<sup>397</sup>

*A number of young people felt that their solicitors lacked the necessary skills to explain complex legal issues to them in a manner they understood...In addition to verbal communication, young people also felt that written communication was 'difficult to understand' and that the procedures were not clearly understood by them until after they had gone through the experience.*

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<sup>392</sup> Ibid.

<sup>393</sup> United Nations High Commissioner for Human Rights, [Access to justice for children: Report of the United Nations High Commissioner for Human Rights](#) at 6.

<sup>394</sup> Centre for Justice Innovation. (2018). [A fairer way: Procedural fairness for young adults at court](#). T2A Alliance & Centre for Justice Innovation at 7.

<sup>395</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 20.

<sup>396</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 49.

<sup>397</sup> Ibid at 86.

Concerns have also been raised about the complexity of the 'Rights Caution' - the explanation of their rights given to people before being questioned by the Police - with research exploring young people's comprehension of the Rights Caution finding participants had limited understanding of the Rights Caution, and that their level of understanding was not affected by their age with the older participants (14-16 years' old) understanding as little as the younger ones (10-13 years' old) did.<sup>398</sup> It was also found that use of the child/youth version of the Rights Caution did not increase participants' understanding, and actually contained language that participants found more difficult to understand.<sup>399</sup> It is important to note that the participants in this study were recruited from two Wellington region schools, as opposed to the cohort of children and young people in contact with the Police who are more likely than those in the general population to have a neurodisability,<sup>400</sup> or experience other challenges affecting their understanding. Another recent study exploring whether a visual presentation of the Youth Caution made it easier for young people to understand their legal rights found that while there were some improvements, young people still demonstrated incomplete understanding suggesting that multiple factors contribute to young people's difficulties with understanding over and above how legal rights are delivered such as young people's developmental stage.<sup>401</sup>

Similar issues have also been raised overseas. For example, a recent review of the detention and questioning of child suspects in the United Kingdom also raised concerns about the complexity of the rights caution noting that the difficulty is not just with the language used, but also the complexity of the rights themselves:<sup>402</sup>

*[I]t is difficult to understand, which raises questions about suspects having a right in law that they do not understand in practice. Research has found problems with the wording of the modified caution, not only with children (Sim and Lamb, 2018), but also with adults (Fenner et al., 2002).*

The authors conclude that this complexity means there should be mandatory legal advice for people under 18 years old so that a lawyer can help them decide how apply their rights in practice when responding police questions.<sup>403</sup>

## Physical or environmental barriers

The Chief Victims Advisor to the New Zealand Government discussed the environmental barriers for children who are victims or witnesses in the criminal justice system in her report as part of the Hāpaitia te Oranga Tangata – Safe and Effective Justice reform programme explaining: “[c]hildren involved in the criminal justice system are subjected to a broad range of stressors that not only compound their victimisation, but also negatively impact the quality of evidence they are able to provide to the court.”<sup>404</sup> She argues that children need suitable court environments rather than the existing “tiny, noisy and horrible or poky little rooms”.<sup>405</sup>

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<sup>398</sup> Gaston, F. (2017). [Young People's Comprehension of the Rights Caution in New Zealand](#). [Master's Thesis, Victoria University of Wellington] at 3.

<sup>399</sup> Ibid.

<sup>400</sup> Hughes, N., Williams, H., Chitsabesan, P., Davies, R. & Mounce, L. (2012) [Nobody made the connection: The prevalence of neurodisability in young people who offend](#). The Office of the Children's Commissioner at 23. See also *Working paper No. 2: Disabled and neurodiverse children and young people* at 21-24.

<sup>401</sup> Fawzy, C. (2022). [The Use of Visual Aids to Improve Young People's Understanding of their Legal Rights in New Zealand](#). [Master's Thesis, Victoria University of Wellington] at III.

<sup>402</sup> Kemp, V., Carr, N., Kent, H., & Farrall, S. (2023). [Examining the Impact of PACE on the Detention and Questioning of Child Suspects](#). The University of Nottingham at 54.

<sup>403</sup> Ibid at 55.

<sup>404</sup> Chief Victims Advisor to Government, [Te Tangi o te Manawanui: Recommendations for Reform](#) at 16.

<sup>405</sup> Ibid at 17.

A 2014 study in Northern Ireland which involved interviews with justice system professionals found that a number of aspects of the physical environment including “solicitors offices being uncomfortably formal settings which are likely impair children and young people's ability to express themselves and to understand the advice given by solicitors”, that meetings held in consultation rooms on court premises were “often insufficiently child-friendly” and that the practice of legal consultations in the hallway at the court were “lacking basic requirements of confidentiality”.<sup>406</sup>

## **Lack of effective and accessible avenues to seek justice**

In 2009 a report for UNICEF New Zealand by children’s advocates and lawyers Robert Ludbrook and Andrea Jamison found that:<sup>407</sup>

*New Zealand has no enforcement mechanism by which government, local government and government-funded bodies can be forced to meet their obligations under UNCROC and/or provide compensation for any loss suffered by failure to do so. There are several (not very satisfactory) means by which some children or persons on their behalf might obtain redress under domestic law [the Human Rights Commission, the Human Rights Review Tribunal, and the Office of the Children’s Commissioner] .... While children have the same rights as adults to make specific complaints to the Ombudsmen, the Independent Police Conduct Authority and the Health and Disability Commissioner, each of these bodies can only deal with the matters defined in their empowering statute. In practice, few children initiate complaints to these bodies and it is difficult for them to do so without access to legal advice and support.*

Arguably there has been little improvement in the intervening thirteen years as discussed in more detail below.

### *Human Rights Commission*

If a child is discriminated against on one of the 13 grounds of unlawful discrimination (and several sub grounds) listed in section 21 of the Human Rights Act 1993 a complaint may be made to the Human Rights Commission. If the complaint is unable to be resolved through the Commission’s complaint resolution processes (including mediation), a complainant can take their complaint to the Human Rights Review Tribunal. However, Section 21 discriminates against those aged under 16 on the grounds of their age in that “age discrimination” provisions do not apply to persons under 16 years of age.<sup>408</sup>

I requested information from the Human Rights Commission under the OIA in relation to their internal policies or guidelines relating to the management of complaints including any special measures or processes relating to complaints made by children and young people [link to request]. In response, the HRC provided a one and a half page extract from the HRC Policies and Procedure manual which sets out a series of steps to determine whether a complaint concerns a minor and, if so, to confirm whether the minor is aware of the complaint, if they consent (or assent) to the complaint being made, and what involvement they wish to have in relation to the complaint.<sup>409</sup> The extract did not set out any other adaptations to its ordinary process for managing complaints or give any guidance on how to engage with children and

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<sup>406</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 52.

<sup>407</sup> Ludbrook, R. & Jamison, A. (2009). [Kids Missing Out: It’s time to make progress on children’s rights](#). Unicef New Zealand at 26.

<sup>408</sup> [Human Rights Act 1993, s21\(i\)](#).

<sup>409</sup> [Attachment re representatives for minors \(undated\)](#).

young people. The HRC response also stated that the Commission has a mediation practice note on Children as parties but they chose to withhold this practice note in order to maintain legal professional privilege.<sup>410</sup>

### Human Rights Review Tribunal

If any government or public body, by any act or omission (whether by the judicial, legislative or executive branch of government), discriminates on any of the grounds set out in section 21 of the Human Rights Act 1993 a child affected by that discrimination (or a person acting on behalf of the child) can bring an application to the Human Rights Review Tribunal for a declaration of inconsistency under section 92J of that Act. The Human Rights Review Tribunal also has various powers including the power to award damages for pecuniary loss or for humiliation, loss of dignity and injury to feelings.

The case study below in relation to the IHC education complaint to the Human Rights Commission and then the Human Rights Review Tribunal demonstrates their limitations as an avenue for recourse including challenges obtaining representation, the Crown litigation strategy, and lengthy delays. In terms of the delay, after complaints about this issue by then Chairperson of the Human Rights Review Tribunal Roger Haines and in the media<sup>411</sup> the Human Rights Act was amended in 2018 to allow for the appointment of Deputy Chairpersons to hear applications and five new Deputy Chairpersons were appointed.<sup>412</sup> However, delays have continued with media reports in 2022 also highlighting the ongoing delays from application to hearing and then to decision.<sup>413</sup> Data obtained by journalist Jeremy Wilkinson under the Official Information Act is set out in the table below.

Year of disposal	Number of disposals	Average age in days
2015	59	363
2016	51	279
2017	46	343
2018	54	650
2019	55	699
2020	68	623
2021	59	576

<sup>410</sup> [Email from Human Rights Commission dated 12 August 2021.](#)

<sup>411</sup> McDonald, N. (2018, February 25). 'Access to justice is being denied to almost all': Human Rights Review Tribunal chairman Rodger Haines. *Stuff*. <https://www.stuff.co.nz/national/crime/101570737/access-to-justice-is-being-denied-to-almost-all-human-rights-review-tribunal-chairman-rodger-haines>; Fisher, D. (2018, April 11). Tribunal set up to protect human rights says it is now abusing those rights through massive delays. *New Zealand Herald*. <https://www.nzherald.co.nz/nz/tribunal-set-up-to-protect-human-rights-says-it-is-now-abusing-those-rights-through-massive-delays/GKFRFMXMM2VTBMTWMG5O34HZJU/>; McDonald, N. (2018, July 27). Justice denied - Human Rights Tribunal claim delays balloon to two years. *Stuff*. <https://www.stuff.co.nz/national/105802681/justice-denied--human-rights-tribunal-claim-delays-balloon-to-two-years>.

<sup>412</sup> New Zealand Law Society. (2019). *Five Deputy Chairpersons for Human Rights Review Tribunal*. <https://www.lawsociety.org.nz/news/legal-news/five-deputy-chairpersons-for-human-rights-review-tribunal/>

<sup>413</sup> Wilkinson, J. (2022, September 27). Two-year Human Rights Tribunal backlog causing stress for complainants. *New Zealand Herald*. <https://www.nzherald.co.nz/nz/two-year-human-rights-tribunal-backlog-causing-stress-for-complainants/3XFS5O7BQEYVECSIRILOWX7UHE/>

### *Case Study re Human Rights Commission and Human Rights Review Tribunal*

The witness statement of Trish Grant presented to the Royal Commission of Inquiry into Abuse in Care provides a stark example of the problems with the Human Rights Review Tribunal.<sup>414</sup> This chronology draws from her evidence and other sources.

2008 IHC lodged its complaint with the Human Rights Commission in July 2008 arguing that children with a range of disabilities experience discrimination at their local school. The claim was lodged after a series of meetings with the Ministry of Education had not been successful in addressing IHC's concerns. A further series of meetings took place after the claim had been filed.

2009 Ms Grant briefed the incoming Minister of Education about the claim. In April a senior mediator from the Human Rights Commission notified the Ministry of Education and the Crown Law Office of the complaint. This was followed by a series of correspondence between IHC, the Human Rights Commission and Crown Law.

2010 IHC made a written submission to the Ministerial Review of Special Education on 19 March followed by an oral submission on 22 March. A facilitated meeting took place between IHC, the Ministry of Education and Crown Law a week later.

In October 2010 the results of the Special Education Review were announced. IHC was disappointed with the outcome and discussions took place with the Human Rights Commission in relation to scheduling a mediation. The IHC gave its dates in December but Crown Law Office refused to do so as they had not yet responded to the claim.

2011 IHC became increasingly frustrated with the delay and wrote to the Associate Minister of Education in August to raise its concerns. A week later Crown Law finally responded to the complaint denying any unlawful discrimination but only addressing the aspect of the complaint relating to ORRS funding.

IHC wrote to Crown Law in September raising the Crown's failure to respond to the complaint. The Crown acknowledged the letter from IHC apologising for overlooking the need to respond to the whole complaint and noting that given IHC's indication they were considering whether to take proceedings, they understood that no further response was required.

2012 On 26 September IHC filed a claim in the Human Rights Review Tribunal. IHC also sought representation from the Director of Human Rights Proceedings which he agreed to provide. An initial telephone conference then took place and a reply was filed by the Crown.

The Director of Human Rights Proceedings' term expired and the new Director decided to withdraw its representation for the claim.

2014 It took some time for IHC to find new counsel with the expertise to progress the claim but in April IHC's legal counsel, Frances Joychild QC, filed an amended claim with the Human Rights Review Tribunal. The claim was further amended in August 2014 in response to an application from the Crown requiring further details of the nature and extent of the treatment of disabled students which IHC claims is discriminatory.

2015 The Human Rights Review Tribunal held a preliminary hearing in February and March into the complaint after the Attorney General applied to strike out several of IHC's claims.

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<sup>414</sup> [Witness Statement of Trish Grant](#) Abuse in Care Royal Commission of Inquiry.

About a month after the hearing was completed the Tribunal sought further submissions on the issue of the duty to provide an effective remedy. These were provided.

In October IHC wrote to the Minister of Justice raising the delay and its concerns about resourcing of the Tribunal. The Minister dismissed these concerns raising IHC's delay when the Director of Human Rights Proceedings withdrew representation.

2016 Given the ongoing delay, IHC contacted a new senior manager in the Special Education Unit and it was agreed that the parties would attempt to mediate the issues. Confidential discussions about the complaint between IHC, the Ministry of Education, the Education Review Office, and the Education Council over four days in 2016 failed to reach a settlement.

2017-

2018 The media reported on the under-resourcing of the Tribunal and despite multiple calls to the Tribunal, IHC was given the same response – that there was no time frame for a decision.

2019 IHC again wrote to the Tribunal asking when IHC would have a decision as 5 new deputy chairpersons had been appointed. A Minute was issued later that month that explained the resourcing issues but did not give an answer.

2020 In December 2020 the Tribunal issued its decision refusing the Crown's application to strike out the parts of the claim.

IHC met with Michael Timmins, the new Director of the Office of Human Rights Proceedings who agreed that his office will provide legal representation for IHC.

2021 IHC and the Office of Human Rights Proceedings began collecting updated evidence about the experiences of disabled children in the education system from parents, educators and community groups.

2022 Media releases from IHC in June and September discussed the ongoing legal action but did not indicate any further progress.<sup>415</sup>

At the time of writing there is no indication as to when the substantive hearing of the IHC claim will take place and a website developed to collect stories of discrimination experienced by disabled students and their families to support IHC's legal action against the Government remains live.<sup>416</sup> Regardless of what the final outcome of these proceedings, the process to date demonstrates the Human Rights Tribunal's limitations as an avenue for redress as Trish Grant explained in her evidence to the Abuse in Care Royal Commission:

*For 12 years there has been no remedy in this case. Despite having the support of the legislation IHC has had to deal with a public sector and its advisors who acted throughout as though the proceedings were an intrusion on their rights to govern and develop policy as they see fit. At best these proceedings were resented by the defendants and their legal advisors. At worst they were actively obstructed.*

*A whole generation of children with disabilities requiring accommodations to learn has moved through school since this claim was first made. A whole generation of*

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<sup>415</sup> IHC. (2022, July 15). *Make it fair or meet us in court*. <https://www.ihc.org.nz/news/make-it-fair-or-meet-us-in-court>; IHC (2022, September 28) *IHC welcomes ERO proposal to give disabled students a fair chance at school*. <https://www.ihc.org.nz/news/ihc-welcomes-ero-proposal-to-give-disabled-students-a-fair-chance-at-school>

<sup>416</sup> IHC (n.d.) *Ākona: To teach everyone*. <https://campaigns.ihc.org.nz/>



*children have not experienced equitable access to and outcomes from an inclusive education in this time. They will live with deleterious consequences of this on all their human rights as citizens.*

This case study demonstrates a number of barriers to accessing justice through the Human Rights Review Tribunal:

- The difficulty obtaining representation. In this case the IHC Board had the resources and the will to progress this litigation particularly where that involved funding the costs of legal representation but this will be a considerable challenge for many NGOs and advocates.
- While the Office of Human Rights Proceedings has now agreed to provide representation in this case, its earlier decision to do so was reversed due to a change in personnel which raises concerns in relation to the discretionary nature of the decision to provide representation.
- The delay at each stage of the proceedings due to the Government's failure to appropriately resource the Human Rights Review Tribunal (see below for recent developments in this regard).
- The Crown's litigation strategy and its ability to use delaying tactics.

### *Office of the Children's Commissioner*

Despite opposition from across the Children's sector and all other major political parties, in 2022 the Labour Government passed legislation which removed the Office of the Children's Commissioner's power to investigate "any decision or recommendation made, or any act done or omitted...in respect of any child in that child's personal capacity".<sup>417</sup> The new Commission's functions are limited to "supporting a child or young person to engage with agencies to facilitate the resolution of issues";<sup>418</sup> inquiring into "any systemic matter, including (without limitation) any legislation or policy, or any practice or procedure, that relates to or affects the rights, interests, or well-being of children and young people";<sup>419</sup> and "presenting reports to proceedings before any court or tribunal that relate to the Children's Convention or to the rights, interests, or well-being of children generally".<sup>420</sup>

It is unclear how the Commission will operate to fulfil its new function in relation to supporting children to engage with agencies to resolve disputes, and in particular, whether the Commission will establish some kind of advocacy function. It is also unclear whether the Commission will continue to operate its Children's Rights Line but such activities would be consistent with its functions under the Children and Young People's Commission Act 2022.

### *Ombudsman*

As I set out above, the Ombudsman's current document management system does not provide the ability to easily collate and consolidate complaint information based on demographic information of the complainant meaning that they do not know how many complaints they have received from children and young people.<sup>421</sup> However, data in relation to the subject matter of complaints shows that there are a number of complaints that are likely to relate to children and

<sup>417</sup> [Children's Commissioners Act 2003](#), s1(a).

<sup>418</sup> [Children and Young People's Commission Act 2022](#), s99(c).

<sup>419</sup> [Children and Young People's Commission Act 2022](#), s99(i).

<sup>420</sup> [Children and Young People's Commission Act 2022](#), s99(j).

<sup>421</sup> See **Office of the Ombudsman**.

young people. The Ombudsman's office also publishes case notes and opinion on its website including many relating to decisions made by schools.<sup>422</sup>

At the time I made my request for information the Ombudsman's Office also advised that they did not have any "finalised policies, principles, or guidelines" in relation to complaints by children<sup>423</sup> which raises concerns that its processes have not been adapted to ensure that they are accessible to children and young people however this may change. Under the Oversight of Oranga Tamariki System Act 2022 the Ombudsman took on additional duties and powers when dealing with matters that fall under the Ombudsmen Act 1975 and relate to services or support delivered by Oranga Tamariki care or custody providers.<sup>424</sup> Given this increased role, the Ombudsman's Office commissioned a research project which involved gathering insights from children and young people in care and the views of their support people about the information they need to make a complaint and any barriers that may prevent a young person and/or their support person(s) from making a complaint.<sup>425</sup> It is not clear from publicly available information whether this has led to any changes in the Ombudsman's policies and processes but it is hoped that the learnings from this research will be applied to make the complaints process more accessible to children.

As discussed in *Part One: Analysis of Interview and Survey Data*,<sup>426</sup> concerns are often expressed about the amount of time it can take for the Ombudsman to investigate complaints.<sup>427</sup> While there are a range of reasons for the time that it can take to resolve complaints, if a child or young person is out of school even three months can be too long.

### *Independent Police Conduct Authority*

The Independent Police Conduct Authority is not subject to the Official Information Act. However, I requested information from them in relation to complaints made by children and young people and any internal policies, principles, rules or guidelines relating to the management of complaints including, but not limited to, any special measures or processes relating to the complaints made by children and young people. I received an initial acknowledgement of my request and was advised that it would be discussed with the IPCA General Manager. However, I did not receive any further communication from them.

### *Health and Disability Commissioner*

I requested information about complaints by children and young people and any internal policies, principles, rules or guidelines relating to the management of complaints from the Health

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<sup>422</sup> Ombudsman. (n.d.). *Resources and publications*.

<https://www.ombudsman.parliament.nz/resources?f%5B0%5D=category%3A74&f%5B1%5D=category%3A774>

<sup>423</sup> [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#).

<sup>424</sup> [Oversight of Oranga Tamariki System Act 2022](#), Part 2, Subpart 2.

<sup>425</sup> [Email from Ombudsman's Office to Jennifer Braithwaite dated 6 October 2021](#) at 1-2.

<sup>426</sup> *Access to justice for children and young people in Aotearoa New Zealand: Part One - Analysis of interview and survey data* at [53].

<sup>427</sup> See Starr, K. & Janah, N. (2016). [Challenging the barriers: Ensuring access to education or children with special educational needs](#). YouthLaw Aotearoa at 84. The Ombudsman's website states that 72% of complaints were resolved within three months and 88% six months but this data is from the 2018/2019 year: Ombudsman. (2019). *Results and remedies*. <https://www.ombudsman.parliament.nz/about-ombudsman/results-and-remedies> Recent media coverage has identified increasing delays in complaint resolution due to increasing complaint numbers with only 54% of complaints resolved within three months as of March 1 2023: Sachdeva, S. (2023, May 1) Ombudsman makes late Budget bid following cyclone devastation. *Newsroom*. <https://www.newsroom.co.nz/ombudsman-makes-late-budget-bid-following-cyclone-devastation>

& Disability Commissioner.<sup>428</sup> They provided a password protected spreadsheet in response to my request which provided information about complaints received over the previous ten years.<sup>429</sup>

## Courts

As discussed above, children are generally unable to take court action in their own right and must be represented by a next friend, litigation guardian or an authorised approved organisation.<sup>430</sup> In addition to these general rules in relation to legal capacity, children and young people must also have legal standing to take action which essentially means being able to show that they are sufficiently affected by the matter before the court. Under the Care of Children Act 2004 (COCA), any person affected may make an application to vary or discharge a parenting order, an order about the upbringing of a child or any other order about the role of providing day to day care for or about contact with a child.<sup>431</sup> Therefore, a child can make an application to vary or discharge an order.<sup>432</sup> Children also have a right to appeal to the High Court in relation to a Family Court decision to make or refuse to make an order, dismiss proceedings or otherwise finally determine the proceedings.<sup>433</sup> However, there is no mechanism to enable children to participate in these ways making these statutory provisions decorative only.<sup>434</sup> Dr Deb Inder, an experienced family lawyer and lawyer for the child, identified a series of barriers to children's participation in private family justice proceedings in her PhD thesis:

- The lack of information and support for children involved in proceedings under COCA or who wish to become a party to proceedings including the lack of any reference to a child's right to apply for a protection order, to apply for variation or discharge of a parenting order or any information on how to conduct an appeal of a Family Court decision in existing Family Court publications for children;<sup>435</sup>
- Cost contribution orders which mean that if a child files proceedings, they will become exposed to a cost contribution order for fees of the lawyer for the child and the specialist report writer, if appointed;<sup>436</sup>
- The absence of any provision in the COCA to challenge a decision of the court not to appoint a lawyer to represent a child;<sup>437</sup>
- The lack of a readily accessible right of redress for a child excluded from Family Dispute Resolution mediation.<sup>438</sup>

Specific issues in proceedings relating to the Oranga Tamariki Act and the care system more generally are discussed in the children and young people in care and with care-experience report.

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<sup>428</sup> [Letter from Jennifer Braithwaite to Health & Disability Commissioner dated 17 February 2021.](#)

<sup>429</sup> [Letter from Health & Disability Commissioner to Jennifer Braithwaite dated 17 March 2021](#) & [Health & Disability Commissioner standard operating procedure.](#)

<sup>430</sup> See **Complexity / difficulty understanding.**

<sup>431</sup> [Care of Children Act 2004](#), s56.

<sup>432</sup> Inder, D. W. R. (2020). [Children's participation in the context of private law disputes in the New Zealand family justice system](#) [Doctoral thesis, University of Otago] at 345.

<sup>433</sup> [Care of Children Act 2004](#), s143.

<sup>434</sup> Inder, [Children's participation in the context of private law disputes in the New Zealand family justice system](#) at 139-140.

<sup>435</sup> *Ibid* at 322 & 345.

<sup>436</sup> *Ibid* at 322.

<sup>437</sup> *Ibid* at 345.

<sup>438</sup> *Ibid* at 345.

## Education system

As has been recognised by both children's advocates such as YouthLaw Aotearoa<sup>439</sup> and the Ministry of Education itself,<sup>440</sup> if a child or young person is removed from school or faces some other disciplinary action, their options are limited to seeking a reconsideration by the Board of Trustees, review by the Ombudsman, or judicial review in the High Court. Each of these options is flawed as there is no guarantee of a different decision on a reconsideration, the Ombudsman is a slow process that doesn't provide a binding decision, and judicial review is expensive, slow, inaccessible to those unfamiliar with the system, and even if successful, generally only results in the decision maker being required to make the decision again using a better process.<sup>441</sup>

These limitations as well as other concerns such as the over-representation of Māori and Pacific students in removal statistics,<sup>442</sup> disadvantage experienced by other minority groups such as neural-diverse and LGBTQIA+ students,<sup>443</sup> and the high levels of dissatisfaction with how Boards of Trustees deal with complaints from parents/caregivers who have children with learning support needs<sup>444</sup> were identified in the Ministry of Education's regulatory impact statement in relation to establishing dispute resolution panels to deal with complaints in relation to school decision making.

This regulatory impact statement resulted in the Education and Training Act passed in 2020 including provisions relating to Dispute Resolution Panels. However, YouthLaw Aotearoa and the Children's Commissioner have recently raised concerns that the panels still have not been set up, almost two years after the legislation was passed.<sup>445</sup> Then Education Minister Chris Hipkins was quoted by media as saying that the government was committed to setting up a disputes resolution process but said he couldn't comment further as all spending decisions are subject to the Budget process.<sup>446</sup>

While the Dispute Resolution Panels will be an improvement on the existing situation when (or if) they are eventually established, this model also contains some significant limitations including some of those identified in relation to existing mechanisms by the Ministry of Education in its regulatory impact statement. For example, determinations of the Dispute Resolution Panels are not binding unless both parties have agreed to be bound.<sup>447</sup> It remains to be seen how quickly Dispute Resolution Panels will deal with disputes, but given that applications can be declined on the basis that the applicant has not made reasonable efforts to resolve the dispute with the Board of Trustees before making the application<sup>448</sup> and the dispute must be referred to a

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<sup>439</sup> Walsh, J. (2016). [Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand](#). YouthLaw Aotearoa at 26

<sup>440</sup> Ministry of Education, [Regulatory Impact Assessment: Establishing dispute resolution panels](#) at 6-7.

<sup>441</sup> Walsh, [Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand](#) at 26; Ministry of Education, [Regulatory Impact Assessment: Establishing dispute resolution panels](#) at 6-7.

<sup>442</sup> Ministry of Education, [Regulatory Impact Assessment: Establishing dispute resolution panels](#) at 7.

<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid* at 9.

<sup>445</sup> Gerritsen, J. (2022, October 27). Children's commissioner demands action as promised school disputes panel yet to be set up. *Radio New Zealand*. <https://www.rnz.co.nz/news/national/477465/children-s-commissioner-demands-action-as-promised-school-disputes-panel-yet-to-be-set-up>

<sup>446</sup> *Ibid.*

<sup>447</sup> [Education and Training Act 2020](#), s226. The Disputes Resolution Panel must also have decided to make a determination instead of a recommendation.

<sup>448</sup> [Education and Training Act 2020](#), s224.

mediator unless the Panel decides it is not appropriate to do so,<sup>449</sup> it is unlikely that the process will be a quick one.

As discussed above, there are also concerns that the process may not be particularly accessible to students and their families given the power imbalance between school principals and Boards of Trustees who are likely to have both expert knowledge and prior experience of the process. The Independent Review Panel process in the United Kingdom which bears many similarities to the Disputes Resolution Panels has also been criticised as failing to hold schools to account or ensure that they follow good process<sup>450</sup> and giving too much power to headteachers and governing bodies who have limited ability to robustly critique headteachers' decisions.<sup>451</sup>

### *Optional Protocol to the UNCRC on a Communications Procedure*

Another potential avenue for complaints is through the Optional Protocol to the UN Convention on the Rights of the Child on a Communications Procedure (OP3) acceded to by New Zealand in 2022.<sup>452</sup> OP3 provides children and young people with an additional avenue to enforce their rights by allowing individuals or groups of individuals to submit "communications" in relation to violations of any of the rights in the Convention on the Rights of the Child.<sup>453</sup>

However, its utility is likely to be fairly limited in practice. Despite the fact that OP3 has been in force more than ten years, the number of communications remains fairly low – in 2021 only 22 individual communications were adopted: 7 decisions on the merits, 6 decisions found inadmissible, and 9 decisions discontinued.<sup>454</sup> The subject matter also remains fairly narrow with the Committee's adopted decisions mainly concerning migration, including issues relating to age assessment of unaccompanied minors and deportation orders.<sup>455</sup> Child Rights Connect also identified some new themes emerging including a gender perspective in age assessment cases, children's consent to communications, and climate change.<sup>456</sup> However, the Committee found that the communications relating to climate change were inadmissible for failure to exhaust domestic remedies.<sup>457</sup> The 2021 OPIC trends report also notes that there were 55 pending cases, most of which relate to Spain, Switzerland and France (31 in total) with the most common issues being deportation (22), age assessment of unaccompanied migrant children (8), and the right to education (6).<sup>458</sup>

International research and literature has also identified a number of limitations or problems with OP3. For example, Grover argues that although complaints can be made by groups, this requires each and every one of the child victim complainants to be named and accurately identified which is a significant barrier to collective complaints.<sup>459</sup> Grover also argues that the

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<sup>449</sup> [Education and Training Act 2020](#), s225.

<sup>450</sup> Kulz, [Mapping the Exclusion Process: Inequality, Justice and the Business of Education](#) at 88.

<sup>451</sup> Kulz, [Mapping the Exclusion Process: Inequality, Justice and the Business of Education](#) at 94.

<sup>452</sup> United Nations General Assembly. (2011). *Resolution adopted by the General Assembly on 19 December 2011: 66/138. Optional Protocol to the Convention on the Rights of the Child on a communications procedure.* [https://treaties.un.org/doc/source/docs/A\\_RES\\_66\\_138-Eng.pdf](https://treaties.un.org/doc/source/docs/A_RES_66_138-Eng.pdf)

<sup>453</sup> United Nations General Assembly, *Resolution adopted by the General Assembly on 19 December 2011: 66/138. Optional Protocol to the Convention on the Rights of the Child on a communications procedure.*

<sup>454</sup> Child Rights Connect. (2022). *Annual OPIC trends 2021.* <https://opic.childrightsconnect.org/wp-content/uploads/2022/01/Annual-OPIC-Trends-2021.pdf> at 1.

<sup>455</sup> *Ibid* at 4.

<sup>456</sup> *Ibid* at 4-5.

<sup>457</sup> *Ibid* at 5.

<sup>458</sup> *Ibid*.

<sup>459</sup> Grover, S.C. (2015). *Children defending their human rights under the CRC communications procedure: on strengthening the Convention on the Rights of the Child complaints mechanism.* Springer at 23.

indeterminate nature of the concept of 'best interests of the child' is problematic given that it can be used to decline a case and because it is vulnerable to manipulation by States.<sup>460</sup>

*[W]ithout objective criteria regarding what constitutes 'best interests of the child', the Committee under the communications protocol to the CRC "may decline to examine any communication that it considers not to be in the child's best interests."<sup>4</sup> There is no stipulation in the OP3-CRC, furthermore, that the Committee on the Rights of the Child set out in detail the basis for ruling the communication not in the child's best interest nor is there any available appeal mechanism. ...The focus under the OP3-CRC on the vague notion of the 'best interests of the child' as the guiding principle for consideration of communications from children (directly or through their representatives) rather than on international human rights and humanitarian law principles creates many potential gaps in protection for the child victims under the OP3-CRC.<sup>5</sup> For instance (i) the best interests of the child principle can be manipulated such that it serves State interests contrary to the child's best interests.*

Grover also identifies concerns with the Committee's "broad discretion in determining what it considers "reasonableness" in respect of the (progressive) steps that the State may have taken to remedy violations of children's economic, social and/or cultural rights" which he argues could allow the continuation of rights violations on the basis that the State "is allegedly taking progressive reasonable steps toward rectifying the situation".<sup>461</sup>

Applicable domestic complaints avenues must also have been exhausted, unreasonably prolonged or ineffective before the UN Committee on the Rights of the Child will accept a claim,<sup>462</sup> meaning that the process to bring a complaint to the UN Committee is likely to be lengthy and outside children's timescales.<sup>463</sup> In my view, it is also unlikely that children or young person will have the confidence to make a complaint to an international human rights institution, if indeed they are even aware that this is a possibility. Others internationally have expressed similar reservations about the potential of OP3 including Smith who argues that a partial solution to many of these challenges is strong national complaints mechanisms.<sup>464</sup>

The National Interests Analysis prepared by the New Zealand Government prior to ratification of OP3 described New Zealand's domestic complaints for children's rights as "well-developed"<sup>465</sup> as well as citing the ongoing work to strengthen some complaints mechanisms including relating to the Oranga Tamariki system and the creation of disputes panels for education disputes.<sup>466</sup> However, as discussed in the children and young people in care and with care-experience report, the Oranga Tamariki complaints process is still subject to ongoing review and the education disputes panels have not been established almost three years after the legislation was passed.

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<sup>460</sup> Ibid at 110.

<sup>461</sup> Ibid at 222.

<sup>462</sup> See Article 7(e).

<sup>463</sup> Ann Skelton, a current member of the UN Committee on the Rights of the Child, has acknowledged that "many children will be adults by the time their complaint is dealt with" due to the "length of time it might take to exhaust local remedies and get the complaint properly filed and dealt with": Skelton, A. (2019). *International Children's Rights Law: Complaints and Remedies*. In U. Kil Kelly & T. Liefaard, (Eds.) *International Human Rights of Children*. Springer at 89.

<sup>464</sup> Smith, [The Third Optional Protocol to the UN Convention on the Rights of the Child? - Challenges Arising Transforming the Rhetoric into Reality](#) at 322.

<sup>465</sup> Ministry of Social Development. (n.d.). [National Interest Analysis \(NIA\) for the United Nations Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure](#) at 5-6.

<sup>466</sup> Ibid at 7.

## Practical barriers to accessing justice

### Lack of knowledge and support

Lack of knowledge can operate as a barrier in multiple ways including where a child or young person is not aware of their rights or how to take action, where they or others assisting them do not understand the process or have a lesser understanding than those on the other side, and where system actors have a lack of knowledge or understanding about the child or young person at the centre of the issue. For example, a Welsh Assembly government-funded study of complaints involving children and their use of advocacy services commissioned by local authorities in Wales found that while “respondents became aware at some point that they had a right to complain, they still lacked information (and more importantly, explanations) about how to complain and what they could expect to happen as a result” and when they did receive information, “[m]ost, however, struggled to make sense of this information and felt it did not tell them enough about the procedure and what to expect”.<sup>467</sup>

Another example is the education disputes processes described above in which headteachers and panel members “enter a format and event they are familiar with, compared with parents who enter an unknown space” where they “do not understand how they can present their case and how they can argue against the case that is presented”.<sup>468</sup> One participant explained that she did not know “how to put it into proper words for people to understand’ or how to craft succinct arguments to make her long story short”<sup>469</sup> and another described how he felt that this lack of knowledge could be used against parents: “[t]hey use language that you are unfamiliar with so you straightaway feel intimidated and that’s how they seem to get away with it”.<sup>470</sup> A related barrier is the lack of support for parents of children involved in school disciplinary processes as Kulz reported “[e]very parent and the vast majority of headteachers and exclusions officers felt that there was not enough support available for parents going through the exclusion process.”<sup>471</sup>

Appell describes how lawyers can also experience a lack of knowledge or understanding about their child clients “attorneys are unlikely to share the same socio-economic background, cultural values, or kin as the children they represent...as outsiders, attorneys may not have the tools or experience to understand their child clients’ interests and needs.”<sup>472</sup>

In Aotearoa New Zealand the Principal Family Court Judge’s Practice Note on the selection and appointment of the Lawyer for the Child in a specific case provides that when appointing a lawyer, the Court will appoint as lawyer who is “by reason of personality, cultural background, training and experience, suitability qualified to represent the child”.<sup>473</sup> However, although this is a positive development, practical issues can arise in its implementation for example, that there is only one Māori Lawyer for the Child in the South Island.<sup>474</sup>

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<sup>467</sup> Pithouse, A. & Crowley, A. (2007). Adults Rule? Children, Advocacy and Complaints to Social Services. *Children & Society*, 21(3), 201-213 at 208.

<sup>468</sup> Kulz, [Mapping the Exclusion Process: Inequality, Justice and the Business of Education](#) at 74.

<sup>469</sup> Ibid at 77.

<sup>470</sup> Ibid at 78.

<sup>471</sup> Ibid at 92.

<sup>472</sup> Appell, [Representing children representing what? Critical reflections on lawyering for children](#) at 595.

<sup>473</sup> Principal Family Court Judge. (2020). [Family Court Practice Note. Lawyer for the Child: Selection, appointment and other matters](#). Principal Family Court Judge’s Chambers at 3.

<sup>474</sup> Key informant interview.

## Lack of data

The lack of data, particularly data that is disaggregated by different demographic characteristics including age, disability status, ethnicity, gender and sexuality as well as other characteristics such as care experience is a considerable barrier to understanding children and young people in Aotearoa's experience of justice problems and barriers to access. For example, during the course of this research study I sought information from a range of Government departments, Crown entities and other bodies none of whom were able to provide the information I sought because this data either wasn't collected, wasn't collected consistently, or was stored in a different way.<sup>475</sup>

In some cases this meant that the relevant agency could not provide me with any information whatsoever. For example, when I requested information from the Ministry of Business, Innovation and Employment in relation to applications to the Employment Relations Authority and the Tenancy Tribunal by children and young people under twenty five, their response was that they do not collect information in relation to age.<sup>476</sup> In other cases, it meant that the relevant agency could provide me with some information disaggregated by age but could not provide information disaggregated by any other characteristic. For example, Oranga Tamariki advised that they could provide information broken down by age of the complainant but could not provide any other demographic breakdown without undertaking a manual search and this information was not always recorded.<sup>477</sup> The Ombudsman also provided information about complaints made by or on behalf of children in care but advised that they could not provide any other demographic information because their document management system did not provide the ability to easily collate and consolidate information.<sup>478</sup>

More generally, when I sent an Official Information Act request to the Ministry of Justice I asked for "[a]ny information and documents relating to assessment of the legal needs of children and young people including information relating to the inclusion of children and young people in wider assessments of legal needs".<sup>479</sup> The Ministry's response was that there is "no specific information that relates to this part of your request" and they refused my request under section 8(e) of the Act.<sup>480</sup>

This lack of data about children and young people's justice needs also occurs in other jurisdictions as Davidson et al explain:<sup>481</sup>

*Children and young people are heavily reliant on justice systems to protect and promote their rights, yet legal needs and victimization surveys are generally not designed to capture their justice distinct needs, and other evidence suggests they face an even wider justice gap than adults.*<sup>55</sup>

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<sup>475</sup> See [Letter from Ministry of Education to Jennifer Braithwaite dated 14 May 2021](#); [Letter from Ministry of Business, Innovation and Employment to Jennifer Braithwaite dated 12 March 2021](#); [Letter from Ministry of Justice to Jennifer Braithwaite dated 27 April 2021](#); [Letter from Office of the Children's Commissioner to Jennifer Braithwaite dated 21 September 2021](#); [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#); and [Email correspondence with Human Rights Commission in July / August 2021](#).

<sup>476</sup> [Letter from Ministry of Business, Innovation and Employment to Jennifer Braithwaite dated 12 March 2021](#) at 1-2.

<sup>477</sup> [Letter from Oranga Tamariki to Jennifer Braithwaite dated 7 May 2021](#) at 2-3.

<sup>478</sup> [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#).

<sup>479</sup> [Letter from Jennifer Braithwaite to Ministry of Justice dated 17 February 2021](#).

<sup>480</sup> [Letter from Ministry of Justice to Jennifer Braithwaite dated 28 April 2021](#).

<sup>481</sup> Davidson, J.; Foussard, C.; Goudie, A.; Hope, K.; Shields, S. (2022). [Justice for Children: Agenda for Change](#). University of Strathclyde at 10-11.



## Diversity of experiences

Many studies have also concluded that much as there are age-related differences between the legal needs of children and young people and adults, there are also considerable differences between different groups of children and young people. As Emerson et al. concluded in their study of legal needs of children and young people in Northern Ireland:<sup>482</sup>

*Children and young people's legal needs are thus as varied and diverse as children and young people themselves and are affected by their age, ethnicity, gender, socio-economic status, family circumstances and sexual orientation etc.*

In particular, vulnerable or 'at risk' groups of children and young people will have differing experiences of legal problem in terms of volume, severity and nature. The Law and Justice Foundation of New South Wales' Legal Australia-Wide Survey ('the LAW Survey') conducted in 2008 found at risk young people were more likely to experience legal problems overall, substantial legal problems and multiple legal problems.<sup>483</sup> At risk groups included 15 to 24 year olds who face homelessness, experience disability, are Aboriginal and Torres Strait Islander, live in out-of-home care and/or are parents.<sup>484</sup> The authors of a report on the 2010 wave of the Civil and Social Justice Panel Survey (CSJPS) in the United Kingdom also identified vulnerable groups of young people who are more likely to experience legal problems and to report problems of greater severity:<sup>485</sup>

*Within young people as a whole, lone parents, victims of crime, those who had recently had contact with the police, those with mental health problems, those who admitted drug use, those who were socially isolated and those not in education, employment or training reported civil legal problems more often. In all, 80% of all young people reporting civil legal problems fell in one category of vulnerability. Young people falling into multiple categories of vulnerability became increasingly more likely to report problems. Vulnerable young people also tended to report problems of greater severity. The types of problems reported by vulnerable young people were different to those reported by other young people. For example, those not in education, employment or training reported high levels of housing problems and relatively high levels of debt and family related problems. Those recently arrested reported high levels of homelessness and problems concerning money and rented housing.*

Pleasence also found that vulnerable young people generally experienced more serious problems based on analysis of respondents' "mean severity" scores.<sup>486</sup> Analysis of the Legal Problem Resolution Survey, 2014-2015 again made similar findings, concluding that problem incidence increases significantly for victims of crime, those in receipt of means tested benefits or in rented accommodation, with long-term ill health or disability, stress, depression or some other mental health problem, and young lone parents.<sup>487</sup>

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<sup>482</sup> Emerson et al., [The legal needs of children and young people in Northern Ireland: the views of young people and adult stakeholders](#) at 14-15.

<sup>483</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 11.

<sup>484</sup> Ibid.

<sup>485</sup> Pleasence, P. (2011). [Civil Legal Problems: Young People, Social Exclusion and Crime](#). JustRights at i.

<sup>486</sup> Ibid at 10.

<sup>487</sup> Balmer & Pleasence, [Young People and Legal Problems: Findings from the Legal Problem Resolution Survey, 2014-2015](#) at 4.

**Table 2: percentage of CSJPS respondents under 25 who reported one or more legal problems<sup>488</sup>**

Group	% reporting one or more legal problems
All respondents under 25	34.2%
Lone parents	59.1%
Victims of crime	62.7%
Young people with mental health problems	50.0%
Young people with a long-term limiting illness or disability	44.8%
Young people not in employment, education or training	47.0%
Socially isolated young people	53.7%

The United Nations High Commissioner for Human Rights also recognised the differential experience of different groups of children and young people in his 2013 study on access to justice for children and young people:<sup>489</sup>

*While difficulties mentioned above are experienced by many children, certain groups of children, including children in alternative care, children deprived of their liberty, children with disabilities, children living in poverty,<sup>24</sup> children living in the streets, belonging to minorities or who are indigenous children,<sup>25</sup> girls,<sup>26</sup> children in conflict situations, asylum-seeking and migrant children, are faced with additional barriers in accessing justice. These children are often exposed to multiple forms of stigmatization and discrimination, including on grounds of sex, disability, race, ethnicity, colour, language, religion, national or social origin, property, birth, or other status, such as sexual orientation or gender identity, as well as violence, such as gender-based violence, domestic violence, murder and violence related to organized crime and gangs, witchcraft and serious forms of violence based on ill perceptions towards children with disability and albinism.*

In addition, just as some groups of children and young people experience more and differing legal issues, the risk of victimisation varies across different groups of children and young people. The World Health Organisation describes different levels of risk factors ranging from individual-level factors to society-level factors that increase the risk of victimisation of some groups and individuals:<sup>490</sup>

- Individual-level risk factors: sex, age, education, income, disability, impaired brain and cognitive development, psychological disorders, harmful use of alcohol, drug abuse, and a history of aggression or maltreatment.
- Close-relationship level risk factors: lack of emotional bonding, poor parenting, family dysfunction, delinquent peers, children witnessing violence, and early or forced marriage.

<sup>488</sup> Pleasence, [Civil Legal Problems: Young People, Social Exclusion and Crime](#) at 9.

<sup>489</sup> United Nations High Commissioner for Human Rights, [Access to justice for children: Report of the United Nations High Commissioner for Human Rights](#) at 7.

<sup>490</sup> World Health Organization. (2016). [INSPIRE: seven strategies for ending violence against children](#) at 16.

- Community-level risk factors: poverty, high population density, transient populations, low social cohesion, unsafe physical environments, and high crime rates including drug offending.
- Society-level risk factors: health, economic, educational and social policies that maintain inequalities; absent or inadequate social protection; social fragility owing to conflict, post-conflict or natural disaster; weak governance and poor law enforcement.

Different groups of children and young people also experience different barriers depending on their individual circumstances:<sup>491</sup>

*[C]hildren and young people are not a homogenous group. They experience different access to justice barriers depending on their personal circumstances. Many of the barriers faced by other groups ... also apply to children and young people, notably people with disability, homeless persons, people who experience economic disadvantage, Aboriginal and Torres Strait Islander peoples, prisoners, people who experience family violence, and people living in regional or remote Australia.*

Simply differing from the 'default' individual for whom systems have been designed can also create barriers as the Community-Based Research Centre explains:<sup>492</sup>

*[L]egal systems and society more broadly establish and assume a 'default' individual who is, among other things, white, cisgender, a man, middle or upper class, and not living with disabilities. This assumption dictates how participants experience the system and are treated, which has immense ramifications for those with identities and experiences that do not fit neatly within this "default" norm.*

As foreshadowed above, I have produced or am in the process of producing a series of reports discussing the experiences of different groups of children and young people including their justice needs and barriers to access. In the following sections I have summarised my findings in those reports before briefly discussing how the intersection of different aspects of young people's identities can also operate to increase the justice problems they experience and/or result in additional or differing barriers to accessing justice.

## Children and young people in care or with care-experience

### Justice problems

Children and young people in care and those with care-experience experience a range of justice problems that are specific to their care status as well as being more likely to experience a range of other justice problems. This includes:

**Issues relating to care status.** Children and young people in State care experience a range of issues whilst in care such as around contact with their parents and siblings, issues in relation to the suitability of their placements, and compliance with care standards more generally.<sup>493</sup>

**Justice issues in the education system.** Child and young people in care or with care experience are more likely to experience a range of justice issues in the education system including bullying and discrimination, special educational needs (or the provision to meet them),

<sup>491</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 19.

<sup>492</sup> Community-Based Research Centre. (2021). [Serious Legal Problems faced by Lesbian, Gay, Bisexual, and Other Sexual-Minority People in Western Canada: A Qualitative Study](#). Department of Justice Canada at 23.

<sup>493</sup> Independent Children's Monitor. (2021). [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021; Brief of Evidence of Tanisha Batten](#) (Wai 2915, #A143) at para 46 & 50.

being the subject of school disciplinary action such as stand-downs, suspensions, exclusion and expulsion, and the right to education more generally.<sup>494</sup>

**Victimisation.** A range of sources including Oranga Tamariki Safety of Children in Care reports,<sup>495</sup> reports by the Office of the Children’s Commissioner,<sup>496</sup> and submissions from lawyers representing survivors of abuse in care<sup>497</sup> demonstrate that children in care continue to suffer abuse. Studies in other countries also identify children in care or leaving care as vulnerable to victimisation including criminal exploitation.<sup>498</sup>

**Transition from care.** Young people transitioning from care can experience a range of additional challenges moving into independence including multiple and high needs and a lack of the ‘normal’ support provided by families.<sup>499</sup> Although amendments have been made to the Oranga Tamariki Act to provide for increased transitional support and transition services have been established, recent reports including those by the Independent Children’s Monitor and VOYCE Whakarongo Mai raise serious concerns about Oranga Tamariki’s failure to comply with the Care Standards around transition support and the effectiveness of the transitional support on offer.<sup>500</sup> Overseas research and literature also identifies the challenges in transitioning from care and related legal and non-legal problems that can result if insufficient support is provided.<sup>501</sup>

**Housing instability and homelessness.** New Zealand based research by independent researchers and commissioned by Oranga Tamariki identifies the inadequacy of housing

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<sup>494</sup> VOYCE – Whakarongo Mai. (2022). [Children in State Care. Thematic Report to the United Nations Committee on the Rights of the Child](#); Oranga Tamariki Voices of Children and Young People Team. (2019). [Experiences of Education for Children in Care in Aotearoa New Zealand / Part 1: Voices of children in care and key adults in their lives](#). Oranga Tamariki—Ministry for Children; Oranga Tamariki Voices of Children and Young People Team. (2019). [Experiences of Education for Children in Care: Part 2: Review of New Zealand Government Data](#). Oranga Tamariki—Ministry for Children; Oranga Tamariki Voices of Children and Young People Team. (2019). [Experiences of Education for Children in Care. Part 3: Literature scan](#). Oranga Tamariki—Ministry for Children.

<sup>495</sup> Oranga Tamariki— Ministry for Children. (2022). [Safety of Children in Care Annual Report July 2020 to June 2021](#).

<sup>496</sup> Office of the Children’s Commissioner. (2019). [A Hard Place to be Happy](#); Office of the Children’s Commissioner. (2021). [Oranga Tamariki Residence Visit \(Unannounced OPCAT monitoring\) Office of the Children’s Commissioner OPCAT Monitoring – Unannounced visit Epuni Care and Protection Residence](#)

<sup>497</sup> Cooper, S., Benton, S. & Raibel, C. (2022). [Alternative report in advance of New Zealand’s review at the 93<sup>rd</sup> session of the United Nations Committee on the Rights of the Child](#).

<sup>498</sup> Commission for Children and Young People (2021) [Out of sight: systemic inquiry into children and young people who are absent or missing from residential care](#); Moore, T., McArthur, M., Death, J., Tilbury, C. & Roche, S. (2017). Young people’s views on safety and preventing abuse and harm in residential care: “It’s got to be better than home”. *Children and Youth Services Review*, 81, 212-219.

<sup>499</sup> Oranga Tamariki— Ministry for Children. (2022). [Prioritising housing services for young people moving to independence from care and youth justice settings](#); Oranga Tamariki Evidence Centre. (2018). [Transitions Cohort Needs Assessment](#).

<sup>500</sup> Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 77; Independent Children’s Monitor [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#); VOYCE – Whakarongo Mai. (2022). [Whakamānawatia tōku taiao! He hononga rangatira! Honour my world – my noble connections: Rangatahi experiences of leaving care in Aotearoa New Zealand](#).

<sup>501</sup> Commission for Children and Young People. (2020). [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#); McDowall, J. (2020). [Aboriginal and Torres Strait Islander Care-Leaver Experiences](#). Create Foundation; Martin, R., Cordier, C., Jau, J., Randall, S., Thoresen, S., Ferrante, A., Chavulak, J., Morris, S., Mendes, P., Liddiard, M., Johnson, G., and Chung, D. (2021). [Accommodating transition: improving housing outcomes for young people leaving OHC](#). *AHURI Final Report No. 364*, Australian Housing and Urban Research Institute Limited.

support and services for young people leaving care with research in 2022 reporting that Oranga Tamariki Transition Support Services in 20 only provided 134 supported accommodation places leaving the 5,200 other young people transitioning from care reliant on personal support and universal adult housing services.<sup>502</sup> Similar gaps between need and provision also exist overseas with research in Australia linking lack of suitable housing with criminalisation.<sup>503</sup>

**Involvement in the youth and criminal justice systems.** There is clear evidence that the vast majority of children and young people in the youth justice system have had contact with the care & protection system as either 'crossover kids' (those who have been subject to a report of concern to Oranga Tamariki) and 'dual status' kids (those who are the subject of concurrent proceedings in the Youth and Family Courts).<sup>504</sup> This phenomenon and the practices that result in it are sometimes described as the criminalisation of care and protection.<sup>505</sup> Again, this picture is repeated in other jurisdictions with literature discussing the drivers of the criminalisation of care including both individual factors (experiences of child maltreatment, exposure to violence, and prevalence of trauma, neurodisability, emotional and behavioural difficulties) and systemic factors (increased surveillance and supervision, less support in navigating the system, and systemic failures to meet children and young people's support needs).<sup>506</sup> Research and literature also identifies the additional challenges that children and young people in care experience when they have contact with the criminal justice system.<sup>507</sup>

## Barriers

Children and young people in State care and those with care-experience experience are also more likely to experience a range of barriers to accessing justice. Some of these barriers are common to other children and young people, some are similar but operate in different ways, and others are distinct to this group.

**Attitudinal barriers.** Research and literature in Aotearoa New Zealand and overseas discusses the stigma and prejudicial attitudes experienced by children and young people in care including stereotypes that children in care are 'bad', just like their parents,<sup>508</sup> or as one young person recalled being told by a social worker "future justice".<sup>509</sup> Research overseas also points to the stigmatising effect of using language like 'absconding' instead of running away from care,<sup>510</sup> and how prejudice about children in care can also be compounded by other factors such as gender

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<sup>502</sup> Oranga Tamariki— Ministry for Children, [Prioritising housing services for young people moving to independence from care and youth justice settings](#) at 15.

<sup>503</sup> Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#) at 17.

<sup>504</sup> Fitzgerald, A. (2021) *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People*. (unpublished paper) at 28; Ministry of Justice. (2023). [Youth Justice Indicators Summary Report](#) at 17-18.

<sup>505</sup> For example see Werry, K. (2021) Crossover kids in New Zealand. *New Zealand Law Journal*, 312-315 at 313-314.

<sup>506</sup> Baidawi, S. & Ball, R. (2022). [Multi-system factors impacting youth justice involvement of children in residential out-of-home care](#). *Child & Family Social Work*. 1–12 at 2 & 7.

<sup>507</sup> See Howard League for Penal Reform. (2019). [Representing looked-after children at the police station: a step-by-step guide for lawyers](#). Howard League for Penal Reform, Youth Justice Legal Centre & Just for Kids Law at 2. See also Lightowler, C. (2022). [Improving legal support for children and young people in conflict with the law: A scoping study](#). *Clan Childlaw* at 31.

<sup>508</sup> Royal Commission of Inquiry into Abuse in Care (n.d.) [State Institutional Response Hearing Transcript of Proceedings 25 August 2022](#) at 964.

<sup>509</sup> [Witness Statement of Tupua Urlich dated 10 August 2021](#). Royal Commission of Inquiry into Abuse in Care at 4.

<sup>510</sup> Commission for Children and Young People, [Out of sight: systemic inquiry into children and young people who are absent or missing from residential care](#) at 30.

stereotypes.<sup>511</sup> A key challenge to accessing justice is an attitude that children and young people in care or with care experience are more likely to lie or exaggerate including the failure to believe children in care when they report abuse as well as when care-experienced young people seek the assistance of authorities after victimisation as an adult.<sup>512</sup>

Experiences of prejudicial or negative treatment by system actors then has an impact on how children and young people in care or with care experience go on to view those in authority with many having a ‘trust deficit’ making them reluctant to engage due to their own experiences.<sup>513</sup> The ‘no-narking’ culture in residential care in particular can also operate as a barrier to accessing justice for this cohort.<sup>514</sup> More generally, children and young people may be concerned about what will happen if they make a complaint or challenge a decision.

**Structural / systemic barriers.** A consistent theme in recent research and reviews is the power imbalance between children and young people in care who lack power and Oranga Tamariki staff (social workers and residential care staff) who can “do powerful things like separate children from their parents”.<sup>515</sup> This power imbalance operates as a significant barrier to making complaints or challenging decisions made about children and young people in care.

A lack of knowledge and awareness about their rights also operates as a barrier.<sup>516</sup> A key problem is a lack of clarity in relation to exactly what rights are with this lack of clarity experienced both by children and young people who the Independent Children’s Monitor reported did not always know the difference between rights and rules,<sup>517</sup> and by Oranga Tamariki whose ‘Statement of Rights’ is more akin to an explanation of the social workers’ role than an explanation of children in care’s legal rights and entitlements.<sup>518</sup>

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<sup>511</sup> Harris, M., Goodfellow, P. & Bridge, M. (2021). [Young Women’s Justice Project Falling Through the Gaps: Young women transitioning to the adult justice system](#). Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice at 19.

<sup>512</sup> Egan-Bitran, M. (2012). [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#). Office of the Children’s Commissioner at 24; Howard League for Penal Reform, [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 4; Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice. (2022). [We’ve not given up”: Young women surviving the criminal justice system](#). Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice at 31.

<sup>513</sup> Peek, C. & Kallmier, M. (2021). [LevelUP: An innovative legal project to help young people in Out Of Home Care](#). Mid North Coast Community Legal Centre at 18; Moore, T., & McArthur, M., (2022). [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#). Institute of Child Protection Studies, Australian Catholic University at 85; Howard League for Penal Reform [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 4.

<sup>514</sup> Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 85; Royal Commission of Inquiry into Abuse in Care (n.d.) [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 813-814.

<sup>515</sup> Egan-Bitran, [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#) at 24. See also Office of the Children’s Commissioner [A Hard Place to be Happy](#) at 23; Royal Commission of Inquiry into Abuse in Care (n.d.) [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 986; Oranga Tamariki Evidence Centre. (2018). [Changing Feedback and Complaints: An evaluation report informing the Oranga Tamariki feedback and complaints system](#). Oranga Tamariki—Ministry for Children at 11.

<sup>516</sup> Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 11.

<sup>517</sup> Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 115.

<sup>518</sup> See [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, Schedule 2](#).

**Practical barriers.** Another barrier to accessing justice is a need for support that is not always available. Children and young people in care generally do not have the same access to support systems as other children, and although there are advocacy services available to support children in care, many young people do not all know about it or how to contact them.<sup>519</sup>

Perhaps the most significant barrier to accessing justice is the lack of any clear mechanism to enforce the rights of children and young people in care. Children in care do have a technical ability to apply to vary or discharge orders made about their care. However, there are challenges to exercising this right in practice. It also does not translate into a general ability to challenge decisions made about their day to day care. Oranga Tamariki's complaints system has also been heavily and consistently criticised in a series of reviews and reports repeatedly identifying the same issues and barriers in particular, that the complaints system is adult-centred and inaccessible to children and young people in care.<sup>520</sup> Repeated commitments to improve practice have also failed to result in any meaningful change. Children and young people in care have also lost their ability to make complaints to the Office of the Children's Commissioner despite opposition from across the children's sector.<sup>521</sup>

See *Working paper no. 1 - Children and young people in care or with care experience*.

## Disabled and neurodiverse children and young people

### Justice problems

**Education system issues.** There is clear evidence that disabled children and young people experience a range of justice issues in the education system starting from entry into education with difficulty enrolling, and then once they are in school, they are more likely to experience bullying and discrimination, and disciplinary issues.<sup>522</sup>

**Victimisation.** There is a lack of comprehensive data collection in relation to abuse of disabled children and young people in Aotearoa New Zealand.<sup>523</sup> However, the data we do have and overseas research suggests that disabled children and young people are more significantly

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<sup>519</sup> Robin, 20-years-old, Youth Hui speech, Auckland, July 2013 quoted in Ashton, The Rights of Children and Young People in State Care at 1083; Independent Children's Monitor [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 75, n71. Interestingly, the publicly available version of the Oranga Tamariki, *Te Matatiki Report* does not report on responses to these questions about Voyce Whakarongo Mai see: Oranga Tamariki Voices of Children and Young People Team (2021) [Te Mātātiki 2021: Findings from the 2019/2020 survey of tamariki and rangatahi in care](#). Oranga Tamariki—Ministry for Children at 21.

<sup>520</sup> See the Case Study: Oranga Tamariki complaints process - ten years of reviews in *Working paper no. 1 - Children and young people in care or with care experience*.

<sup>521</sup> See Children's Rights Alliance Aotearoa New Zealand. (2022). [Joint Children's Sector Submission to the Social Services and Community Select Committee: Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill](#) at 2. Many of the organisations supporting the joint submission also made their own submissions for example see: Save the Children New Zealand (SCNZ). (2022). [Save the Children Submission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill](#).

<sup>522</sup> Kearney, A. (2016). [The right to education: What is happening for disabled students in New Zealand?](#) *Disability Studies Quarterly*, 36(1); Te Ihu Waka Education Evaluation Centre. (2022). [A Great Start? Education for Disabled Children in Early Childhood Education](#). Education Review Office at 3 & 8-10; Te Ihu Waka Education Evaluation Centre. (2022). [Thriving at School? Education for Disabled Learners in Schools](#). Education Review Office at 2 & 8-10; Mhuru, M. (2020). [He Whakaaro: The educational experiences of disabled learners](#). Ministry of Education at 7; Walsh, [Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand](#) at 32-33.

<sup>523</sup> New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2021). [Whakamahia te tūkinokore ināianei, ā muri ake nei: Acting now for a violence and abuse free future](#) at 33.

more likely to experience victimisation.<sup>524</sup> Research and literature identifies a range of factors that increase disabled people's risk of victimisation including myths about disabled people as asexual, innocent and dependent; exclusion from sexuality and healthy relationship education; learnt compliance with authority/carers; being accustomed to intimate handling which mask abusive behaviour; inappropriate responses to challenging behaviour; and social and physical isolation.<sup>525</sup>

**Involvement in the care and protection system.** The lack of comprehensive data collection in relation to the abuse of disabled children and young people in Aotearoa New Zealand also translates into a lack of data in relation to disabled and neuro-diverse children in care.<sup>526</sup> However, again the data we do have and overseas research suggests that disabled and neurodiverse children and young people are over-represented in care.<sup>527</sup> The available data and evidence also paints a concerning picture in relation to shortcomings in care of disabled and neurodiverse children and young people.<sup>528</sup>

**Involvement in the criminal justice system.** Once again, there is a lack of data in relation to the prevalence of neurodiversity and disability in the cohort of children and young people involved in the youth and criminal justice system.<sup>529</sup> However, overseas prevalence studies show that children and young people with a range of neurodevelopmental disorders are overrepresented including those with learning disabilities, dyslexia, communication disorders, attention deficit hyperactive disorder, autistic spectrum disorder, traumatic brain injury, epilepsy and fetal alcohol spectrum disorder.<sup>530</sup> Research and literature also shows the negative impact that contact with the justice system has on disabled and neurodiverse children and young

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<sup>524</sup> Ministry of Justice, [Survey findings - Cycle 4 report Descriptive statistics. June 2022. Results drawn from Cycle 4 \(2020/21\) of the New Zealand Crime and Victims Survey](#) at 92; Briggs, F. (2006). [Safety issues in the lives of children with learning disabilities](#). *Social Policy Journal of New Zealand*, 29, 43–59 at 43-53.

<sup>525</sup> Simpson, K. L., Yeung, P., & Munford, R. (2022). [Responses to abuse, neglect, and trauma of children with intellectual disability: Experiences of social workers and health practitioners in Aotearoa New Zealand](#). *Aotearoa New Zealand Social Work*, 34(1), 72–87 at 73, 78-19; New Zealand Human Rights Commission, [Whakamahia te tūkino kore ināianeī, ā muri ake nei: Acting now for a violence and abuse free future](#) at 35.

<sup>526</sup> New Zealand Human Rights Commission, [Whakamahia te tūkino kore ināianeī, ā muri ake nei: Acting now for a violence and abuse free future](#) at 33-34; Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 105.

<sup>527</sup> Independent Children's Monitor. (2023). [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 12; Fleming, T., Archer, D., Sutcliffe, K., Dewhirst, M., & Clark, T.C. (2021). [Young people who have been involved with Oranga Tamariki: Mental and physical health and healthcare access](#). The Youth19 Research Group, The University of Auckland and Victoria University of Wellington, New Zealand at 15.

<sup>528</sup> Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 21 & 104-105; Office of the Children's Commissioner, [Oranga Tamariki Residence Visit \(Unannounced OPCAT monitoring\) Office of the Children's Commissioner OPCAT Monitoring – Unannounced visit Epunu Care and Protection Residence](#) at 9.

<sup>529</sup> Lynch, N. (2016). [Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice](#) (report summarising the contributions of participants at the 2016 Neurodisabilities Forum, hosted by DFNZ in Wellington, 12 May 2016) at 7; Fitzgerald, *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People* at 21-22.

<sup>530</sup> Hughes, N., Williams, H., Chitsabesan, P., Davies, R. & Mounce, L. (2012). [Nobody made the connection: The prevalence of neurodisability in young people who offend](#). The Office of the Children's Commissioner at 23; Boiteux, S. & Poynton, S. (2023). [Offending by young people with disability: A NSW linkage study \(Crime and Justice Bulletin No. 254\)](#). NSW Bureau of Crime Statistics and Research at 5.



people who are already more likely to experience poor outcomes in terms of education, career prospects and likelihood of reoffending.<sup>531</sup>

**Poverty.** Data shows that disabled children and children in disabled households are significantly more likely to be living in poverty as determined by a range of measures.<sup>532</sup>

**Other justice problems.** Legal needs research in Aotearoa New Zealand and overseas has found that disabled people both experience distinct justice issues e.g. issues relating to disability entitlements, medical treatment, State and schools' obligations in relation to schooling, special education funding and transition services, and the use of segregation and restraint in care as well as more frequent and more serious legal issues also experienced by other groups such as money and debt problems, housing, employment, and family court issues.<sup>533</sup>

## Barriers to access

The research and literature describes the varying and often multiple barriers to accessing justice experienced by disabled and neurodiverse children and young people. As with the other groups of children and young people I have considered, these attitudes are grouped into attitudinal barriers, systemic or structural barriers, and practical barriers. I have also discussed some of the differing barriers experienced by people with different forms of impairment.

**Attitudinal barriers.** Attitudinal barriers can but both ways with disabled and neurodiverse children and young people facing a range of barriers including not being believed, not being seen as a credible witness, a lack of support-people within the system, difficulty engaging with police due to police attitudes, and overt demonstrations of prejudice.<sup>534</sup> As with other groups, the negative and prejudicial attitudes of system actors and/or prior negative experiences in the system or with authority can also result in disabled people not trusting the system or being reluctant to engage with it.<sup>535</sup> Prior negative experiences also has an impact on the families of disabled children and young people who can be left with an attitude of distrust.<sup>536</sup>

**Structural and systemic barriers.** The system simply is not designed for disabled and neurodiverse people and it's even less appropriate for disabled and neurodiverse children and

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<sup>531</sup> Centre for Justice Innovation. (2022). [The right support at the right time: Where the justice system fits in](#) at 1; Revolving Doors. (2022). [Exploring the links between neurodiversity and the revolving door of crisis and crime: Policy briefing](#) at 3; Day, A. (2022). [Disabling and criminalising systems? Understanding the experiences and challenges facing incarcerated, neurodivergent children in the education and youth justice systems in England](#). *Forensic Science International: Mind and Law*. 3,100102 at 4.

<sup>532</sup> Murray, S. (2019). [The state of wellbeing and equality for disabled people, their families, and whānau](#). CCS Disability Action at 24; Perry, B. (2022). [Child Poverty in New Zealand](#). Ministry of Social Development at 45.

<sup>533</sup> Maxwell, G., Shepherd, P., Smith, C., & Morris, A. (1999). *Meeting legal needs*. Legal Services Board; Diesfeld, K., Patston, P., McLean, M., Miller-Burgering, W., Vickery, R. & Phelan, T. (2006). *Literature Review: Unmet Legal Needs of People with Disabilities in the Auckland Region Report No. 1*. Legal Services Agency; Law Council of Australia. (2018). [The Justice Project: Final Report Part 1 People with Disability](#) at 14-15.

<sup>534</sup> Diesfeld et al., *Literature Review: Unmet Legal Needs of People with Disabilities in the Auckland Region Report No. 1*. at 10; New Zealand Human Rights Commission, [Whakamahia te tūkinu kore ināianeī, ā muri ake nei: Acting now for a violence and abuse free future](#) at 42; Senate Community Affairs Committee Secretariat. (2015). [Community Affairs References Committee: Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability](#). Commonwealth of Australia at 174.

<sup>535</sup> Diesfeld et al., *Literature Review: Unmet Legal Needs of People with Disabilities in the Auckland Region Report No. 1*. at 12.

<sup>536</sup> Starr, K. & Janah, N. (2016). [Challenging the barriers: Ensuring access to education or children with special educational needs](#). YouthLaw Aotearoa at 37.

young people. This includes things like the amount of time allowed to consult with a lawyer being under the legal aid system failing to reflect the time required to work effectively with disabled clients,<sup>537</sup> and the lack of trained services and professionals who can respond appropriately to disabled people who have experienced domestic or family violence.<sup>538</sup> Disabled and neurodiverse children and young people are often even more disadvantaged as they can be disregarded when children and young people and their rights are considered, and disregarded when the rights of disabled people are considered.<sup>539</sup>

**Practical barriers.** A primary barrier is lack of a diagnosis whether this is because the impairment is not easy to identify, no one considers that there may be a need for diagnosis, or a lack of diagnostic services.<sup>540</sup> Data gaps are another primary barrier with significant data gaps about disabled children and young people in the Oranga Tamariki system and a Ministry of Education failure to collect data in relation to the disability status of children and young people who are subject to stand-downs, suspensions, exclusion and expulsion.<sup>541</sup>

Lack of knowledge and understanding is another significant barrier.<sup>542</sup> This includes services and professionals' lack of knowledge about disability related needs, as well disabled children and young people and those supporting them not knowing what their rights are and/or not understanding what is happening in legal processes.<sup>543</sup>

Another set of related barriers is disabled children and young people's dependence on adults and need for support. This dependence can leave disabled children and young people vulnerable to abuse from those that they rely on for care and support.<sup>544</sup> Disabled children and young people can also require support to engage in with professionals and justice system

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<sup>537</sup> Mirfin-Veitch, B. Diesfeld, K. Gates, S. Henaghan, M. (2014). [Developing a more responsive legal system for people with intellectual disability in New Zealand](#). Donald Beasley Institute at 36.

<sup>538</sup> New Zealand Human Rights Commission, [Whakamahia te tūkinokore ināianeī, ā muri ake nei: Acting now for a violence and abuse free future](#) at 35.

<sup>539</sup> Lansdown, G. (2014). Children with disabilities. In M. Sabatello & M. Schulze, (Eds.) *Human Rights and Disability Advocacy*. (pp. 97-112) University of Pennsylvania Press at 97.

<sup>540</sup> Lambie, I. (2020). [What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand](#). Office of the Prime Minister's Chief Science Advisor at 11.

<sup>541</sup> New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2022). *New Zealand's 6th Periodic Review under the UN Convention on the Rights of the Child: Submission of the New Zealand Human Rights Commission to the Committee on the Rights of the Child* at 12-13; Office of the Ombudsman, Disabled People's Coalition & Human Rights Commission (2020) [Making Disability Rights Real Whakatūturu Ngā Tika Hauātanga: Third report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities](#) at 66. See also Bourke, R., Butler, P. & O'Neill, J. (2021). [Children With Additional Needs](#). Massey University at 14-22.

<sup>542</sup> Diesfeld et al., *Literature Review: Unmet Legal Needs of People with Disabilities in the Auckland Region Report No. 1.*; Revolving Doors, [Exploring the links between neurodiversity and the revolving door of crisis and crime: Policy briefing](#); Her Majesty's Inspectorate of Prisons. (2021). [Neurodiversity in the criminal justice system: A review of evidence](#). Criminal Justice Joint Inspection at 8.

<sup>543</sup> Simpson et al., [Responses to abuse, neglect, and trauma of children with intellectual disability: Experiences of social workers and health practitioners in Aotearoa New Zealand](#) at 78; Diesfeld et al., *Literature Review: Unmet Legal Needs of People with Disabilities in the Auckland Region Report No. 1* at 5, 10-12; Gibbs, A. (2022). [Best practices for justice: Practitioner views on understanding and helping youth living with fetal alcohol spectrum disorder \(FASD\)](#). *Aotearoa New Zealand Social Work*, 34(4), 6–18 at 15; Landsell, G., Sunders, B. & Eriksson. (2022). [Young people with acquired brain injury: Preventing entrenchment in the criminal justice system](#). In Australian Institute of Criminology *Trends & issues in crime and criminal justice* at 8.

<sup>544</sup> New Zealand Human Rights Commission, [Whakamahia te tūkinokore ināianeī, ā muri ake nei: Acting now for a violence and abuse free future](#) at 36.

processes. The other side to this is a lack of tailored, specialist services with expertise in relation to the specific needs of disabled children and young people.<sup>545</sup>

A final practical barrier to accessing justice is the lack of an effective complaints process or avenue to address issues in the education system. As discussed above,<sup>546</sup> there is no real ability to challenge decisions made by schools.<sup>547</sup>

Disabled and neurodiverse children and young people can also experience additional or differing barriers relating to the nature of their impairment/s.<sup>548</sup>

See *Working paper no.2 - Disabled and neurodiverse children and young people*.

## Tamariki and rangatahi Māori

### Justice problems

**Education system.** Schools stand-down, suspend and exclude tamariki and rangatahi Māori at a greater rate than any other ethnic group.<sup>549</sup> However, it is important to recognise that disciplinary statistics reflect school's response to behaviour not the behaviour itself.<sup>550</sup> This means that in addition to legal issues in relation to disciplinary action, these statistics may also represent wider justice issues such as systemic bias or discrimination. Tamariki and rangatahi Māori are also overrepresented in those referred to special educational services,<sup>551</sup> and more likely to report experiencing bullying and discrimination in school.<sup>552</sup>

**Victimisation.** The New Zealand Crime and Victims survey shows that Māori are victimised at a disproportionate rate.<sup>553</sup> The Ministry of Justice argue that this over-representation appears to reflect the higher proportions of young Māori and higher proportions of Māori in high deprivation areas.<sup>554</sup> However, data also shows that Māori are more likely to experience victimisation in areas with relatively small Māori communities which suggests other causes.<sup>555</sup>

**Involvement in the care & protection system.** Tamariki and rangatahi Māori are more likely to come to the attention of care & protection services and then more likely to move through each

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<sup>545</sup> New Zealand Human Rights Commission, [Whakamahia te tūkino kore ināianei, ā muri ake nei: Acting now for a violence and abuse free future](#) at 37; Diesfeld et al., *Literature Review: Unmet Legal Needs of People with Disabilities in the Auckland Region Report No. 1* at 11; Mirfin-Veitch et al., [Developing a more responsive legal system for people with intellectual disability in New Zealand](#) at 48-49.

<sup>546</sup> See **Lack of effective and accessible avenues to seek justice**.

<sup>547</sup> Te Ihu Waka Education Evaluation Centre, [Thriving at School? Education for Disabled Learners in Schools](#) at 92 & 104; McMenamin, R. (2017). [Reasonable Accommodation: Equal Education for Learners with Disabilities](#). *Public Interest Law Journal of New Zealand*. 4, 5-28 at 23-24.

<sup>548</sup> Bruce, E. (2020). *Understanding and Being Heard: Exploring the Right to Participate in the New Zealand Youth Court*. [Masters Thesis, Victoria University of Wellington Te Herenga Waka] at 118 & Lambie, [What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand](#) at 11 for a discussion of some potential impacts of various impairments.

<sup>549</sup> Ministry of Education. (2022). [Stand-downs, suspensions exclusions and expulsions from school](#) at 4.

<sup>550</sup> Bourke et al., [Children With Additional Needs](#) at 4, 34.

<sup>551</sup> Ibid at 13.

<sup>552</sup> Morton et al., [Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now We Are Eight](#) at 126; Webber, A. & McGregor, A. (2019). [He Whakaaro: What do we know about discrimination in schools?](#) Ministry of Education at 1.

<sup>553</sup> Ministry of Justice. (2021). [Māori victimisation in Aotearoa New Zealand Cycle 1 and 2 \(March 2018 – September 2019\)](#) at 2. See also Fanslow et al., *Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study* at 6-7.

<sup>554</sup> Ibid at 24.

<sup>555</sup> Ibid at 50.

stage of the system as compared with children and young people of other ethnicities.<sup>556</sup> Although there is some debate about the causes of this overrepresentation,<sup>557</sup> Keddell and Cleaver's thesis that disparities in child protection system contact are caused by a combination of heightened needs and biases in the systems that respond to them with both need and bias being related to "patterns of racism, colonisation, and class inequity through history" is particularly persuasive.<sup>558</sup> Arguably this thesis would apply equally well to other areas of overrepresentation including in disciplinary statistics, victimisation, and criminal justice system involvement.

**Involvement in criminal justice system.** Tamariki and rangatahi Māori also continue to be overrepresented in the justice system,<sup>559</sup> with an amplifier effect operating at each stage of the criminal justice process which increases the likelihood that Māori will progress further into the criminal justice system and be dealt with more severely.<sup>560</sup> Research and literature in relation to other settler colonial countries such as Australia and Canada show similar patterns of overrepresentation.<sup>561</sup>

**Other legal needs.** General legal needs research gives a partial picture in relation to Māori experience of other legal needs including findings that Māori are more likely to have experienced impactful legal problems and more likely to have experienced multiple legal problems.<sup>562</sup> This pattern is also reflected in other settler colonial countries such as Australia and Canada where there has been more in-depth research. For example, LAW Survey found that indigenous Australians face elevated legal need in areas of crime, government, health and rights as well as increased prevalence of multiple legal problems.<sup>563</sup> The Indigenous Legal Needs Project also identified a high degree of complexity within Indigenous legal need including the inter-connection between legal problems and non-legal issues associated with disadvantage which can make it harder to resolve legal issues once they occur.<sup>564</sup>

## Barriers to access

**Attitudinal barriers.** The primary attitudinal barrier is racism. Racism can be a legal or justice problem in its own right (e.g. racial discrimination in health or employment), increase the likelihood of experiencing legal issues (e.g. racially mediated perceptions of risk and

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<sup>556</sup> Oranga Tamariki—Ministry for Children. (2020). [Factors Associated with Disparities Experienced by Tamariki Māori in the Care and Protection System](#) at 7.

<sup>557</sup> For example Ibid at 6; Cook, L.W. (2020). [A Statistical Window for the Justice System: Putting a Spotlight on the Scale of State Custody across Generations of Māori](#). Victoria University of Wellington, Institute for Governance and Policy Studies at 15.

<sup>558</sup> [Joint brief of evidence of Emily Keddell and Kerri Cleaver](#) (Wai 2915, #A90) at [14]-[16].

<sup>559</sup> Ministry of Justice. (2023). [Youth Justice Indicators Summary Report](#) at 5-6.

<sup>560</sup> Toki, V. (2018). *Indigenous Courts, Self-Determination and Criminal Justice* (1st ed.). Routledge at 19.

<sup>561</sup> Commission for Children and Young People. (2021). [Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system](#) at 21; Truth and Reconciliation Commission of Canada. (2015). [Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada](#) at 177-178.

<sup>562</sup> Ignite Research, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* at 33 & 36.

<sup>563</sup> Coumarelos et al., [Legal Australia-Wide Survey: legal need in Australia](#) at 178.

<sup>564</sup> Allison, F., Cunneen, C. & Schwartz, M. (2017). [The Civil and Family Law Needs of Indigenous People Forty Years after Sackville: The Findings of the Indigenous Legal Needs Project](#)" in A. Durbach, B. Edgeworth & V. Sentas. (Eds.), *Law and Poverty: 40 years after the Commission of Inquiry into Poverty*, Federation Press (pp.231-248) at 244-245. See also Savage, L. & McDonald, L. (2022). [Experiences of serious problems or disputes in the Canadian provinces, 2021](#). Statistics Canada at 7.

culpability),<sup>565</sup> as well as a barrier to accessing justice in relation to other justice problems (e.g. prejudicial attitudes by lawyers or other justice system actors).<sup>566</sup>

Experiences of racism and other negative experiences of contact with the justice system or those in authority can lead to a lack of trust in the system and system actors.<sup>567</sup> A series of surveys have found that Māori have significantly lower levels of high trust and confidence in the Police and were significantly less likely than the NZ average to agree that Police are professional when conducting their duties.<sup>568</sup> Research in other settler colonial countries has also found that indigenous peoples are less likely to trust the police due to a combination of historical experiences, e.g. colonisation and assimilation practices, as well as contemporary experiences such as over-policing and deaths in custody.<sup>569</sup>

**Structural / systemic barriers.** Racism can also operate at a systemic level in the form of institutional racism. The monocultural legal and policy settings operate as a barrier to accessing justice in a range of ways including legal definitions that are based on Western, individualistic ways of seeing the world and legal systems and processes that have largely been transplanted from England and conflict with te ao Māori.<sup>570</sup> Although there are some tools and methods that are said to be culturally appropriate, such as the family group conference,<sup>571</sup> many express concerns that they are just a co-option of Māori culture,<sup>572</sup> with Māori participants in one research study reporting that the FGC process is culturally inappropriate and disempowering<sup>573</sup>

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<sup>565</sup> Waitangi Tribunal. (2021). [He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry](#). Legislation Direct at 104; Stanley, E. & Mihaere, R. (2019). The problems and promise of international rights in the challenge to Māori imprisonment. *International Journal for Crime, Justice and Social Democracy*, 8(1), 1-17 at 121-122.

<sup>566</sup> Monteith, K., Quinn, E., Dennis, A., Joseph-Salisbury, R., Kane, E., Addo F. & McGourlay, C. (2022). [Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy \(2020-2025\)](#). University of Manchester at 6.

<sup>567</sup> See Office of the Children's Commissioner. (2021). [What Makes a Good Life for Tamariki and Rangatahi Māori?](#) at 3; Latimer, C.L., Le Grice, J., Hamley, L., Greaves, L., Gillon, A., Groot, S., Manchi, M., Renfrew, L. & Clark, T.C. (2021). ['Why would you give your children to something you don't trust?': Rangatahi health and social services and the pursuit of tino rangatiratanga](#), *Kōtuitui: New Zealand Journal of Social Sciences Online*. 17(3), 298-312 at 303.

<sup>568</sup> Daniels-Shpall, A. (2019). [Strategies for \(re\)building community trust: A review of practices in the New Zealand Police](#). Fullbright New Zealand at 5-6; Gravititas Research and Strategy Ltd Research. (2020). [Citizens' Satisfaction Survey – Full Report for 2019/20 Fiscal Year Research Report](#). New Zealand Police at 12; Evidence Based Policing Centre, [New Zealand Crime and Victims Survey: Police Module Results](#) at 11-12.

<sup>569</sup> Curran & Taylor-Barnett, [Overcoming the Invisible Hurdles to Justice for Young People](#) at 100; Cesaroni, C., Grol, C., & Fredericks, K. (2019). [Overrepresentation of Indigenous youth in Canada's Criminal Justice System: Perspectives of Indigenous young people](#). *Australian & New Zealand Journal of Criminology*, 52(1), 111–128 at 115.

<sup>570</sup> Waitangi Tribunal, [Hepā Harakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry](#) at 108; Smith, C., Tinirau, R., Rattray-Te Mana, H. Tawaroa, M., Moewaka Barnes, H., Cormack, D. & Fitzgerald, E. (2021). [Whaka Tika: A Survey of Maori experiences of racism](#). Te Atawhai o Te Ao Charitable Trust at 11.

<sup>571</sup> Consedine, J. (1995). *Restorative justice: Healing the effects of crime*. Ploughshare Publishing; Olsen, T., Maxwell, G., & Morris, A. (1995). Māori and youth justice in New Zealand. In K. Hazlehurst (Ed.), *Popular justice and community regeneration: Pathways to indigenous reform* (pp. 45–66). Praeger.

<sup>572</sup> Tauri, J. (1998). Family group conferences: A case study of the indigenisation of New Zealand's justice system. *Current Issues in Criminal Justice*, 10(2), 168–182; Love, C. (2000). Family group conferencing: Cultural origins, sharing and appropriation—A Māori reflection. In G. Burford & J. Hudson (Eds.), *Family group conferencing: New directions in child and family practice* (pp. 15–30). Walter de Gruyter Inc.; Tauri, J. (2014). [An indigenous, critical commentary on the globalisation of restorative justice](#). *British Journal of Community Justice*, 12(2), 35–55.

<sup>573</sup> Moyle, P. & Tauri, J.M. (2016). [Māori, Family Group Conferencing and the Mystifications of Restorative Justice](#). *Victims & Offenders*, 11(1), 87-106 at 96.

and the Waitangi Tribunal making specific findings that deficiencies in the FGC process meant that whānau, hapū, and iwi were not able to meaningfully participate.<sup>574</sup>

Professionals' lack of cultural competence can also operate as a barrier to accessing justice. For example, a key finding in research relating to Māori whānau experiences of family group conferences was that mainstream non-Māori social workers generally did not know how to engage with them and given the nature of the FGC process, a failure to engage effectively can have a significant impact on its outcome.<sup>575</sup> In a recent report, the Independent Children's Monitor also described how a lack of cultural competence can affect the outcome of investigation of reports of concern.<sup>576</sup> Cross cultural communication challenges can also lead to misinterpretations in both investigations and court processes.<sup>577</sup>

**Practical barriers.** A key practical barrier is the lack of data in some key areas including the Oranga Tamariki system with both the Waitangi Tribunal and the Independent Children's Monitor raising concerns about the quality and availability of Oranga Tamariki data.<sup>578</sup>

See *Working paper no.3 - Tamariki and rangatahi Māori*.

## Pacific children and young people

Although there is less research and literature in relation to Pacific children and young people in Aotearoa New Zealand, the material available shows some differences in the experience of justice needs and barriers to access as set out below.

### Justice problems

**Education system.** The stand-down, suspension, exclusion, and expulsion rates for Pacific students were generally lower than Māori students but higher than European/Pākehā students.<sup>579</sup>

**Criminal justice system involvement.** Overall offending rates for Pacific children and young people are much lower than tamariki and rangatahi Māori, but higher than European/Pākehā children and young people.<sup>580</sup> Research also suggests that Pacific youth are involved in higher levels of violent offending than other ethnic groups and that Pacific youth are generally older when they committed their first offence, were more likely to be living in deprived areas, more likely to reoffend, and more likely to commit a violent offence as a first time offence<sup>581</sup>

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<sup>574</sup> Waitangi Tribunal, [Hepā Harakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry](#) at 105.

<sup>575</sup> Moyle & Tauri, [Māori, Family Group Conferencing and the Mystifications of Restorative Justice](#) at 95; Tauri, J. (2022) What exactly are you restoring us to? A critical examination of Indigenous experiences of state-centred restorative justice. *The Howard Journal of Crime and Justice*. 61(1), 53-67 at 58.

<sup>576</sup> Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 42.

<sup>577</sup> Eades, D. (2012). [Communication with Aboriginal Speakers of English in the Legal Process](#). *Australian Journal of Linguistics*, 32(4), 473-489 at 478.

<sup>578</sup> Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 9-10; Waitangi Tribunal, [He Pāharakeke, Herito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry](#) at 158.

<sup>579</sup> Ministry of Education, [Stand-downs, suspensions exclusions and expulsions from school](#) at 4.

<sup>580</sup> Ministry of Justice, [Youth Justice Indicators Summary Report](#) at 8-16.

<sup>581</sup> Ioane, J., Lambie, I. & Percival, T. (2016). A Comparison of Pacific, Māori, and European Violent Youth Offenders in New Zealand. *International Journal of Offender Therapy and Comparative Criminology*, 60(6), 657-674 at 665.

## Barriers to access

**Attitudinal barriers.** As for tamariki and rangatahi Māori, the primary attitudinal barrier for Pacific children and young people is racism. This includes impact of both past and present experiences with disproportionate focus on Pacific people during the Dawn Raids having contemporary parallels in the over-policing in South Auckland.<sup>582</sup>

The experience of racism also creates additional barriers including a lack of trust and confidence in mainstream systems and processes. For example, Tunufa'i notes that experiences of racism and discriminatory police practices leads to more antagonistic relationships where Samoan youth find trusting the police to be very challenging.<sup>583</sup>

**Systemic barriers.** The main systemic or structural barriers are the lack of understanding of cultural differences, inconsistencies between justice system processes and cultural norms,<sup>584</sup> and lack of culturally responsive services. The lack of understanding of cultural differences can include the failure to recognise the diversity within Pacific cultures,<sup>585</sup> and not recognising that many Pacific children and young people in Aotearoa today are second, third, fourth, and even fifth-generation meaning that their cultural identity draws from both their Pacific heritage and upbringing in New Zealand.<sup>586</sup>

Academics have also identified a lack of data including a lack of disaggregated quantitative and qualitative data relating to each Pacific group,<sup>587</sup> the lack of a gender breakdown of violent offending by Pacific youth,<sup>588</sup> and limited information about Pacific peoples experiences in the criminal justice system generally, and in the family group conference process in particular.<sup>589</sup> These data gaps may it more difficult to get an accurate and nuanced picture of the involvement of Pacific youth in the criminal justice system which in turn makes it more difficult to identify any issues, develop solutions to address those issues, and measure positive (or negative) change.

See *Working paper no.4 - Pacific children and young people*.

## Rainbow and takatāpui children and young people

### Justice problems

**Care and protection system involvement.** Existing data suggests that rainbow and takatāpui children and young people are more likely to be involved with Oranga Tamariki and more likely

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<sup>582</sup> See Tunufa'i, Samoan Youth Crime at 183-184.

<sup>583</sup> Ibid at 183.

<sup>584</sup> For example see Kaho, H. (2016). The family group conference: Tongan perspective. *New Zealand Law Review*, 2016(4), 687-722 & Sua'ali'i-Sauni, T. (2006). [\*Le Matuamoepo: Competing 'spirits of Governing' and the Management of New Zealand-based Samoan Youth Offender Cases\*](#). [Doctoral Thesis, University of Auckland] at 167.

<sup>585</sup> Kaho, The family group conference: Tongan perspective at 717; Tuiburelevu, L. (2018). [\*Legally Brown: The Experiences of Pasifika Women in the Criminal Justice System\*](#), *New Zealand Women's Law Journal*, 2, 78–106 at 96.

<sup>586</sup> Tunufa'i, Samoan Youth Crime at 179.

<sup>587</sup> Kaho, The family group conference: Tongan perspective at 701-702; Kaho, H. (2017). 'Oku hange 'a e tangata, ha fala oku lālanga' - Pacific people and non-violence programmes under the Domestic Violence (Amendment) Act 2013. *New Zealand Women's Law Journal*, 1, 182-191 at 186-187; Tuiburelevu, [\*Legally Brown: The Experiences of Pasifika Women in the Criminal Justice System\*](#) at 86.

<sup>588</sup> Tuiburelevu, [\*Legally Brown: The Experiences of Pasifika Women in the Criminal Justice System\*](#) at 83-84.

<sup>589</sup> Kaho, The family group conference: Tongan perspective at 701-702; Suaalii-Sauni, T., Tauri, J. & Webb, R. (2018). Exploring Maori and Samoan youth justice: Aims of an international research study. *Journal of Applied Youth Studies*, 2(5), 29-40 at 31-32.

to be in State care.<sup>590</sup> Youth19 data also shows that rates of involvement also differs across other demographic characteristics with takatāpui Māori twice as likely to be involved as rainbow young people from other ethnic groups, rates of involvement were also about four times higher for those in alternative education or not in education or training, and gender diverse young people also reported higher rates of involvement than same or multiple sex attracted students.<sup>591</sup>

**Education system.** Rainbow and takatāpui children and young people experience a range of justice issues in the education system including issues common to other children and young people but more likely to be experienced by those who are rainbow and takatāpui such as bullying and being subject to disciplinary action by the school.<sup>592</sup> Rainbow and takatāpui children and young people also experience additional issues relating to their identity such as gender affirming bathroom access, uniform requirements, changing names, sports and physical education including getting changed and participation based on affirmed gender, freedom of speech, rules relating to who they can take to the school ball, and displays of affection.<sup>593</sup>

**Homelessness.** Although there are some data limitations,<sup>594</sup> the data that is available suggests that rainbow young people are more likely to experience homelessness and/or housing deprivation.<sup>595</sup> Research in New Zealand and overseas also identifies associations between homelessness and family conflict, experience of formal or informal state care, involuntary mobility, and housing-related discrimination.<sup>596</sup> Overseas studies also identify connections between homelessness and increased risks of victimisation and involvement in the criminal justice system.<sup>597</sup>

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<sup>590</sup> King-Finau, T., Archer, D., Fenaughty, J., Sutcliffe, K., Clark, T., & Fleming, T. (2022). [The health and wellbeing of takatāpui and rainbow young people who have been involved with Oranga Tamariki](#). The Youth19 Research Group, The University of Auckland and Victoria University of Wellington, New Zealand; Malatest International. (2021). [Just Sayin' survey: Understanding the transition needs of rainbow young people](#). Oranga Tamariki at 4-6.

<sup>591</sup> King-Finau et al., [The health and wellbeing of takatāpui and rainbow young people who have been involved with Oranga Tamariki](#) at 7, 21 & 27.

<sup>592</sup> Fenaughty, J., Sutcliffe, K., Fleming, T., Ker, A., Lucassen, M., Greaves, L., and Clark, T. (2021). [A Youth19 Brief: Transgender and diverse gender students](#). The Youth19 Research Group, Victoria University of Wellington and The University of Auckland, New Zealand at 3; Veale, J., Byrne, J., Tan, K., Guy, S., Yee, A., Nopera, T. & Bentham, R. (2019). [Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand](#). Transgender Health Research Lab, University of Waikato at 61; Arredondo, M. & Suarez, M. (2019). Ecological determinants of child welfare and juvenile justice involvement. In Conron, K. J. & Wilson, B. D. M. (Eds.) [LGBTQ Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems: A Research Agenda](#). The Williams Institute at 21; Himmelstein, K.E.W. & Brückner, H. (2011). [Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study](#). *Pediatrics*. 127(1), 49-57 at 54.

<sup>593</sup> InsideOUT Kōaro. (2021). [Legal Rights at School: A resource for rainbow young people in Aotearoa](#); RainbowYOUTH and YouthLaw (n.d.) [School](#). <https://rainbowrights.nz/school>

<sup>594</sup> Paul, J. & Ratana, M. (2022). [Youth Homelessness in Tāmaki Makaurau, Aotearoa New Zealand](#). Ngā Wai a te Tui Māori and Indigenous Research Centre at 23.

<sup>595</sup> Clark, T.C., Drayton, B., Ball, J., Schwenke, A., Crengle, S., Peiris-John, R., Sutcliffe, K., Fenaughty, J., Groot, S., & Fleming, T. (2021). [Youth19 Housing Deprivation Brief](#). University of Auckland & Victoria University of Wellington, New Zealand at 5; Veale et al., [Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand](#).

<sup>596</sup> Fraser, B., Chisholm, E. & Piers, N. (2021). "You're so powerless": Takatāpui/LGBTIQ+ people's experiences before becoming homeless in Aotearoa New Zealand. *PLoS ONE*, 16(12), e0259799.

<sup>597</sup> McCandless, S. (2018). LGBT Homeless Youth and Policing. *Public Integrity*. 20, 558–570 at 560. See also Global Initiative on Justice with Children & Child Friendly Justice European Network. (2022). [Towards LGBTI+ sensitive justice systems for children in Europe: Challenge Paper](#) at 18 for an international discussion of these issues.



**Discrimination.** Research in New Zealand and overseas discusses the experience of gender and sexuality based discrimination in a range of contexts as well as the intersectional nature of discrimination.<sup>598</sup>

**Criminal justice system involvement.** Although the criminal justice system in Aotearoa New Zealand does not systematically collect data in relation to sexual orientation or gender identity other than in relation to the gender binary,<sup>599</sup> a number of studies have described rainbow and takatāpui young people's experiences of discrimination and other negative experiences in the criminal justice system.<sup>600</sup> Research overseas has also found that young people who identify as lesbian, gay, bisexual, trans-gender, or gender non-conforming are significantly over-represented in the criminal justice system with their paths into the criminal justice system often being connected to their sexual orientation or gender identity such as experiencing homelessness due to family rejection or abuse centred on their gender and/or sexuality, then being arrested for committing survival crimes such as stealing or trespassing.<sup>601</sup>

**Victimisation.** A series of studies in New Zealand have found that rainbow and takatāpui children and young people experience higher rates of multiple forms of victimisation including sexual assault, offences by family members, intimate partner violence, receiving unwanted digital communications, and harassment.<sup>602</sup> Research overseas has also identified increased risks of victimisation by professionals including from foster parents, group home supervisors, case workers, and shelter staff.<sup>603</sup>

## Barriers to access

**Attitudinal barriers.** Rainbow and takatāpui children and young people also experience a range of barriers to accessing justice including barriers relating to homophobia, transphobia and heterosexism.<sup>604</sup> In particular, the marginalisation of same-sex relationships and gendered

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<sup>598</sup> Fraser et al., "You're so powerless": Takatāpui/LGBTIQ+ people's experiences before becoming homeless in Aotearoa New Zealand at 17; LGBTIQ Legal Service, [LGBTIQ Legal Needs Analysis: Reflections on legal need and future planning from our two-year pilot program](#) at 26.

<sup>599</sup> For example see Ministry of Justice, [Youth Justice Indicators Summary Report](#).

<sup>600</sup> Independent Police Conduct Authority, Human Rights Commission & Children's Commissioner. (2012). [Joint thematic review of young persons in Police detention](#) at 41; King-Finau et al., [The health and wellbeing of takatāpui and rainbow young people who have been involved with Oranga Tamariki](#) at 27. The figures are set out in a table at 28; Veale et al., [Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand](#) at 79-80.

<sup>601</sup> Mitchell, M., McCrory, A., Skaburskis, I., & Appleton, B. (2022). [Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System](#). *International Journal for Crime, Justice and Social Democracy*, 11(2), 99-112 at 102; Washington State Supreme Court Gender and Justice Commission, [2021: How gender and race affect justice now](#) at 427; Global Initiative on Justice with Children & Child Friendly Justice European Network, [Towards LGBTIQ+ sensitive justice systems for children in Europe: Challenge Paper](#) at 18.

<sup>602</sup> Ministry of Justice, [Survey findings - Cycle 4 report Descriptive statistics. June 2022. Results drawn from Cycle 4 \(2020/21\) of the New Zealand Crime and Victims Survey](#) at 110-111, 123 & 176; King-Finau et al., [The health and wellbeing of takatāpui and rainbow young people who have been involved with Oranga Tamariki](#) at 27. The figures are set out in a table at 28; Veale et al., [Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand](#) at 76; Netsafe (2021) [Online harm increasing in Aotearoa's rainbow community](#). <https://www.netsafe.org.nz/wp-content/uploads/2016/12/Netsafe-rainbow-release.pdf> at 3.

<sup>603</sup> Haslam et al., [The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report](#) at 21; Layard, E., Parker, J., Cook, T., Murray, J., Asquith, N., Fileborn, B., Mason, R., Barnes, A., Dwyer, A. & Mortimer, S. (2022). [LGBTQ+ peoples experiences and perceptions of sexual violence](#), ACON research summary report at 22; Greene, Homelessness at 34 citing Ventimiglia, N. (2012). LGBT Selective Victimization: Unprotected Youth on the Streets Homelessness. *Journal of Law in Society*, 13, 439-454.

<sup>604</sup> Law Council of Australia. (2018). [The Justice Project: Final Report Part 1 LGBTIQ+ People](#) at 22.

assumptions about victimisation can mean that survivors of domestic or sexual violence are reluctant to report victimization.<sup>605</sup> Participants in research in the United States also reported negative experiences in the court system including judges, prosecutors, and court officers refusing to use correct pronouns or names and making negative comments about their gender identity, gender expression or sexual orientation.<sup>606</sup>

Experiences of poor treatment or awareness of the poor treatment of others can also lead to additional barriers including a lack of trust in police, the justice system, and authority in general.<sup>607</sup> For example, an Australian study found that LGBTIQ people frequently feel anxiety in their interactions with police, due to their collective and individual lived experience of homophobic and transphobic police responses which in turn reduces the likelihood they will report incidents to police or seek victims of crime assistance.<sup>608</sup>

**Structural / systemic barriers.** The primary structural or systemic barriers I identified in research in New Zealand and overseas are that systems and services have been designed to meet the needs of cisgender heterosexual people and are therefore less accessible to people with different sexual and gender identities.<sup>609</sup> A related issue is that rainbow and takatāpui people can experience barriers due to lack of awareness about rainbow identities and relationships, a lack of understanding of the issues experienced by rainbow communities and their needs, or how to respond to them.<sup>610</sup>

**Practical barriers.** Research overseas has also identified practical barriers including a lack of knowledge about their rights and financial barriers.<sup>611</sup>

The barriers experienced by rainbow and takatāpui children and young people can also be compounded by intersectional marginalisation and disadvantage.<sup>612</sup>

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<sup>605</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 LGBTI+ People](#) at 26; Community-Based Research Centre, [Serious Legal Problems faced by Lesbian, Gay, Bisexual, and Other Sexual-Minority People in Western Canada: A Qualitative Study](#) at 23-24; Guadalupe-Diaz, X. L., Jasinski, J. (2017). "I wasn't a priority, I wasn't a victim": Challenges in help seeking for transgender survivors of intimate partner violence. *Violence Against Women*, 23(6), 772–792 at 785.

<sup>606</sup> Movement Advancement Project & Center for American Progress. (2016). [Unjust: How the Broken Juvenile and Criminal Justice Systems Fail LGBTQ Youth](#) at 18; Washington State Supreme Court Gender and Justice Commission, [2021: How gender and race affect justice now](#) at 427.

<sup>607</sup> Cornish, S. & Gourley, E. (2022, June 29). 'Work is needed': Sexual assault reporting stuck at below 10%, survey finds. <https://www.stuff.co.nz/national/129104659/work-is-needed-sexual-assault-reporting-stuck-at-below-10-survey-finds> InsideOUT are an NGO supporting rainbow and takatāpui young people. See also LGBTIQ Legal Service, [LGBTIQ Legal Needs Analysis: Reflections on legal need and future planning from our two-year pilot program](#) at 35; Law Council of Australia, [The Justice Project: Final Report Part 1 LGBTI+ People](#) at 21.

<sup>608</sup> Victorian Pride Lobby. (2021). [Upholding our rights LGBTIQA+ attitudes towards and experiences of policing in Victoria](#) at 5-11.

<sup>609</sup> Guadalupe-Diaz & Jasinski, "I wasn't a priority, I wasn't a victim": Challenges in help seeking for transgender survivors of intimate partner violence at 4; McCandless, LGBT Homeless Youth and Policing at 559; Te Puna Aonui. (2023). [List of Family Violence and Sexual Violence Service Gaps](https://tepunaaonui.govt.nz/assets/Other-Agencies/FVSV-gaps-list-for-public-consultation_March-2023.pdf). [https://tepunaaonui.govt.nz/assets/Other-Agencies/FVSV-gaps-list-for-public-consultation\\_March-2023.pdf](https://tepunaaonui.govt.nz/assets/Other-Agencies/FVSV-gaps-list-for-public-consultation_March-2023.pdf) at 4-5.

<sup>610</sup> Victoria State Government. (2016). [Access to Justice Review \(Full report\)](#) at [3.3.8]; Law Council of Australia, [The Justice Project: Final Report Part 1 LGBTI+ People](#) at 28; Community-Based Research Centre, [Serious Legal Problems faced by Lesbian, Gay, Bisexual, and Other Sexual-Minority People in Western Canada: A Qualitative Study](#) at 32.

<sup>611</sup> Law Council of Australia, [LGBTI People: Consultation Paper](#) at 17.

<sup>612</sup> Law Council of Australia, [The Justice Project: Final Report Part 1 LGBTI+ People](#) at 30-32; Community-Based Research Centre, [Serious Legal Problems faced by Lesbian, Gay, Bisexual, and Other Sexual-Minority People in Western Canada: A Qualitative Study](#) at 21; Irvine & Canfield, *The*

See *Working paper no.5 - Rainbow and takatāpui children and young people*.

## Girls and young women

### Justice problems

**Education system.** The stand-down, suspension, exclusion, and expulsion rates for female students are lower than male students.<sup>613</sup> Girls also experience less bullying than boys, and tend to experience different forms of bullying with slightly more girls than boys experiencing social-relational bullying and far more boys experiencing physical violence, being made fun of, verbal threats and theft or destruction of property.<sup>614</sup> Some overseas research suggests that the impact of bullying on girls differs with significantly higher rates of self-harm amongst girls who have been bullied.<sup>615</sup>

**Victimisation.** Girls and young women experience significantly higher rates of sexual victimisation with one in four females aged 15–19 (28%) and 1 in 9 males of the same age (11%) participating in the New Zealand Crime and Victims Survey reporting that they had been subject to sexual assault in their lifetime.<sup>616</sup> Other New Zealand and overseas data has identified similarly disproportionate rates of victimisation.<sup>617</sup>

**Criminal justice system involvement.** Girls and young women are less likely to be involved in criminal offending than boys.<sup>618</sup> There are also some differences in the characteristics of girls and boys who offend with girls being more likely to have experienced maltreatment and other negative life experiences including mental health problems.<sup>619</sup> Overseas research and literature identifies an ‘abuse to prison’ pathway which describes the gendered pathway by which girls enter the justice system for offences relating to being victims of abuse.<sup>620</sup>

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Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population at 254.

<sup>613</sup> Ministry of Education. (2022). [Stand-downs, suspensions exclusions and expulsions from school](#) at 10-11.

<sup>614</sup> Jang-Jones & McGregor, [PISA2018 New Zealand Students' Wellbeing School climate & student mindsets of 15-year-olds](#) at 25.

<sup>615</sup> Myklestad, I. & Straiton, M. (2021). The relationship between self-harm and bullying behaviour: results from a population based study of adolescents. *BMC Public Health*. 21, 524 <https://doi.org/10.1186/s12889-021-10555-9> at 10-11.

<sup>616</sup> Ministry of Justice, [Survey findings - Cycle 4 report Descriptive statistics. June 2022. Results drawn from Cycle 4 \(2020/21\) of the New Zealand Crime and Victims Survey](#) at 139. See also the data tables available at <https://www.justice.govt.nz/justice-sector-policy/research-data/nzcvs/resources-and-results/> The percentage of males 15-19 was suppressed as the numerator and/or denominator of the ratio estimate has a relative sampling error greater than or equal to 50%, which is considered too unreliable for general use.

<sup>617</sup> Fleming, T., Archer, D., King-Finau, T., Dewhirst, M., Clark T., (2021). [Youth19 Safety and Violence Brief](#). Youth19 and The Adolescent Health Research Group at 4; Fisher, C. M., Waling, A., Kerr, L., Bellamy, R., Ezer, P., Mikolajczak, G., Brown, G., Carman, M. & Lucke, J. (2019). [6th National Survey of Australian Secondary Students and Sexual Health 2018](#), (ARCSHS Monograph Series No. 113), Australian Research Centre in Sex, Health & Society, La Trobe University at 39; Haslam et al., [The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report](#) at 21.

<sup>618</sup> Ministry of Justice, [Youth Justice Indicators Summary Report](#) at 8-13.

<sup>619</sup> Ministry of Justice, [Youth Justice Indicators Summary Report](#) at 17-19; Best, C., Ioane, J. & Lambie, I. (2021). Young female offenders and the New Zealand Youth Justice System: the need for a gender-specific response. *Psychiatry, Psychology and Law*. DOI: [10.1080/13218719.2021.1894258](https://doi.org/10.1080/13218719.2021.1894258) at 3; Lim, S., Lambie, I. & Van Toledo, A. (2018). Characteristics of Female Youth Offenders in New Zealand. *International Journal of Offender Therapy and Comparative Criminology*, 63(2), 198-217 at 209.

<sup>620</sup> Fitzpatrick, C., Hunter, K., Staines J. & Shaw, J. (2019). [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#). Lancaster University Centre for Child & Family

## Barriers to access

**Attitudinal barriers.** Research and commentary from children's rights advocates describes how gendered judgements operate to disadvantage including girls being perceived as more difficult to work with than boys and as doubly deviant where they have transgressed both the law and traditional views of how girls should behave.<sup>621</sup> Gendered judgements about girls and young women can also intersect with other aspects of their identities such as race, ethnicity and care status.<sup>622</sup> The social tolerance of violence against women and girls is also identified as a key factor making girls vulnerable to abuse.<sup>623</sup>

A fear of what will happen if they disclose or report abuse is a common fear for girls and young women and can operate as a barrier to reporting.<sup>624</sup> This can include feelings of shame or concerns about being blamed for being abused particularly in cases of sexual violence.<sup>625</sup>

**Structural / systemic barriers.** A key structural barrier for girls and young women in the criminal justice system stems from being a minority in the system with many aspects of the criminal justice system, and research in relation to the criminal justice system being based on boys and young men.<sup>626</sup> This includes risk assessment tools being based on males,<sup>627</sup> and a lack of suitable programmes and supports for girls and young women.<sup>628</sup> Research has also found that girls report much more negative experiences in family group conferences and other restorative justice processes.<sup>629</sup>

The New Zealand Law Commission's study of women's access to justice published in 1999 found that 'male culture' could also operate as a barrier.<sup>630</sup> However, this report was focused on

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Research at 17-18; Saar, M.S., Epstein, R., Rosenthal, L. & Vafa, Y. (2015). [Sexual Abuse to Prison Pipeline: A Girl's Story](#), Georgetown University Center for Poverty and Inequality at 8.

<sup>621</sup> Eivers, F. (2022). ["I am misunderstood": Young women in the youth justice system](#). *New Zealand Women's Law Journal*. 7, 14-20 at 20; Sanders et al., The impact of school exclusion on later justice system involvement: investigating the experiences of male and female students at 398; Fitzpatrick et al., [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#) at 26.

<sup>622</sup> Fitzpatrick et al., [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#) at 26; Vafa, Y., Ferrer, E., Kaleem, M., Hopkins, C. & Feldhake, E. (2018). [Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System](#). Rights4Girls & the Georgetown Juvenile Justice Initiative at 3; and Russell et al., It's a Gendered Issue, 100 Per Cent': How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage.

<sup>623</sup> World Health Organization, [INSPIRE: seven strategies for ending violence against children](#) at 16.

<sup>624</sup> Swift, D. (2011). [The Girls' Project. Girl Fighting: An investigation of young women's violent and anti-social behaviour](#). Stopping Violence Services at 83 & 89; Rackley, E., McGlynn, C., Johnson, K. et al. (2021). [Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse](#). *Feminist Legal Studies*. 29, 293–322 at 301.

<sup>625</sup> World Health Organization, [INSPIRE: seven strategies for ending violence against children](#) at 16.

<sup>626</sup> Lynch, N. (2014). ["Girls Behaving Badly?" Young Female Violence in New Zealand](#). *Victoria University of Wellington Law Review*, 45(3), 509–524 at 518 & 523; Swift, [The Girls' Project. Girl Fighting: An investigation of young women's violent and anti-social behaviour](#) at 67; Daly, K. (2008). [Girls, Peer Violence, and Restorative Justice](#). *Australian & New Zealand Journal of Criminology*. 41(109), 109–137 at 109; Justice Committee. (2016). [The treatment of young adults in the criminal justice system](#). House of Commons at 12; Hodgson, J. (2022). Offending Girls and Restorative Justice: A Critical Analysis. *Youth Justice*, 22(2), 166–188 at 166.

<sup>627</sup> Best et al., Young female offenders and the New Zealand Youth Justice System: the need for a gender-specific response at 868.

<sup>628</sup> [New Zealand Police v AN](#) [2020] NZYC 609 at [79], [82].

<sup>629</sup> Best et al., Young female offenders and the New Zealand Youth Justice System: the need for a gender-specific response at 12; Sanders et al., [Young females in the court system: A report prepared for the principal youth court judge \(Technical Report 25\)](#) at 35-36; Hodgson, [Offending Girls and Restorative Justice: A Critical Analysis](#) at 181.

<sup>630</sup> Te Aka Matua o te Ture / New Zealand Law Commission. (1999). [Women's Access to Legal Services](#) at 44, 49 & 58.

the experiences of adults and is now close to twenty-five years old meaning further research is needed to determine the extent to which this is a barrier for girls and young women today.

See *Working paper no.6 - Girls and young women*.

## Boys and young men

There is much less research and literature in relation to the gender related justice needs and barriers experienced by boys and young men, possibly representing the assumption that cis-hetero males are considered the default identity upon which our systems and society is based. However, the lack of research and literature both props up these cis-hetero normative assumptions and obscures the experiences of boys and young men who are victims of abuse and violence.

### Justice problems

**Education system.** Male students experience consistently higher stand-down, suspension, exclusion and expulsion rates than female students with this gender disparity higher in primary school and reducing in secondary school.<sup>631</sup> Boys are also more likely to be involved with the Ongoing Resourcing Scheme which requires them to have been identified as having high or very high ongoing special education needs with this disparity appearing to increase over time.<sup>632</sup> An Education Review Office survey of school students found that male students were more likely to report experiencing every kind of bullying behaviour than female students.<sup>633</sup> Overseas research in relation to the prevalence of bullying also identifies gender-based differences in bullying victimisation with boys being more likely to both experience bullying, particularly physical aggression<sup>634</sup> and to perpetrate it.<sup>635</sup>

**Criminal justice system involvement.** Boys outnumber girls in offending rates in all age groups with the offending by children aged 10 to 13 made up of 72% boys and 28% girls, and offending by 14-17 (or 18) year olds 77% boys and 23% girls.<sup>636</sup> There are also differences in offending by gender with offending by boys being more likely to be serious enough to lead to an FGC or court action and to appear in the Youth Court.<sup>637</sup>

Although girls and young women are more likely to experience sexual violence, boys do make up a sizable minority.<sup>638</sup> Research in the United Kingdom has also found that male victims of child sexual exploitation differ from females in a number of ways including being younger, being more likely to present with disabilities, and being more likely to have a youth offending record.<sup>639</sup>

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<sup>631</sup> Ministry of Education, [Stand-downs, suspensions exclusions and expulsions from school](#) at 10-11.

<sup>632</sup> Figure NZ. (2022). *Students involved with the Ongoing Resourcing Scheme in New Zealand*. <https://figure.nz/chart/A8Q6XhL90w1d6Ypi>

<sup>633</sup> Education Review Office Te Tari Arotake Mātauranga. (2019). [Bullying Prevention and Response in New Zealand Schools](#) at 14.

<sup>634</sup> Silva, M.A., Pereira, B., Mendonça, D., Nunes, B., & de Oliveira, W.A. (2013). [The involvement of girls and boys with bullying: an analysis of gender differences](#). *International Journal of Environmental Research and Public Health*, 10(12), 6820–6831 at 6820, 6822 & 6827.

<sup>635</sup> Lunneblad, J. & Johansson, T. (2021). Violence and gender thresholds: A study of the gender coding of violent behaviour in schools, *Gender and Education*, 33(1), 1-16 at 4.

<sup>636</sup> Ministry of Justice, [Youth Justice Indicators Summary Report](#) at 9 & 14.

<sup>637</sup> Ministry of Justice, [Youth Justice Indicators Summary Report](#) at 10-11.

<sup>638</sup> McNaughton Nicholls, C., Cockbain, E., Brayley, H., Harvey, S., Fox, C., Paskell, C., Ashby, M., Gibson, K. & Jago, N. (2014). [Research on the sexual exploitation of boys and young men: A UK scoping study Summary of findings](#). Barnardos at 6.

<sup>639</sup> *Ibid* at 6-9.

## Barriers to access

The barriers experienced by boys and young men mirror some of those experienced by girls and young women and rainbow and takatāpui children and young people. For example:

- Gendered assumptions and the negative expectations of maleness (i.e. that they are violent, disruptive, and disrespectful) can operate to disadvantage boys and young men.<sup>640</sup>
- Discriminatory social attitudes and stereotypes including homophobia, stereotypes of masculinity, and stigmatisation as offenders can operate as barriers to disclosing or reporting abuse for boys and young men particularly in cases of sexual violence.<sup>641</sup>
- There is a lack of available and visible services for male victim survivors.<sup>642</sup> Police and mainstream support services can also fail to respond appropriately to boys and young men when they do report victimisation.<sup>643</sup>
- The focus on girls and young women as victims also operates as a barrier for boys and young men. This includes the invisibility and minimization of male sexual victimization and the assumption of female victimhood.<sup>644</sup>

See *Working paper no.7 - Boys and young men*.

## Poverty and socio-economic disadvantage

### Justice problems

Studies consistently show that poverty and disadvantage are closely related to the experience of legal problems.<sup>645</sup> The relationship between socioeconomic disadvantage and the experience of legal problems is also bi-directional with socioeconomic disadvantage or social exclusion increasing the likelihood of experiencing legal problems, and experiencing legal problems creating, perpetuating or further entrenching social exclusion.<sup>646</sup>

**Education system.** There is a clear correlation between a school's socio-economic status (SES), as measured by decile, and age-standardised stand-down, suspension, exclusion and

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<sup>640</sup> Gillon, [Thinking about justice](#) at 31.

<sup>641</sup> Dixon, L., Treharne, G., Pettie, M., Bowden, C., Patterson, T., Beres, M., Mirfin-Vietch, B., Shaw, R., Eketone-Kelly, A., & Ashdown, J. (2023). [Male survivors of sexual violence and abuse \(SVA\): Barriers and facilitators to reporting and accessing services](#). Open Access Te Herenga Waka-Victoria University of Wellington at 4; Carswell, S., Donovan, E. & Kaiwai, H. (2019). [What is known about effective recovery services for men who have been sexually abused? An evidence review](#). Commissioned by the Ministry of Social Development at 4.

<sup>642</sup> Dixon et al., [Male survivors of sexual violence and abuse \(SVA\): Barriers and facilitators to reporting and accessing services](#) at 54.

<sup>643</sup> Dixon et al., [Male survivors of sexual violence and abuse \(SVA\): Barriers and facilitators to reporting and accessing services](#) at 59; Moore, T. (2021). [Suggestions to improve outcomes for male victims of domestic abuse: a review of the literature](#). *SN Social Sciences* 1, 252 at 6-7.

<sup>644</sup> Hlavka, H. R. (2017). [Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization](#). *Men and Masculinities*, 20(4), 482–505; McNaughton Nicholls et al., [Research on the sexual exploitation of boys and young men: A UK scoping study Summary of findings](#) at 13; Weiss, K. G. (2010). [Male Sexual Victimization: Examining Men's Experiences of Rape and Sexual Assault](#). *Men and Masculinities*, 12(3), 275–298 at 277.

<sup>645</sup> Coumarelos et al., [Legal Australia-Wide Survey: legal need in Australia](#) at 16; Pleasence, P. (2014). [Reshaping Legal Assistance Services: Building on the evidence base](#). Law and Justice Foundation of New South Wales at 5; Law Council of Australia. (2018). [The Justice Project: Final Report Part 1 People experiencing economic disadvantage](#).

<sup>646</sup> Coumarelos et al., [Legal Australia-Wide Survey: legal need in Australia](#) at 28.

expulsion rates.<sup>647</sup> Data from PISA2018 also shows significant disparities between socio-economically disadvantaged and advantaged students across a range of measures including perception of teacher support, sense of belonging, feeling of self-efficacy, reading scores, and access to educational resources.<sup>648</sup>

**Victimisation.** There is also clear evidence of a correlation between poverty and an increased risk of criminal victimisation.<sup>649</sup> Fanslow et al.'s population based study using data from the 2019 Family Violence Survey which produced prevalence estimates of measured adverse childhood experience (ACE) types by socio-demographic characteristics found that those who were in low socio-economic groups bore a disproportionately high burden of ACEs.<sup>650</sup>

**Care and protection system involvement.** There is also a significant relationship between poverty and care system contact in New Zealand. For example, 36% of all substantiated findings, and 28% of all children placed in care, occurred in the most deprived decile (the poorest 10% of areas in Aotearoa).<sup>651</sup> Views differ in relation to the reasons for this disparity. For example, a report by the Oranga Tamariki Evidence Centre identifies two main theories - the 'what money can buy' and the 'parental stress' models,<sup>652</sup> whereas Keddell and Davie identify other possible explanations including the heightened surveillance experienced by more deprived people and bias within the system.<sup>653</sup>

**Criminal justice system involvement.** A number of New Zealand and international studies identify the connections between poverty or socio-economic disadvantage and criminal justice system involvement.<sup>654</sup> However, new data from the Edinburgh Study raises vitally important question – whether the disparity in youth offending statistics between children and young people

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<sup>647</sup> Ministry of Education, [Stand-downs, suspensions exclusions and expulsions from school](https://www.educationcounts.govt.nz/statistics/stand-downs,-suspensions,-exclusions-and-expulsions) at 8 and Time Series spreadsheets available at: <https://www.educationcounts.govt.nz/statistics/stand-downs,-suspensions,-exclusions-and-expulsions> Decile 1-2 schools and kura (low SES) were made up of students from communities with the highest degree of socio-economic disadvantage.

<sup>648</sup> See Jang-Jones & McGregor, [PISA2018 New Zealand Students' Wellbeing School climate & student mindsets of 15-year-olds](#); May, S., Jang-Jones, A. & McGregor, A. (2019). [PISA2018 New Zealand Summary Report System Performance & Equity](#). Ministry of Education; Medina, E. (2020). [PISA 2018 Reading experiences of 15 year olds Resources for Learning: Access, quality and capacity](#). Ministry of Education.

<sup>649</sup> Expert Advisory Group on Solutions to Child Poverty. (2012). [Working Paper no.23: Justice Solutions to Mitigate Child Poverty](#). Office of the Children's Commissioner at 2-3.

<sup>650</sup> Fanslow et al., Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study at 12. See also Ministry of Justice, [Survey findings - Cycle 4 report Descriptive statistics. June 2022. Results drawn from Cycle 4 \(2020/21\) of the New Zealand Crime and Victims Survey](#) at 56.

<sup>651</sup> Keddell, E., Davie, G. & Barson, D. (2019) Child protection inequalities in Aotearoa New Zealand: Social gradient and the 'inverse intervention law', *Children and Youth Services Review*, 104, 104383 at 6: "The size of the differences between quintiles [all areas split into fifths] of NZDep were particularly marked for substantiations and family group conferences although a rate more than six times higher was still observed for placement of children in the most deprived quintile [poorest 20% of areas] compared to the least deprived quintile [richest 20% of areas]."

<sup>652</sup> Oranga Tamariki Evidence Centre. (2018). [How do welfare and tax settings affect children's involvement with child protective services?](#) Wellington, New Zealand: Oranga Tamariki— Ministry for Children at 6.

<sup>653</sup> Keddell, E. & Davie, G. (2018). [Inequalities and Child Protection System Contact in Aotearoa New Zealand: Developing a Conceptual Framework and Research Agenda](#). *Social Sciences*. 7(6), 89 at 4-5.

<sup>654</sup> Expert Advisory Group on Solutions to Child Poverty, [Working Paper no.23: Justice Solutions to Mitigate Child Poverty](#) at 2; Reil et al., [How we fail children who offend and what to do about it: 'A breakdown across the whole system'. Research and recommendations](#) at 8; Snow, P. C. (2019). [Speech-Language Pathology and the Youth Offender: Epidemiological Overview and Roadmap for Future Speech-Language Pathology Research and Scope of Practice](#). *Language, Speech & Hearing Services in Schools*, 50(2), 324-339 at 326; Haines et al., *Children and Crime: In the Moment* at 291.

from different socio-economic groups reflects differences in actual offending rates, or differences in the response by the police and the court system.<sup>655</sup>

Other common justice problems include housing and homelessness,<sup>656</sup> and welfare and benefits issues.<sup>657</sup>

## Barriers to access

**Attitudinal barriers.** Some research suggests that students with a high socio-economic status “carry a sense of entitlement” and that inequalities in treatment of high and low socio-economic status students can be caused by both teacher bias and the sense of entitlement with which middle-class children seek to secure advantages for themselves and their ease with authority figures.<sup>658</sup> Young people in poverty may also be more reluctant to seek legal or other help with their justice problems.<sup>659</sup>

**Systemic barriers.** The main systemic or structural barriers are the power imbalance with State institutions.<sup>660</sup> Systems are not designed for children and young people in poverty with a lack of services for homeless young people,<sup>661</sup> and systems and processes often designed for middle class forms of communication.<sup>662</sup>

**Practical barriers.** There are a range of practical barriers around attending appointments and court hearings,<sup>663</sup> as well as barriers in relation to both people’s lack of knowledge and professionals’ lack of knowledge about the legal issues affecting those in poverty.<sup>664</sup> The lack of data also presents a barrier to understanding the nature and extent of some challenges for example, the lack of data in relation to youth homelessness.<sup>665</sup>

See *Working paper no.8 - Poverty and socio-economic disadvantage*.

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<sup>655</sup> McAra, L. & McVie, S. (2022). [Causes and Impacts of Offending and Criminal Justice Pathways: Follow-up of the Edinburgh Study Cohort at Age 35](#) The University of Edinburgh at 18, 22 & 29

<sup>656</sup> Amore, K., Viggers, H. & Howden-Chapman, P. (2020). [Severe housing deprivation in Aotearoa New Zealand, 2018](#). University of Otago & He Kainga Oranga at 4; Paul & Ratana, [Youth Homelessness in Tāmaki Makaurau, Aotearoa New Zealand](#) at 22.

<sup>657</sup> Morton, K., Gray, C., Heins, A. & Carswell, S. (2014). [Access to Justice for Beneficiaries: A Community Law Response](#). Community Law Canterbury at 131-132.

<sup>658</sup> Perry-Hazan, [Students’ Perceptions of Their Rights in School: A Systematic Review of the International Literature](#) at 940.

<sup>659</sup> Chan, E. & Huys, J. (2019). [Access to justice through street youth legal services](#). *Parity*, 32(8), 53-54 at 53.

<sup>660</sup> Morton et al., [Access to Justice for Beneficiaries: A Community Law Response](#) at 126.

<sup>661</sup> McAllister, J., Neuwelt-Kearns, C., Bain, L., Turner, N., & Wynd, D. (2021). [The Most Important Task: Outcomes of our collective care for low-income children in Aotearoa New Zealand in the first year of Covid-19](#). Child Poverty Action Group at 8; Noble-Carr, D., & Trew, S. (2018). [“Nowhere to go”: Investigating homelessness experiences of 12-15 years olds in the Australian Capital Territory](#). Canberra: Institute of Child Protection Studies, Australian Catholic University at 43.

<sup>662</sup> Wood, W.R. (2020). [The indecent demands of accountability: trauma, marginalisation and moral agency in youth restorative conferencing](#). *The International Journal of Restorative Justice*, 3(2), 168-193 at 183.

<sup>663</sup> McNamara et al., [Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia](#) at 118-120.

<sup>664</sup> Morton et al., [Access to Justice for Beneficiaries: A Community Law Response](#) at 125-126.

<sup>665</sup> Paul & Ratana, [Youth Homelessness in Tāmaki Makaurau, Aotearoa New Zealand](#) at 22.



## Trauma

### Justice problems

**Education system.** The experience of trauma can affect children and young people's experiences at school including increased likelihood of being subject to disciplinary action including due to educators misinterpreting trauma.<sup>666</sup> The school environment can also provide significant support for children who have experienced trauma which makes exclusion from school even more damaging for this cohort of children and young people.<sup>667</sup>

**Care and protection system involvement.** Due to the nature of care and protection system involvement it is likely that most, if not all, children and young people will have experienced some form of trauma.

**Victimisation.** Again, the experience of victimisation will often involve some form of trauma. Some research has also found a strong relationship between experiences of adverse childhood experiences and later intimate partner violence.<sup>668</sup>

**Criminal justice system involvement.** Multiple studies have found that children and young people involved in the criminal justice system are very likely to have experienced trauma.<sup>669</sup> Experiences of trauma can contribute to involvement in offending making it relevant to culpability as well as suggesting that if young people's trauma related needs are met they are less likely to reoffend and having an impact on the appropriateness of common responses to offending.<sup>670</sup> Experience of trauma also has an impact on children and young people's experiences in the criminal justice system including their ability to participate in justice processes and their perceptions of fairness and respect.<sup>671</sup>

### Barriers to access

People who have experienced trauma are more likely to misinterpret the emotions of others, assume other peoples' intentions to be malevolent and to distrust authority, including the police.<sup>672</sup> Negative perceptions of the police can have a significantly negative impact on people's interactions with the police and other authority figures with a lack of cooperation sometimes being misinterpreted as a sign of aggression.<sup>673</sup>

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<sup>666</sup> McKenna, N.C. & Holtfreter, K. (2020). Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness, *Journal of Aggression, Maltreatment & Trauma*, 30(4), 450-470 at 458.

<sup>667</sup> Ibid at 458.

<sup>668</sup> Fanslow et al., Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study at 12.

<sup>669</sup> For example: Wood, [The indecent demands of accountability: trauma, marginalisation and moral agency in youth restorative conferencing](#) at 170; Malvaso, C.G., Day, D., Cale, J., Hackett, L., Delfabbro, P. & Ross, S. (2022). [Adverse childhood experiences and trauma among young people in the youth justice system](#). In Australian Institute of Criminology, *Trends & issues in crime and criminal justice*.

<sup>670</sup> Fitzgerald, *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People* at 24; Wood, [The indecent demands of accountability: trauma, marginalisation and moral agency in youth restorative conferencing](#) at 170; Vaswani, N. (2021). [Info Sheet 98: The interaction between young masculinities, trauma and prison](#). Children and Young People's Centre for Justice at 1-2.

<sup>671</sup> Wood, [The indecent demands of accountability: trauma, marginalisation and moral agency in youth restorative conferencing](#) at 175.

<sup>672</sup> Borysik, B. & Corry-Roake, E. (2021). [The Knot: Lived experience perspectives on policing trauma, poverty and inequalities](#). Revolving Doors Agency & New Generation Policing at 24.

<sup>673</sup> Ibid.

Research demonstrates that the adversarial courtroom process is inappropriate for those who have experienced trauma including features such as aggressive argument, strategic and selective presentation of facts, developmentally inappropriate, complex language, and repeated questions with subtle variations designed to demonstrate inconsistencies in evidence.<sup>674</sup> Aggressive cross-examination can also be both harmful to the child or young person giving evidence and detrimentally affect the accuracy of evidence obtained.<sup>675</sup> Trauma can also have an impact on the ability to recount experiences and which is often misinterpreted when assessing credibility.<sup>676</sup>

See *Working paper no.9 – Trauma*.

## Intersectionality

### Justice problems

The intersection of different aspects of young people's identities can operate to increase their justice needs in a range of ways. For example, research and literature overseas identifies increased school disciplinary disparities for students with multiple marginalised identities. This includes the intersection of race and gender & sexuality with both youth of colour and LGBTQ students being significantly more likely to experience punitive disciplinary measures in school.<sup>677</sup> Roy et al.'s report *Negotiating multiple identities* which draws from the Youth'19 dataset also describes a series of ways intersecting identities can result in increased experiences of discrimination.<sup>678</sup>

Other research and literature also discusses how intersectional marginalisation can operate to both increase the risk of victimisation and reduce the appropriateness of responses to victimisation. For example, LGBTQ youth of colour "are disproportionately likely to be exposed to multiple forms of violence (i.e., interpersonal, structural, institutional)" and harassment.<sup>679</sup> Thiara and Roy also explain how gender and race of victim and offender can intersect in cases of sexual violence and the response to it with significant implications for justice.<sup>680</sup>

Research studies in Australia, the United Kingdom and the United States also raise concerns about intersecting vulnerabilities in the criminal justice system due to age, race (including Indigeneity), ethnicity, disability, socio-economic status, and gender.<sup>681</sup> For example, a series

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<sup>674</sup> Crenshaw, D.A., Stella, L., O'Neill-Stephens, E., & Walsen, C. (2019). Developmentally and Trauma-Sensitive Courtrooms. *The Journal of Humanistic Psychology*, 59(6), 779-795 at 781.

<sup>675</sup> Randell, [That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants](#) at 33-34.

<sup>676</sup> Borysik & Corry-Roake, [The Knot: Lived experience perspectives on policing trauma, poverty and inequalities](#) at 30.

<sup>677</sup> Green, [Youth of Color in the School-to-Prison Pipeline: Freedom, Liberation, and Resistance](#) at 42.

<sup>678</sup> Roy, R., Greaves, L. M., Peiris-John, R., Clark, T., Fenaughty, J., Sutcliffe, K., Barnett, D., Hawthorne, V., Tiatia-Seath, J., & Fleming, T. (2021). [Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people](#). The Youth19 Research Group, The University of Auckland and Victoria University of Wellington at 15-16.

<sup>679</sup> Keene, L. (2019). Neighbourhood / Community. In K.J. Conron & B.D.M. Wilson. (Eds.) [A Research Agenda to Reduce System Involvement and Promote Positive Outcomes with LGBTQ Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems](#). The Williams Institute at 28.

<sup>680</sup> Thiara, R. & Roy, S. (2020). [Reclaiming Voice: Minoritised Women and Sexual Violence Key Findings](#). Imkaan & The University of Warwick at 6-7.

<sup>681</sup> Hughes, D., Colvin, E., & Bartkowiak-Théron, I. (2021). [Police and Vulnerability in Bail Decisions](#). *International Journal for Crime, Justice and Social Democracy*, 10(3), 122-138 at 127; Russell, E.K., Carlton, B., & Tyson, D. (2021). ['It's a Gendered Issue, 100 Per Cent': How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage](#). *International Journal for Crime, Justice and Social Democracy*, 11(3), 107-121 at 108; Bridge, M. (2021). ['I wanted to be heard': Young women in the criminal justice system at risk of violence, abuse and exploitation](#). Agenda Alliance for Woman &

of studies in the United States and Canada identifies LGBTQ youth of colour as an intersectionally marginalised group that is disproportionately likely to become involved in the criminal justice system,<sup>682</sup> with the most significant determinant in the criminalisation of LGBTQ youth of colour being their proximity to poverty.<sup>683</sup>

## Barriers

Intersectionally marginalised children and young people also experience additional barriers to accessing justice, most principally that systems and processes simply are not designed to meet their need.<sup>684</sup> Moreover, when specialist services do exist, they generally only consider one aspect of a person's identity.<sup>685</sup> The problem with this type of division of services is that it "forces people to highlight one identity at the expense of another (or others), and fails to consider that, for most people, such self-partitioning is not possible nor helpful".<sup>686</sup>

Another key barrier is the lack of disaggregated data, or data that allows comparison across multiple aspects of people's identities. For example, during this research project I wanted to explore how multiple different aspects of children and young people's identities affected their experiences of justice problems and barriers. However, when there was demographic data available, it generally only allowed for comparison across one or two demographic variables. This issue has also been raised in other jurisdictions.<sup>687</sup>

See *Working paper no. 10 – Intersectionality*.

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Girls at Risk and Alliance for Youth Justice at 36; Washington State Supreme Court Gender and Justice Commission. (2021). [2021: How gender and race affect justice now](#). Washington Courts Administrative Office of the Courts.

<sup>682</sup> Green, [LGBTQ Youth of Color in the School-to-Prison Pipeline: Freedom, Liberation, and Resistance](#). *Aleph* at 42; Keene, *Neighbourhood / Community* at 27-28; Bergman, J. (2020). [Intersectionality: A Means for Addressing the Needs of Children with Mental Health Issues who are Engaged with the Family Law and Criminal Justice Systems?](#) *Windsor Yearbook of Access to Justice*, 36, 115-137.

<sup>683</sup> Green, [LGBTQ Youth of Color in the School-to-Prison Pipeline: Freedom, Liberation, and Resistance](#) at 42.

<sup>684</sup> LGBTIQ Legal Service, [LGBTIQ Legal Needs Analysis: Reflections on legal need and future planning from our two-year pilot program](#) at 18.

<sup>685</sup> Roy et al., [Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people](#) at 2.

<sup>686</sup> Joy, "You cannot take it with you": Reflections on intersectionality and social work at 46-47.

<sup>687</sup> Vafa et al., *Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System* at 38.

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