

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

Working paper No.9 – Children and young people who have experienced trauma

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# Introduction

This working paper explores the justice problems and barriers to access experienced by people who have experienced trauma, followed by some of the possible solutions raised in the research and literature from Aotearoa New Zealand and overseas. It forms part of an overall research project exploring the extent to which children and young people are able to access to justice in Aotearoa New Zealand. The findings of the 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 as well as analysis of 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 and is broken up into a series of reports relating to groups 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. Poverty and socio-economic disadvantage;
9. Trauma; and
10. Intersectionality.

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

# Trauma and its impacts

## What is trauma?

Trauma can be defined as “the lasting adverse effects on a person’s functioning and the mental, physical, social, emotional or spiritual wellbeing, caused by events, circumstances or intergenerational historical experiences”.<sup>1</sup> The SAMSA concept of trauma is widely used in the literature and describes trauma as the result of a process of three ‘E’s – event, experience and effects.<sup>2</sup>

1. An event which exposes a person to trauma. This could be a single traumatic event or repeated events over time.
2. How the is experienced by an individual or a population which determines whether it is a traumatic event.
3. The effects of the event, which can be immediate or have a delayed onset.

A particular event may be experienced as traumatic for one individual and not for another with how the event is experienced potentially linked to a range of factors including the individual’s cultural beliefs, availability of support, and their developmental stage.<sup>3</sup> The effects of the effect can also differ between individuals and may occur immediately or have a delayed onset.<sup>4</sup>

A related concept which has gained increasing prominence over the last twenty years is adverse childhood experiences (ACEs). The original ACE study involved adults responding to questionnaires about eight adverse childhood experiences with three related to the child’s experience of abuse (emotional, physical, and sexual abuse) and five related to household dysfunction (substance abuse, mental illness, mother treated violently, incarcerated household member, parental separation or divorce).<sup>5</sup> The ACE Study also assessed numerous social, behavioural, and health outcomes which allowed researchers to explore the effects of multiple forms of abuse and related stressors.<sup>6</sup>

Use of the ACE checklist in Aotearoa New Zealand has been the subject of critique including in relation to its origin as research with a US based population of mostly white, average to well off, insured patients in a health care setting and the use of questions that had not been subject to rigorous review as to which are most likely to predict health outcomes.<sup>7</sup> In particular, Joy and Beddoe criticise the failure to consider wider social pressures or adequately “adequately account for the (often) entangled effects of poverty, racism, and colonisation”.<sup>8</sup>

I have largely focussed on the concept of trauma in this paper due to critique of the ACE checklist and because the concept of trauma incorporates consideration of how an event is experienced making it more person-centred and allowing for greater nuance. However, I also

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<sup>1</sup> Donaldson, W. (2018). [Trauma-Informed Care: Literature Scan](#). Te Pou o te Whakaaro Nui at 16.

<sup>2</sup> Substance Abuse and Mental Health Services Administration. (2014). [Concept of Trauma and Guidance for a Trauma-Informed Approach](#). HHS Publication No. (SMA) 14-4884 at 7-8.

<sup>3</sup> Substance Abuse and Mental Health Services Administration, [Concept of Trauma and Guidance for a Trauma-Informed Approach](#) at 8.

<sup>4</sup> Ibid.

<sup>5</sup> Anda, R. F., Felitti, V. J., Bremner, J. D., Walker, J. D., Whitfield, C., Perry, B. D., Dube, S.R & Giles, W. H. (2006). [The enduring effects of abuse and related adverse experiences in childhood](#). *European Archives of Psychiatry and Clinical Neuroscience*, 256, 174–186 at 176.

<sup>6</sup> Anda et al., [The enduring effects of abuse and related adverse experiences in childhood](#) at 176.

<sup>7</sup> Joy, E., & Beddoe, L. (2019). ACEs, Cultural Considerations and ‘Common Sense’ in Aotearoa New Zealand. *Social Policy and Society*, 18(3), 491-497 at 493. See also Joy, E., & Beddoe, L. (2019). [ACEs and Cultural Considerations in Aotearoa New Zealand](#). University of Auckland Public Policy Institute for an open access paper addressing some of these same points.

<sup>8</sup> Ibid.

discuss the research and literature in relation to ACEs as they are often used as a proxy or measure of the experience of trauma particularly in the case of children.<sup>9</sup>

## Historical and Intergenerational Trauma

In a settler colonial society like Aotearoa New Zealand it is important to recognise historical trauma and/or intergenerational trauma. The term ‘historical trauma’ was initially used to describe the traumatic experiences of holocaust survivors and the impact of those experiences on following generations and has also been used in relation to the intergenerational impact of Japanese concentration camps during WWII.<sup>10</sup> Indigenous scholars argue that the genocidal and ethnocidal acts perpetuated against indigenous peoples have also caused intergenerational transfer of trauma.<sup>11</sup> Moreover, as Pihama argues, “colonisation [is not] a ‘one off’ historical trauma event; rather it is an ongoing process of oppressing Indigenous peoples causing cumulative harm”.<sup>12</sup> She also points to impacts of and responses to this trauma:<sup>13</sup>

*It is noted that the ongoing acts of violence upon Māori are associated with colonial State violence of systemic racism; disparities in access to education and health care; denial and marginalisation of te reo, tikanga and mātauranga Māori; high rates of incarceration; and increasing removal of Māori children from their whānau. Reactions to the legacy of historical trauma and daily acts of oppression for Māori and Indigenous peoples manifest in multiple ways that culminate in both personal and interpersonal trauma responses, both individual and collective.*

## Prevalence of trauma

Fanslow et al.’s population based study using data from the 2019 Family Violence Survey produced prevalence estimates of measured ACE types by socio-demographic characteristics. They found “ACEs in NZ were prevalent and co-occurring, with one out of two respondents reporting having experienced at least one ACE and one out of nine reporting at least four ACEs before the age of 18”.<sup>14</sup> Fanslow et al. also found that experience of ACEs 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.

**Table 1** sets out prevalence estimates for some ACE types using a selection of the socio-demographic characteristics used in Fanslow et al.’s study.<sup>15</sup>

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<sup>9</sup> For example, see Donaldson, [Trauma-Informed Care: Literature Scan](#) at 16-17.

<sup>10</sup> Pihama, L., Cameron, N., & Te Nana, R. (2019). [Historical trauma and whānau violence. Issues Paper 15](#). New Zealand Family Violence Clearinghouse, University of Auckland at 9.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid at 10. In the context of Australia see also McCallum, D. (2021). [Law, Justice, and Indigenous intergenerational trauma - a genealogy](#). *International Journal for Crime, Justice and Social Democracy*, 11(3), 165-177 at 171 who explains: “[i]n the cases experienced by Indigenous peoples, intergenerational trauma is produced and reproduced in the present, as what we might describe as ‘war by other means’, from the origins of colonising and its effects on later generations through the reproduction of similar traumatic events, many of which are experienced in the contexts of family, health, and everyday living. The effects include those detailed in the Australian Institute of Health and Welfare reports down the years—Indigenous incarceration and deaths in custody, child removal, poverty, alcohol abuse, family violence, etc.”

<sup>13</sup> Pihama et al., [Historical trauma and whānau violence. Issues Paper 15](#) at 14.

<sup>14</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>15</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. I have not included the ACEs relating to parental separation or divorce and incarcerated household member on

**Table 1 Prevalence of Adverse Childhood Experiences<sup>16</sup>**

Characteristics	Emotional abuse	Physical abuse	Sexual abuse	Witnessing IPV <sup>17</sup>	Household Substance abuse	Household mental illness
Total	29.2%	17.8%	18.3%	15.8%	20%	19.1%
<b>Gender</b>						
Male	30.1%	18.9%	26%	18%	22%	24%
Female	28.3%	16.9%	10.6%	13.4%	17.3%	14.1%
<b>Age group</b>						
16-24	42.5%	18%	11.1%	18.9%	23.3%	23.2%
25-34	36.1%	17.7%	14.2%	15.2%	22.4%	23.7%
35-44	31.8%	15.9%	16.8%	16.9%	19.9%	20.1%
45-54	31.5%	18.5%	20.8%	17.3%	22.6%	22.3%
55-64	29.2%	22.4%	23.3%	16.9%	21.9%	20.9%
>64	18.1%	15.4%	18.4%	12.2%	14.5%	11.3%
<b>Ethnicity</b>						
European	27.1%	16%	16.7%	12.8%	19.2%	20.7%
Māori	52.1%	31.3%	31.3%	33.3%	36.8%	23.6%
Pacific	33.5%	24.7%	21.1%	24.2%	21.7%	12%
Asian	19.9%	13.3%	14.2%	12%	9.4%	8.8%
MELAA	30.2%	20.9%	26.8%	27.9%	16.7%	25.6%
<b>Area deprivation</b>						
Least deprived	22.5%	15.6%	16.8%	11.5%	19.2%	20.1%
Moderately deprived	30.4%	16.7%	15.9%	15.5%	19.2%	18.9%
Most deprived	33.8%	21.7%	23.4%	20.2%	21.9%	18.5%

Another recent study in Australia explored the national prevalence of each of the five types of child abuse and neglect through phone interviews with 8,500 participants, 3,500 of whom were aged between 16-24.<sup>18</sup> Among all Australians aged 16-65 and older:<sup>19</sup>

- 32% experienced physical abuse;
- 28.5% experienced sexual abuse;

the basis that these variables do not have a direct relationship with trauma and are potentially discriminatory. I have also excluded some of the socio-economic variables as they relate to participants' socio-economic status at the time of the survey rather than when the ACE was experienced.

<sup>16</sup> Ibid.

<sup>17</sup> Intimate partner violence.

<sup>18</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 13.

<sup>19</sup> Ibid at 14.

- 30.9% experienced emotional abuse;
- 8.9% experienced neglect; and
- 39.6% were exposed to domestic violence.

They also found that some types of child maltreatment were even more common in the 16-24 cohort, with young people more likely to experience emotional abuse (34.6% v 30.9%) and exposure to domestic violence (43.8% v 39.6%).<sup>20</sup> The prevalence of physical abuse was lower in the 16-24 cohort,<sup>21</sup> whereas the prevalence of sexual abuse was similar in both groups but with some differences in the class of perpetrators (prevalence of sexual abuse by parents or parent-like figures was lower in the 16-24 cohort but prevalence of sexual abuse by other adolescents had increased).<sup>22</sup>

## Impact of trauma

Donaldson's literature review for Te Pou o te Whakaaro Nui describes the neurobiological consequences of trauma:<sup>23</sup>

*[I]mpaired brain development, reduced cognitive (learning ability) and socio-emotional (social and emotional) skills, and lower language development (Leitch, 2017). Different types of abuse and neglect appear to target the sensory systems and pathways involved with processing the abuse and are associated with risks for different forms of neurobiological alterations (Teicher & Samson, 2016). For example, young adults exposed to emotionally abusive language in childhood, showed changes in brain regions involved in processing language and speech (Tomoda et al., 2011). Young adults who experienced ongoing, harsh physical punishment in childhood showed alterations to the cortical pathways involved with pain (Tomoda et al., 2009). Teicher and Samson (2016) therefore concluded it may not just be the total number of adverse events that matter, but also the type of maltreatment, given the different types of neurobiological changes.*

Hashemi et al's study exploring the health burden of cumulative and specific adverse childhood experiences in New Zealand using data from the 2019 New Zealand Family Violence Survey found that children's response to trauma can vary with many potential impacts having implications for their experience of justice problems:<sup>24</sup>

*It is well documented that, when children are exposed to a traumatic event, including violent crime, their response may vary. Some children become fearful. They may prefer to stay at home, and they may have trouble sleeping and concentrating in school. Some children exposed to violence start to resolve their own conflicts in a violent manner, especially if they don't have access to the support and guidance that they need to help them. Others can become desensitised to violence and the pain and distress of other people. Some retreat into a shell, avoiding people and the world around them. Children with long-term exposure to violence are at an increased risk of: behavioural, psychological and physical problems; academic failure; alcohol and substance use; adolescent anti-social behaviour; and adult criminality. When children repeat the violence, they have experienced themselves without suitable*

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<sup>20</sup> Ibid at 16.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid at 17-18.

<sup>23</sup> Donaldson, [Trauma-Informed Care: Literature Scan](#) at 29-30.

<sup>24</sup> Her Majesty's Inspectorate of Probation. (2021). [The experiences of black and mixed heritage boys in the youth justice system](#) at 20-21.



*and effective support and interventions, they can perpetuate a cycle of violence that continues through future generations.*

Historical and intergenerational trauma also has specific and significant impacts on tamariki and rangatahi Māori experience of justice issues as Pihama et al. explain:<sup>25</sup>

*It is noted that the ongoing acts of violence upon Māori are associated with colonial State violence of systemic racism; disparities in access to education and health care; denial and marginalisation of te reo, tikanga and mātauranga Māori; high rates of incarceration; and increasing removal of Māori children from their whānau. Reactions to the legacy of historical trauma and daily acts of oppression for Māori and Indigenous peoples manifest in multiple ways that culminate in both personal and interpersonal trauma responses, both individual and collective.*

Another recent study by the NHS for Scotland involving both victims and witnesses and justice leaders concluded that if experiences of trauma are not understood and responded to, people may struggle to fully take part in the justice process and can experience further distress and harm with the range of negative consequences for both the individual concerned and the wider pursuit of justice including:<sup>26</sup>

- *a lower quantity and quality of evidence being gathered*
- *justice workers and others thinking that a witness is not credible or reliable because of behaviour that actually stems from the impact of trauma*
- *witnesses dropping out of the justice process*
- *witnesses being exposed to reminders of harm they previously experienced, which can lead to them feeling as bad as when the trauma was happening (this is called re-traumatisation)*
- *reinforcement of self-blame and shame, with the witness's life and recovery from trauma being put "on hold".*

The impact of trauma on both the justice issues experienced by children and young people, and how it can operate as a barrier to accessing justice is discussed in more detail in the next two sections.

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<sup>25</sup> Pihama et al., [Historical trauma and whānau violence. Issues Paper 15](#) at 14.

<sup>26</sup> NHS for Scotland. (2023). [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses Executive Summary](#) at 5.



# Justice problems

## School exclusion

McKenna & Holtfreter describe how the experience of trauma can affect children and young people's experiences at school including disciplinary action:<sup>27</sup>

*The school environment may be especially difficult for students with trauma as they are less likely to complete homework, score lower on tests, fail at higher rates than their counterparts, have lower GPAs, are more likely to be suspended, and have lower graduation rates (Day et al., 2015; Novak, 2019; Wiest-Stevenson & Lee, 2016).*

*Similar to the justice system, educators may misinterpret trauma (Day et al., 2015; Wiest-Stevenson & Lee, 2016).*

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. McKenna and Holtfreter explain:<sup>28</sup>

*[T]he school environment can promote resiliency that can act as a protective factor across the lifespan. Schools can provide safety, supportive connections, and help students understand and manage their emotions, which is an important tool for lifelong, positive coping skills (Haight et al., 2016; Wilkins et al., 2014). They can also share information and collaborate with child welfare services, juvenile justice, and mental health services to improve the wellbeing of students.*

## Victimisation

Fanslow et al.'s population-based study cited above also considered subsequent experience of violence by intimate partners and non-partners in adulthood. They found a strong relationship between experiences of ACEs and later intimate partner violence:<sup>29</sup>

*Among those who reported ACE exposure, psychological and physical violence were the most common types of IPV experienced, followed by controlling behaviours. As the number of ACEs increased, the risk (adjusted odds ratio) of reporting all types of partner and non-partner violence during adulthood increased (Table 6). Compared to those with no ACE exposure, those with exposure to 4 or more ACEs were: 4.3 times more likely to report experience of controlling behaviour from an intimate partner (95 %CI; 3.27-5.76); 5.8 times more likely to report physical IPV (95 %CI; 4.42-7.60); 6.2 times more likely to report physical non-partner violence (95 % CI; 4.61-8.39), and 9.5 times more likely to report exposure to non-partner sexual violence (95 %CI; 5.77-15.72).*

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<sup>27</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>28</sup> McKenna & Holtfreter, Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness at 458.

<sup>29</sup> Fanslow et al., Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study at 12.

The authors suggested two possible explanations, the intergenerational transfer of violence through imitating or tolerating violence in adult relationships and pathways “such as fostering lowered self-opinion in relation to others and maladaptive beliefs about relationships”.<sup>30</sup>

## Involvement in criminal justice system

There is clear evidence that children and young people involved in the criminal justice system are very likely to have experienced trauma.<sup>31</sup> Trauma can be a root cause of offending behaviour making it relevant to culpability as well as suggesting that if a young person’s trauma related needs are met they will be less likely to reoffend. Experience of trauma can also have an impact on how children and young people behave during justice processes, as well as how they perceive the system.

Youth Court Judge Fitzgerald describes the connections between trauma and youth justice system involvement:<sup>32</sup>

*Many young people who come before the Court have been exposed to violence within the home. ... Emotional, psychological, physical and sexual abuse, as well as emotional and physical neglect, causes significant trauma for which ongoing support and coping strategies are required. So much more is now known about the impact that trauma has on the brain. Those affected by trauma are also more likely to come into contact with the welfare and justice systems where their needs and vulnerabilities often go undiagnosed and therefore untreated, or mis-diagnosed and mis-treated. Even where treatment is provided, the conventional forms alone (such as talk therapy and medication) are often insufficient to provide the full and lasting healing needed. Given the overwhelming numbers of traumatised young people appearing before the Court, the need for the Court, the professionals and agencies involved - and the processes followed - to be properly trauma-informed is absolutely critical.*

Malvaso et al's research involving 184 young people under youth justice supervision in the community and in custody in South Australia found high rates of ACEs in this population group:<sup>33</sup>

*Fewer than five young people reported zero ACEs, and 162 (88%) reported four or more. Over three-quarters (89%) experienced a combination of maltreatment and household dysfunction... ACEs experienced frequently ('often' or 'very often') included: emotional abuse (64% of young people), neglect (62%), family violence (46%), physical abuse (45%), bullying (44%), neighbourhood violence (39%), and sexual abuse (7%). Overall, 170 participants (92%) were recorded as having experienced at least one of these ACEs frequently.*

88% (n=146) of young people who completed valid Trauma Symptom Checklist for Children assessments also scored in the symptomatic range for at least one of the scales and their responses indicated clinically significant problems across a broad range of trauma symptom

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<sup>30</sup> Ibid at 13.

<sup>31</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 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>32</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 24.

<sup>33</sup> Malvaso et al., [Adverse childhood experiences and trauma among young people in the youth justice system](#) at 5.

domains.<sup>34</sup> Malvaso et al. concluded that both prevalence of ACEs, and levels of trauma symptomatology, substance use, and internalising and externalising behaviour were particularly high in this population.<sup>35</sup> They commented:<sup>36</sup>

*The most prevalent trauma symptom in this study was dissociation, and overt dissociation in particular. Dissociation items include derealisation, one's mind going blank, emotional numbing, pretending to be someone or somewhere else, daydreaming, memory problems and avoidance.*

It is easy to understand how these symptoms of trauma would affect participation in the criminal justice system process.

Wood also points to trauma-informed research which suggests some young people offend as attempts to resolve trauma symptomatology or to protect themselves from real or perceived harms meaning accountability models of justice are poor mechanisms from which to address the causes or symptomatology of serious trauma.<sup>37</sup> They explain:<sup>38</sup>

*Serious trauma presents problems for young people to be able to give account or be 'held to account' when the basis of their offending may be a result of living in a 'current threat' mode, when anti-social behaviours may be coping mechanisms, or when offending is not a bad decision to harm others but rather a reaction made by the young person to deflect or mitigate real or perceived harms. Trauma-related effects such as decreased empathy or remorse, significant distrust of adults and authority, emotional withdrawal or hyperarousal, and weak emotional affect also present challenges in getting to accountability.*

As a result, attempting to address trauma-related offending behaviour by appealing to accountability is unlikely to be effective and these coping mechanisms or strategies of trauma avoidance are likely to continue until the underlying causes of trauma are addressed.<sup>39</sup> Wood also explains that the experience of serious trauma can also affect young people's perceptions of fairness and respect:<sup>40</sup>

*[Y]oung people with serious trauma, particularly as a result of abuse and neglect, are often hypersensitive to anger, conflict or confrontation (Cohen, Mannarino & Deblinger, 2016). Even where conference environments may be 'safe' for young people and facilitated towards goals of respectful communication and conflict resolution, young people with serious trauma often view their world through a lens of constant or current threat to their safety and to avoiding situations that may trigger trauma symptoms.5 Research from Scheuerman and Matthews (2014: 870) has found high negative emotionality and low constraint (which are higher in trauma victims) predict lower experiences of procedural justice in young offenders, and has concluded 'the experience of [procedural justice] and shaming may not depend as much on how restorative justice programmes are implemented, but on how they are perceived'.*

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<sup>34</sup> Ibid at 7.

<sup>35</sup> Ibid at 12.

<sup>36</sup> Ibid.

<sup>37</sup> Wood, [The indecent demands of accountability: trauma, marginalisation and moral agency in youth restorative conferencing](#) at 170.

<sup>38</sup> Ibid at 182.

<sup>39</sup> Ibid at 175.

<sup>40</sup> Ibid.

Vaswani also explains how “[t]rauma can cause males to express a more stereotypical or ‘traditional’ form of masculinity” including “excessive exercise, overtly enacted heterosexuality, aggression, risk-taking and violence which, combined with trauma symptoms such as hyperarousal and hypervigilance that can result in the misinterpretation of social cues and provoke inappropriate hostile reactions, may result in offending behaviours and contact with the justice system.”<sup>41</sup> She also raises concerns that:<sup>42</sup>

*[T]he use of prison for people who have experienced trauma can be retraumatizing and expose people to new traumas such as the threat of violence or witnessing distress and self-harm. While many prisoners put on a front to survive the prison experience, the problem is particularly acute among male prisoners. ... Males in prison have been observed to be permanently vigilant to potential risk and threats to their masculinity, causing ongoing stress and anxiety, and the hypervigilance of trauma causes people to do the same. Prison masculinities can therefore create an added burden for those who are already vulnerable through trauma.*

## Civil justice problems

A recent study in the United States by Young & Billings investigated how a range of less-examined characteristics shape people’s chances of facing a civil justice problem including the experience of trauma using variables to indicate whether a person had experienced two types of traumatic events: being arrested, and experiencing domestic violence or sexual assault.<sup>43</sup> They found that survivors of either of these two trauma types experienced a greater likelihood of having an employment problem, a family structure problem, and a debt problem.<sup>44</sup> This included trauma experienced at any point in their lives, not necessarily recently, and these effects were independent of other factors such as gender or income level.<sup>45</sup>

The study did not include involve collecting qualitative data but study authors suggested some possible explanations for this relationship including the association between trauma and mental health whereby mental health problems can give rise to life conditions that make civil justice problems more likely.<sup>46</sup> Other explanations include the direct impact of criminal justice system involvement on employment, and legal issues connected with fleeing a domestic assault such as housing, employment, and custody issues.<sup>47</sup>

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<sup>41</sup> 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>42</sup> Ibid at 2.

<sup>43</sup> Young, K. M., & Billings, K. R. (2023). [An Intersectional Examination of U.S. Civil Justice Problems](#). *Utah Law Review*, 3, 487-543 at 501.

<sup>44</sup> Ibid at 532.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid at 534.

<sup>47</sup> Ibid at 535-536.

# Barriers

## Attitudinal Barriers

Borysik and Corry-Roake cite research that people who have experienced trauma “are more likely to incorrectly understand the emotions of others and assume other peoples’ intentions to be malevolent. They are also more likely to distrust authority, including the police”.<sup>48</sup> Their own research found that participants’ negative perceptions of the police could then have a detrimental effect on engagement with police incorrectly interpreting the actions of a traumatised person as aggression.<sup>49</sup>

*Participants’ accounts broadly suggested an inverse correlation between the participants’ perceptions of police services as a fair or helpful service and the number of interactions they had with police (including welfare, victim, and criminal justice responses). This negative perception of policing had serious ramifications for their cooperation with the police officers, particularly in high stress situations such as stop and search, and on arrest. ... Participants, especially men, reflected that “lack of cooperation” with police officers during arrest was frequently a sign of distress caused by unresolved trauma, but the police officers often interpreted it as a sign of aggression.*

Participants in the NHS for Scotland’s research with victims and witnesses who had experienced trauma also identified how they way justice system professionals treated them, particularly where they felt they were not being listened to or heard, could lead to disengagement with the system.<sup>50</sup>

## Structural / Systemic Barriers

Crenshaw et al’s research in relation to developmentally and trauma-sensitive courtrooms explains just how inappropriate the adversarial court process can be for those who have experienced trauma.<sup>51</sup>

*In courtroom testimony, safety and sensitivity to timing and pacing are not what drives the questioning process. In fact, the court process embraces aggressive argument, strategic and selective presentation of facts, and in the case of child witnesses tolerates in many instances the use of developmentally inappropriate, complex language, and repeated questions with subtle variations for the purpose of demonstrating inconsistencies in the verbalizations of young children. The assumption is that this hostile, tense, adversary context aids the truth-seeking process. This assumption does not seem credible in the face of current knowledge of child trauma. Judith Herman (2003), a child trauma authority, stated, “Indeed, if one set out intentionally to design a system for provoking symptoms of posttraumatic disorder, it might look very much like a court of law.*

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<sup>48</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>49</sup> Ibid.

<sup>50</sup> NHS for Scotland. (2021). [\*The Knowledge & Skills needed for a Trauma Informed Justice Workforce: What did Victims and Witnesses tell us?\*](#) at 29.

<sup>51</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.



Research in Aotearoa New Zealand in relation to child witnesses and witnesses in cases of sexual violence more generally, raises many of the same issues.<sup>52</sup> For example, in a research report commissioned by the Chief Victims' Advisor to the New Zealand Government, academic Dr Isabel Randall explains:<sup>53</sup>

*Young complainants are being questioned by a person in a significant position of power about their actions in relation to sexual abuse perpetrated against them. It does not take an expert to draw a logical connection between questioning that places responsibility on the victim, challenges their credibility, dismisses their responses and overtly accuses them of lying and the experiences of cross-examination by young people as humiliating, stressful, deeply upsetting. The way that young witnesses are being cross-examined fundamentally clashes with psychological understandings of what is known to be helpful to them following the experience of sexual violence. Being believed and heard are factors that can mediate the harm of experiencing sexual trauma whereas disbelief and other negative responses upon disclosure has been found to exacerbate the harm (Elliott & Carnes, 2001; Jacques-Tiura et al., 2010).*

Not only is such cross-examination harmful to the child or young person giving evidence, it can also negatively affect the accuracy of evidence obtained:<sup>54</sup>

*[T]he culture of cross-examination in Aotearoa has long been in conflict with a 'best evidence' approach for young witnesses. Leading, confusing and credibility challenging styles of questioning are known to be counter to best evidence (Andrews et al., 2015; Andrews & Lamb, 2017; Klemfuss et al., 2014; Zajac et al., 2003; Zajac & Cannan, 2009). The Benchmark initiative's evidence-based guidelines stress young sexual assault complainants may find accusations of lying distressing thus leading to loss of concentration, difficulty continuing with testimony and becoming erroneously compliant and suggestible (Henderson et al., 2018). However, trials as they currently stand are less about best evidence and more about advocacy and challenging evidence, using whatever means counsel have available that fall within the bounds of what is deemed as acceptable.*

There have been some improvements in practice including the introduction of sexual violence pilot courts. However, Randall et al.'s research with young witnesses who had given evidence in one of the two sexual violence pilot courts and their supportive caregivers found there was significant further room for improvement:<sup>55</sup>

*Their experiences ranged from challenging to extremely distressing and retraumatising, indicating that participation in sexual violence trials continues to be negative in its impact on young witnesses. Concerns expressed by participants in*

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<sup>52</sup> Randell, I., Seymour, F., Henderson, E. & Blackwell, S. (2018). The Experiences of Young Complainant Witnesses in Criminal Court Trials for Sexual Offences. *Psychiatry, Psychology and Law*, 25(3), 357-373; Randell, I., Seymour, F., McCann, C., Anderson, T. & Blackwell, S. (2020). [Young witnesses in New Zealand's Sexual Violence Pilot Courts](#). University of Auckland; 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; Randell, I., Seymour, F., McCann, C. & Blackwell, S. (2022). The experiences of young witnesses and caregivers in Aotearoa New Zealand's Sexual Violence Pilot Courts. *Psychiatry, Psychology and Law*, 29(1), 134-153.

<sup>53</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.

<sup>54</sup> Ibid at 34.

<sup>55</sup> Randell et al., The experiences of young witnesses and caregivers in Aotearoa New Zealand's Sexual Violence Pilot Courts at 148.

*the current study are remarkably similar to those raised by young witnesses and caregivers in research predating the pilot courts.*

Additional funding for court support for children and young people in sexual violence cases,<sup>56</sup> as well as other reforms to “give victims more rights and support in justice system”<sup>57</sup> have recently been announced. However, it is not clear that either of these announcements will make a significant difference to the questioning of child witnesses.

## Practical Barriers

Borysik and Corry-Roake’s research involving participatory workshops and interviews with young adults with experience of the youth justice system found that trauma of police custody could have an impact on young people’s ability to understand their rights or justice system processes.<sup>58</sup>

*[Y]oung adults routinely feel so disoriented and stressed in police custody that they did not understand the processes, their rights and obligations, the information given to them or requested from them. They subsequently pleaded guilty to simply speed up the process and leave the custody suite as soon as they could. This has a huge bearing on the procedures and fairness of our justice system, and it should be looked at as a priority by policing leaders.*

Participants also identified the impact of trauma on their ability to recount their experiences and how this was misinterpreted by the Police when assessing their credibility:<sup>59</sup>

*Others told us that due to trauma, or psychosis, they experience lapses in memory or recall and struggled to describe their experiences in a coherent way. They felt that the police interpreted this as an “inconsistent therefore incorrect” account, which only contributed to existing feelings of anxiety, and made them more likely to accept being charged with the offence, even if they did not commit it.*

The misinterpretation of trauma responses is also discussed above in the Attitudinal barriers section.

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<sup>56</sup> New Zealand Family Violence Clearinghouse. (2023). *Budget 2023 funding for family violence and sexual violence*. <https://nzfvc.org.nz/news/budget-2023-funding-family-violence-and-sexual-violence>

<sup>57</sup> New Zealand Government. (2023). *Practical changes give victims more rights and support in justice system*. <https://www.beehive.govt.nz/release/practical-changes-give-victims-more-rights-and-support-justice-system>

<sup>58</sup> Borysik & Corry-Roake, *The Knot: Lived experience perspectives on policing trauma, poverty and inequalities* at 9.

<sup>59</sup> Ibid at 30.



# Possible solutions

## Introduction

In this section I discuss some possible solutions or ways of addressing some of the barriers to access raised in the research and literature from Aotearoa New Zealand and overseas. It is not a complete analysis, nor an attempt to identify ways to resolve all the access to justice challenges experienced by children and young people who have experienced trauma.

## Trauma-informed practice

SAMHSA's concept of a trauma-informed approach is grounded in a set of four assumptions sometimes described as the Four "R"s:<sup>60</sup>

*A program, organization, or system that is trauma-informed **realizes** the widespread impact of trauma and understands potential paths for recovery; **recognizes** the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and **responds** by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively **resist re-traumatization**.*

SAMHSA also identify six principles of trauma-informed practice: safety; trust and transparency; peer support; collaboration and mutuality; empowerment, voice, and choice; and consideration of cultural, historical, and gender issues.<sup>61</sup>

The NHS for Scotland recently adapted SAMHSA's Four Rs to develop six aims of a trauma-informed justice system recognising that the primary roles of many justice professionals and aims of the justice process are evidential rather than recovery focussed, and subject to a range of evidential and other legal constraints:<sup>62</sup>

*Aim 1 "Understand the prevalence and impact of trauma on both witnesses and the workforce"*

*Aim 2 "Avoid re-traumatisation where at all possible."*

*Aim 3 "Support recovery from the impact of trauma where possible"*

*Aim 4 "Uphold the rights of witnesses affected by trauma to equal and effective participation in the legal process"*

*Aim 5: "Support resilience of the workforce and reduce the potential impact of vicarious trauma"*

*Aim 6: "Leadership and management of organisations and systems uphold these aims"*

Although this framework is focussed on the impact of trauma on witnesses, the NHS for Scotland's report describing the framework also acknowledges the prevalence of trauma exposure in those who appear as accused noting that it is outside the "remit of this framework to include the skills required to meet aims that go beyond the needs of witnesses".<sup>63</sup> They also note that much of the content relating to understanding and responding to the impact of trauma,

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<sup>60</sup> Substance Abuse and Mental Health Services Administration. (2014). [Concept of Trauma and Guidance for a Trauma-Informed Approach](#). HHS Publication No. (SMA) 14-4884 at 9.

<sup>61</sup> Ibid at 10.

<sup>62</sup> NHS for Scotland. (2023). [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses](#) at 17-18.

<sup>63</sup> Ibid at 11.

and trauma informed responses could also apply to accused persons.<sup>64</sup> In any event, this framework could be a useful starting point for the development of a framework for a trauma-informed justice system addressing all the needs of all those who come into contact with it.

## Trauma-informed legal services

There is limited research and literature in relation to trauma-informed practice and the legal profession in New Zealand and of that which does exist, the focus is largely on vicarious trauma.<sup>65</sup> However, in other jurisdictions there are much more detailed discussions and an increasing focus on the importance of trauma-informed legal practice. For example, the Law Council of Australia argues trauma-informed legal practice is relevant to a number of groups including children and young people at risk, particularly those in the youth justice and out of home care systems.<sup>66</sup> The Law Council also identifies other groups for whom trauma informed legal practice is relevant including Aboriginal and Torres Strait Islander people, people experiencing domestic violence, homeless people, LGBTI+ people, prisoners and detainees, and people with mental health conditions.<sup>67</sup> The Law Council of Australia also describe the key elements of trauma informed practice for lawyers:<sup>68</sup>

- avoiding any further harm to clients, including by referring them to immediate multi-disciplinary support, conducting appropriate interviews, and avoiding minimising/disbelieving victims' stories;
- using approaches which prioritise cultural healing and restore strength, dignity and self-determination to Aboriginal and Torres Strait Islander peoples;
- pursuing diversionary responses that target the causes of offending and are aimed at rehabilitation;
- undertaking training to understand the dynamics and impact of sexual assault and family violence, and the steps necessary to avoid further trauma;
- better recognising and responding to the effects of trauma amongst refugees; 330
- understanding the effects of trauma upon memory e.g. difficulty remembering relevant events in chronological order; and
- understanding and avoiding clients' likely triggers of further trauma.

A guide for lawyers in the United Kingdom developed by Youth Justice Legal Centre, Doughty Street Chambers and Just for Kids Law sets out ten basic principles of a trauma-informed approach to working with trauma-experienced children and young people in the criminal justice system:<sup>69</sup>

1. Build trust – Children and young people who have experienced trauma may think that adults won't keep them safe and may hurt them. They may also test adults to see if they will disappoint them the way that others have done in the past. This means that it is important for lawyers to be reliable and consistent to show children and young people that they can trust them.
2. Model positive relationships – Trauma experienced children and young people can expect new relationships to reinforce negative beliefs about themselves and others particularly in the context of interpersonal relationships. It is important to maintain appropriate boundaries, while being compassionate.

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<sup>64</sup> Ibid.

<sup>65</sup> See discussion below.

<sup>66</sup> Law Council of Australia. (2018). [The Justice Project: Final Report Part 2 Legal Services](#) at 48-49.

<sup>67</sup> Ibid at 48-49.

<sup>68</sup> Ibid at 50-51.

<sup>69</sup> Lambe, S. (2021). [#05 Trauma Informed Lawyering](#). Youth Justice Legal Centre; Doughty Street Chambers; Just for Kids Law; The Dawes Trust at 3-4.

3. Transparency – Transparency promotes trust and minimises the child’s or young adult’s feelings of powerlessness – a common trauma trigger as well as helping to distinguish your relationship from past traumatic or dysfunctional relationships. This includes lawyers explaining their role clearly and being honest about what they can and cannot achieve as well as being transparent about the legal process including confidentiality, the purpose of note-taking, and conversations with other parties.
4. Predictability – Predictability can help a traumatised client feel safe. Lawyers should let their client know what is going to happen going forward including any decisions they will need to make, upcoming appointments, hearings or meetings. It is also important for lawyers to be clear with the client about what they know and when a decision might be made.
5. Client control – Lawyers should ensure their client has an opportunity to be heard in decisions that affect them as this can counteract feelings of powerlessness as can letting them know they can ‘fire’ their lawyer and should hold them to account.
6. Ensure understanding – Lawyers should regularly check their client’s understanding of the issues at hand by asking them to explain back what they have told them.
7. Respect – Lawyers should explain to their client why they are asking for particular information (e.g. how it will help the lawyer fulfil their role) and respect their client’s choices about how much information they share with them.
8. Proactive support – Anticipate issues that may arise during the process and ask for their client’s consent to engage additional support where appropriate. It is also important for lawyers to be conscious that giving instructions or giving evidence can be very difficult for a young client, and ensure they have support where possible.
9. Patience – Lawyers should be aware that a traumatised client can initially respond negatively and it can take time to build connections, rapport and trust. Remain patient, present and available.
10. Environment – Lawyers should adapt their environment to promote safety e.g. sitting at a 45-degree angle to the client so they are not sitting directly in their line of sight, allow the client to sit near the door without they lawyer blocking the exit, minimise noise and adjust lighting. Provide materials for them to use while talking if needed e.g. pens and paper or age-appropriate toys.

The Guide also provides practical advice including in relation to identifying a traumatised client,<sup>70</sup> the impact of trauma on autobiographical memory and practical steps lawyers can take,<sup>71</sup> and how evidence of trauma can be used to support legal strategies including introducing evidence of trauma at different stages of a criminal case.<sup>72</sup> Another practice guide by the Youth Justice Legal Centre focusses on the specific needs of Black and minority ethnic children and young people who have experienced trauma. The author explains:<sup>73</sup>

*Lawyers need to be acutely aware of Black, Brown and Racialised children’s and young adults’ experiences of trauma and how interacting with the CJS is likely to be re-traumatising at every stage. For Black boys and young men in particular, knowledge of police brutality and discrimination will be a central point of trauma in police interviews, custody and interactions with police witnesses at court. Muslim clients are likely to routinely receive Islamophobic treatment in the CJS.<sup>54</sup> For Muslim child clients, this includes being subject to the discriminatory ‘Prevent’ duty at school,<sup>55</sup> their negative interactions with the police,<sup>56</sup> Islamophobic tropes used*

<sup>70</sup> Lambe, [#05 Trauma Informed Lawyering](#) at 7.

<sup>71</sup> Ibid at 7-8.

<sup>72</sup> Ibid at 9-17.

<sup>73</sup> Hasan, Z. (2022). [Fighting Racial Injustice Background, childhood, legal representation & trauma](#). Youth Justice Legal Centre; Just for Kids Law; the Transition to Adulthood Alliance at 24.

*by the police,<sup>57 58</sup> and their experiences of Islamophobia within wider society.<sup>59</sup> Practitioners must acknowledge this and support clients through these experiences, using a 'trauma-informed' approach, to mitigate against elevated distress and subsequent harm.*

The Law Society of Scotland now offers training in trauma-informed legal practice,<sup>74</sup> likely brought about through the advocacy efforts of lawyers such as Iain Smith and Melissa Rutherford who have worked to increase awareness of the impacts of trauma and adverse childhood experiences including through establishing the Scottish Trauma Aware Lawyers.<sup>75</sup> The Scottish Trauma Aware Lawyers have held a series of events to share their knowledge including education for law students<sup>76</sup> and a panel discussion on *Trauma Informed Law, ACE's, Justice, Education And Care Systems In Scotland*.<sup>77</sup>

Martin et al. have also written about what trauma-informed legal practice means in the context of family law proceedings in the Law Society of Scotland journal.<sup>78</sup> They reiterate many of the principles identified by the Youth Justice Legal Centre including the importance of trust, transparency, predictability / preparing the client, client control or empowerment together with some additional points: the importance of acknowledging distress, being mindful of how the adversarial court process can mirror previous (or current) experiences of abusive relationships and entrench conflict, and the need for self-care.<sup>79</sup>

Canadian lawyer Myrna McCallum also advocates for trauma informed legal practice including through her trauma informed lawyer podcast<sup>80</sup> which includes an interview with Iain Smith. McCallum has also collaborated with other trauma-informed law scholars to publish a book *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing*.<sup>81</sup> The American Bar Association website describes the book as a collection of:<sup>82</sup>

*[C]ases and situations with practice implications for other cases impacted by trauma, whether those cases and situations involve race, class, gender, different physical or mental abilities (or disability), sexual orientation or other diverse factors including the impact of developmental health issues, addiction, substance abuse, poverty, access to opportunities, community safety or belonging and more.*

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<sup>74</sup> Law Society of Scotland. (2023). *Trauma-Informed Lawyer Certification Course*. <https://www.lawscot.org.uk/news-and-events/events/trauma-informed-lawyer-certification-course/>

<sup>75</sup> See ACESupportHub. (n.d.). The revolutionary Iain Smith. *Inspiration from ACE Interrupters in Great Britain*. [https://issuu.com/acesupporthub/docs/inspiration\\_from\\_ace\\_interrupters\\_in\\_gb/s/10563296](https://issuu.com/acesupporthub/docs/inspiration_from_ace_interrupters_in_gb/s/10563296) & Zeedyk, S. (2018). When four ACEs is a bad hand. *Journal*, 63(6)

<https://www.lawscot.org.uk/members/journal/issues/vol-63-issue-06/when-four-aces-is-a-bad-hand/> Scottish trauma informed lawyers are also active on social media: <https://twitter.com/traumaawarelaw> and <https://www.facebook.com/groups/205259491087443/>

<sup>76</sup> For example see The University of Edinburgh. (2022). *Advocates for ACEs: ACEs for Law students*. <https://advocates-for-aces.ed.ac.uk/aces-for-law-students>

<sup>77</sup> Trauma Aware Lawyers. (2021). *Trauma Aware Lawyers: Trauma Informed Law, ACE's, Justice, Education And Care Systems In Scotland*. <https://www.youtube.com/watch?app=desktop&v=GS2GVwbheLY&feature=youtu.be>

<sup>78</sup> Martin, N., Woodhouse, A. & Burke, C. (2019). *Being trauma-informed – in practice*. *Journal*, 64(10)

<sup>79</sup> Ibid.

<sup>80</sup> McCallum, M. (2022). *The Trauma-Informed Lawyer*. <https://podcasts.apple.com/mx/podcast/the-trauma-informed-lawyer/id1514824294>

<sup>81</sup> Maki, H., Florestal, M., McCallum, M., & Wright, J.K. (2023). *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing*. American Bar Association.

<sup>82</sup> American Bar Association. (2023). *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing*. <https://www.americanbar.org/products/inv/book/430137593/>

I have not been able to order this book yet but the summary suggests it will be a valuable resource for lawyers.

## Trauma informed court practices

McKenna and Holtfreter have mapped out how SAMHSA's six principles of trauma-informed practice connect to other theories of justice as well as both current and proposed court practices (see **Table 2** below).<sup>83</sup>

**Table 2 Trauma-informed principles: Connecting theory to practice**

<b>Trauma informed principles</b>	<b>Theoretical connections</b>	<b>Current practices</b>	<b>Proposed practices</b>
Safety	Therapeutic jurisprudence Gender responsiveness	Youth justice School discipline Specialised courts	Protective orders Private testimonies Maintaining confidentiality Safety planning in lawyer-client conversations
Trust & transparency	Procedural justice Restorative justice	Youth justice Specialised courts	Explaining potential outcomes Validating client emotions Referrals and support options Providing reasoning behind probation and bail decisions Communicating desire for fairness
Peer support	Therapeutic jurisprudence Restorative justice	Youth justice Specialised courts	Open communication among staff Peer support for victims and defendants Peer mentors to navigate court process
Collaboration & mutuality	Procedural justice Restorative justice Gender responsiveness	Youth justice School discipline Specialised courts	Team based approach Monthly stakeholder meetings Collaborating with agencies to inform practices Referral services Implementing a "fact finder" role
Empowerment, voice & choice	Therapeutic jurisprudence Procedural justice Restorative justice Gender responsiveness	Youth justice Specialised courts	Opportunity for victims and defendants to speak Lawyers prepare clients to speak Judges work with defendants to prepare plans for change Behavioural contracts Public commitment

<sup>83</sup> McKenna & Holtfreter, Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness at 461.



			Defendants have opportunity to speak rather than lawyer
Cultural, historical & gender issues	Therapeutic jurisprudence Gender responsiveness	Youth justice School discipline Specialised courts	Understand how culture and identity relate to justice processes Define target behaviours specifically and clearly Reminders of court dates, avoid jargon Staff introductions to court involved individuals Understanding how trauma affects memory and retelling of events

The Substance Abuse and Mental Health Service Administration (SAMHSA) have also developed guidance in relation to the *Essential Components of Trauma-informed Judicial Practice*.<sup>84</sup> The guidance includes discussion of the importance of what judges say and do as well as the environment in which they do it:

- What You Say: Communication Counts – A judge’s words can potentially be hurtful or healing. Trauma-informed judicial practice recognizes the role that trauma may play in how an individual perceives what the judge says and how they say it.<sup>85</sup>
- What You Do: Court Processes and Procedures – Legal proceedings can be confusing to someone new to the criminal justice system. Simply giving court participants a clear explanation of what is going to happen can help alleviate their fears and reduce the possibility that they will disrupt courtroom proceedings.<sup>86</sup>
- How You Do It: The Courtroom Environment - Courtrooms can be intimidating and court practices can be shocking and dehumanising, even for individuals who have not experienced trauma e.g. being handcuffed or forced to appear in prison jumpsuits. Courtrooms frequently include many signs telling individuals what not to do which serve to intimidate and separate participants. Safety concerns can also arise when perpetrators and/or victims of their crimes are in attendance.<sup>87</sup>

Other trauma-sensitive practices include court facility dogs “to provide calm and comfort to vulnerable child witnesses when testifying”.<sup>88</sup> Court facility dogs are well trained to follow various commands which can also give children a sense of some control over a situation in which they otherwise feel powerless and uncertain.<sup>89</sup> Their training also means that they are able to learn when they need to avoid distracting the child. Another advantage is that the dogs do “not

<sup>84</sup> Substance Abuse and Mental Health Services Administration. (2013). [Essential Components of Trauma-Informed Judicial Practice](#).

<sup>85</sup> Ibid at 4. A table on this page sets out some common examples of comments a judge might make, how a trauma survivor might hear or perceive that comment, and a more trauma-informed way the judge could express their concern.

<sup>86</sup> Ibid at 5. A table on page six lists some common courtroom experiences, how a trauma survivor might respond to or perceive them, and concrete suggestions for providing a more trauma-informed experience.

<sup>87</sup> Ibid at 7. A table on page 8 identifies some aspects of the physical environment in a typical courtroom, how a trauma survivor might react to them, and how they could be adapted to be more trauma-informed.

<sup>88</sup> Crenshaw et al., Developmentally and Trauma-Sensitive Courtrooms at 787.

<sup>89</sup> Ibid at 789.

interfere with the Sixth Amendment rights that ensure that the accused as the right to confront face-to-face their accuser.”<sup>90</sup>

## Universal precautions

The idea of ‘Universal Precautions for Trauma’ draws from the concept of Universal Precautions taught in first aid classes which requires people to treat all blood and bodily waste as contaminated with a virus.<sup>91</sup> Jones explains:<sup>92</sup>

*When we examine the percentage of individuals in the justice system who have victimization histories, the need for Universal Precautions for Trauma becomes clear. According to Bucerius, Jones, et al. (2021), 97% of incarcerated women and 95% of incarcerated men experienced violent or sexual victimization in their lives, often in childhood and before their own involvement in the system as an offender. A significant amount of criminal offending, substance use, and antisocial behaviour is symptomatic as a result of trauma.*

The rationale behind universal precautions for trauma is that we should treat everyone in the criminal justice system as if they have experienced trauma given its prevalence. This rationale could also be applied to the Oranga Tamariki system and potentially other areas of the justice system.

Research in Scotland with victims and witnesses suggests an additional reasons for a universal approach – avoiding the need for those who have experienced trauma to share often very deeply personal information:<sup>93</sup>

*Crucially, one respondent suggested that victims should not feel compelled to have to introduce or re-tell previous victimisation or trauma experiences in order to provide context for justice professionals in the current case. Feeling that they needed to share this information to provide context could leave some feeling even more vulnerable or exposed and potentially re-traumatised by wider life experiences. An assumption that victims or witnesses may have previous victimisation or trauma histories should perhaps be in place among professionals to remind them to treat current incidents with increased sensitivity.*

This research related to adults but children and young people’s greater vulnerability arguably provides an additional justification.

## Tiers of knowledge and support

The other side to ‘Universal Precautions for Trauma’ is the argument that everyone involved in the justice system and related processes should have an understanding of trauma and its impacts as well as how to respond to those who have experienced trauma. However, while it may be easy to make a case universal trauma knowledge and training, resource limitations could act as a barrier in practice as discussed further in the training sections below. A potential

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<sup>90</sup> Crenshaw et al., Developmentally and Trauma-Sensitive Courtrooms at 787.

<sup>91</sup> Jones, D. (2021). [Universal precautions: A methodology for trauma-informed justice](#). *Journal of Community Safety and Well-Being*, 6 (3), 156–159 at 156-157.

<sup>92</sup> Ibid at 157.

<sup>93</sup> NHS for Scotland. (2021). [The Knowledge & Skills needed for a Trauma Informed Justice Workforce: What did Victims and Witnesses tell us?](#) at 8.



solution is the multi-level approach advocated for in the NHS for Scotland's Knowledge and Skills Framework for Working with Victims and Witnesses which includes three levels.<sup>94</sup>

- Trauma Informed: The foundational knowledge and skills required by all justice workers.<sup>95</sup>
- Trauma Skilled: Additional knowledge for anyone in direct contact with witnesses.<sup>96</sup>
- Trauma Enhanced: Further knowledge and skills required by professionals working in four areas: advocacy and support, evidence gathering, evidence presentation and interpretation, and leadership and management of systems.<sup>97</sup>

The framework reflects the idea that those who have greater contact with witnesses or their evidence will need more knowledge and skills than those who have less contact.<sup>98</sup>

## Addressing vicarious trauma

Another aspect of trauma in the justice or legal contexts is the impact of trauma on lawyers and other justice system professionals as James explains:<sup>99</sup>

*Lawyers may need to engage with clients and others who have been directly injured and traumatised, listen to graphic descriptions of violence, engage at length with traumatised people and analyse details of abuse and injuries for legal purposes. Every lawyer who works with traumatised clients is affected at some level in different ways, although often it may not be damaging or career limiting. In other cases, exposure to clients' trauma can lead to significant harm and life-changing effects.*

There are two projects underway in Aotearoa New Zealand considering these issues – one focussing on the experiences of criminal lawyers,<sup>100</sup> and the other looking more broadly at the “work-related distress experienced by New Zealand lawyers and judges as a result of indirect trauma”.<sup>101</sup> Both are currently in the research phase. Their findings and recommendations for better support and risk-mitigation strategies will no doubt be of interest and value to the legal profession.

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<sup>94</sup> NHS for Scotland. (2023). [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses Executive Summary](#) at 9.

<sup>95</sup> The knowledge required at this level is outlined in NHS for Scotland, [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses](#) at 28-40.

<sup>96</sup> See NHS for Scotland, [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses](#) at 41-85.

<sup>97</sup> The knowledge required at this level and for each area of practice is outlined in NHS for Scotland, [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses](#) at 86-184.

<sup>98</sup> NHS for Scotland, [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses Executive Summary](#) at 8.

<sup>99</sup> James, C. (2020). Towards trauma-informed legal practice: A review. *Psychiatry, Psychology and Law*, 27(2), 275–299 at 275.

<sup>100</sup> This project is called the Criminal Lawyers Experiences of Working with Potentially Traumatic Material and Emotion: The C-LEVEL Project. See Firesetting and Forensic Mental Health Lab. (n.d.). *Recent Projects*. <https://ffmhlab.wordpress.com/recent-projects/>

<sup>101</sup> Law in Distress. (2023). *The Project*. <https://lawindistress.co.nz/the-project/>

## Training for professionals

Leaders Unlocked, a group of young people in the United Kingdom with lived experience of the care and youth justice systems, recommends training for professionals around the trauma experienced by young people in care:<sup>102</sup>

*[P]articularly around trauma and how professionals can engage with young adults in care in a way that is not retraumatizing. Participants especially recommended that young adults who have experienced or are experiencing care are involved in the creation and facilitation of the training. This would enable professionals to learn from young adults and their experiences directly.*

Training around trauma and trauma-informed practice is consistently seen as important for all professionals interacting with both complainants and alleged offenders in the criminal justice system. For example, in her book on closing the justice gap for adult and child sexual assault Cossins argues for mandatory trauma training together with training in related issues including language development and disability:<sup>103</sup>

*[M]andatory training about the effects of trauma and trauma-informed systems and principles, as well as the triggers within an adversarial trial that could re-traumatise complainants is also required, not only of lawyers (solicitors, prosecutors and defence lawyers) who appear in sexual assault cases, but also all court staff within a court complex—from the security guards at court entrances, to judges, judges' associates and tipstiffs, sheriffs, courts reporters and so on. In addition, all judges and lawyers involved in sexual assault cases should be required to undergo training about child development and language development, as well as the cognitive and language capacities of differently aged complainants who may be suffering from the effects of trauma or living with particular disabilities.*

Trauma-informed training is particularly important for the police “in order to ensure that complainants participate in the criminal justice system rather than withdrawing”.<sup>104</sup> Trauma informed training also “enhances effective interviewing skills (Rich, 2019), with the aim of prioritizing victims’ comfort and safety, and in turn improving their working memory of the assault in a non-judgmental and empathic approach.”<sup>105</sup>

Jones argues that the fact that the vast majority of those in prison have experienced victimisation means that training for all frontline staff is also critical part of trauma-informed justice for alleged offenders.<sup>106</sup> They suggest training on the following topics:<sup>107</sup>

- Indigenous Historical Trauma: The history and impact of colonization on Indigenous peoples and its contemporary relevance in a justice context;
- Trauma 101: The different forms of trauma and their impacts;
- Adverse Childhood Experiences: An explanation that ACEs can result in actual injuries to the brain that can lead to developmental issues and negative behaviour;

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<sup>102</sup> Leaders Unlocked. (2020). [Young Adult Advisors on Criminal Justice: Hearing from young adults in the criminal justice system](#) at 24.

<sup>103</sup> Cossins, A. (2020). [Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial](#). Palgrave Macmillan at 598.

<sup>104</sup> Ibid at 39.

<sup>105</sup> Widanaralalage, B.K., Hine, B.A. Murphy, A.D., & Murji, K. (2022). “I Didn’t Feel I Was A Victim”: A Phenomenological Analysis of the Experiences of Male-on-male Survivors of Rape and Sexual Abuse, *Victims & Offenders*, 17(8), 1147-1172 at 1166.

<sup>106</sup> Jones, [Universal precautions: A methodology for trauma-informed justice](#) at 157.

<sup>107</sup> Ibid at 158.

- Victim–Offender Overlap: An explanation of common experiences of those involved in the justice system including victimization, trauma, homelessness, substance use disorder, and other contemporary issues;
- Procedural Justice: The impact of procedural justice including building legitimacy; and
- Police & Correctional Legitimacy: Why the concept of legitimacy matters and how it is achieved.

As with other areas of training, Jones suggests it is important that participants have an opportunity to hear from and interact with people with lived experience of the justice system so that they can develop a full understanding of what people experience in the system and identify and understand gaps.<sup>108</sup>

Research with justice system leaders in Scotland identified a series of training related challenges including investment in staff, staff confidence and experience, leadership, and monitoring.<sup>109</sup> For example, many justice system leaders pointed to difficulty finding time and resources to invest in staff development and training with prioritisation also presenting challenges: “[t]raining everyone too early or at different workforce tiers may result in wasted time/resources (as some staff may leave or disengage from the system), whereas focussing on only a limited number of staff or those at particular levels would leave the system exposed”.<sup>110</sup>

This study also recognised the training alone is not enough to create change in practice:<sup>111</sup>

*It is recognised that training alone is a necessary but not sufficient element in the implementation of new skills in practice. Just as critical is what happens after training in terms of opportunities to develop and apply new skills in practice, with adequate supervision or coaching support to sustain and refine these changes. Also important are feedback loops and systems that meaningfully evaluate the impact of training on the skills and practice of those trained, and the impact of those changes for the consequent experience of witnesses themselves. Without these, training in and of itself is likely to fail to effect any change in practice.*

This issue is discussed in more detail in *Working paper no. 15: Training for professionals*.

## Training for lawyers

### Legal education

As Katz and Haldar explain, clients often seek help from lawyers when they are highly vulnerable and emotional, and in areas of law such as family law, immigration, child protection, criminal law and others, clients need to share incredibly intimate and painful information including about traumatic experiences.<sup>112</sup> This means that law students who intend to work in these areas of practice:<sup>113</sup>

*[M]ust learn to recognize the effects these traumatic experiences may have on their clients' actions and behaviors. Further, law students must learn to recognize the effect that their clients' stories and hardships are having on their own advocacy and*

<sup>108</sup> Jones, [Universal precautions: A methodology for trauma-informed justice](#) at 158.

<sup>109</sup> NHS for Scotland. (2021). [The Knowledge & Skills needed for a Trauma Informed Justice Workforce: What did Justice Leaders tell us?](#) at 21-22.

<sup>110</sup> Ibid.

<sup>111</sup> NHS for Scotland, [Trauma informed justice: A knowledge and skills framework for working with victims and witnesses](#) at 22.

<sup>112</sup> Katz, S., & Haldar, D. (2016). [The pedagogy of trauma-informed lawyering](#). *Clinical Law Review*, 22(2), 359-394 at 361.

<sup>113</sup> Ibid at 362.

*lives as a whole. It is particularly crucial that we educate our law students about the effects of vicarious trauma and help them develop tools to manage its effects as they move through their clinical work, and ultimately into legal practice.*

Katz and Haldar suggest that rather than waiting until lawyers enter practice, law schools can and should teach trauma-informed lawyering, particularly in the law clinic setting as it is “particularly well-suited to teach trauma-informed lawyering because of the focus on reflective practice, and their capacity to teach law students important practice skills to take into their legal careers.”<sup>114</sup> Teaching law students about trauma-informed legal practice also encourages students to think critically about the legal system, as well as issues relating to procedural justice and true substantive justice.<sup>115</sup> It also reinforces the importance of client-centred legal practice.<sup>116</sup>

Smyth et al. are two legal clinicians/academics and a social psychologist who “developed and evaluated a trauma informed educational Module for law students working in clinical law settings with clients experiencing low income” because they had observed that “law students struggled to comprehend how their clients’ thoughts and behaviours could be psychosocial manifestations of trauma, and adapt their legal practice accordingly”.<sup>117</sup> They piloted the module on three occasions in three locations in Canada and invited attendees to participate in an evaluation involving the completion of pre and post-test qualitative surveys which assessed shifts in students’ beliefs and knowledge as a proxy for outcomes relating to increased competence in trauma informed practice.<sup>118</sup> They found that:<sup>119</sup>

*The post-test responses showed more patience and attentiveness to the time it would take to build a supportive relationship and were less concerned with keeping conversations narrowly focused on what they perceived as the relevant ‘legal’ issues. Students were more ready to empathize with the stress that clients experience as they navigate bureaucratic legal processes and indicated greater willingness to take the time to explain things or reschedule appointments at the client’s convenience. Finally, many students expressed a desire for more experience with hands-on and interactive training exercises to continue their learning of practical trauma informed methods to client interactions.*

Smyth et al. concluded that “even a truncated, three-hour training on trauma drawing on neurobiology has the potential to counter and disrupt client-blaming attitudes.”<sup>120</sup> This may be because the course took place relatively early in these future lawyers’ careers when they may be more amenable to change although the authors also note that they felt it was important that participants had some practice experience to reflect upon.

## Continuing professional development

Much as it is important for law students to receive training about trauma, this is also essential for practicing lawyers. As Cossins explains in the context of sexual assault trials, “it is clear that judges and lawyers need training about trauma symptoms and their impact on a complainant’s ability to give evidence, how to avoid re-traumatisation and how to manage the situation when

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<sup>114</sup> Ibid at 372-373.

<sup>115</sup> Ibid at 374.

<sup>116</sup> Ibid at 375.

<sup>117</sup> Smyth, J. Johnstone, D. & Rogan. J. (2021). [Trauma-Informed Lawyering In The Student Legal Clinic Setting: Increasing Competence In Trauma Informed Practice](#). *International Journal of Clinical Legal Education*. 28(1), 149-194 at 150.

<sup>118</sup> Ibid at 162.

<sup>119</sup> Ibid at 181.

<sup>120</sup> Ibid at 187.

a complainant is triggered.”<sup>121</sup> Cossins points to the English Inns of Court College of Advocacy training course for criminal law practitioners as an example of good practice.<sup>122</sup> This course, *Advocacy & The Vulnerable*, was designed “to ensure that all advocates, when dealing with children and vulnerable witnesses, understand the key principles behind the approach to, and questioning of, vulnerable people in the justice system, irrespective of the nature of the allegation, or the jurisdiction in which the advocate appears”.<sup>123</sup>

However, the need for training about trauma is not limited to those lawyers involved in sexual assault cases. As set out above, the Law Society of Scotland now offers a Trauma-Informed Lawyer Certification with the course description website describing both the breadth of its relevance, and the goals of this type of training both in terms of client engagement and preserving one’s own wellbeing:<sup>124</sup>

*This course is designed for all solicitors working with people, no matter their practice area, whether working in criminal law, family and child law, personal injury, succession and estate planning or conveyancing and beyond, and is suitable for all levels of expertise.*

*In becoming trauma-informed, you will learn to recognise the impact of trauma in those you work for and with, and to be able to practice in a way that does no further harm, supports recovery and is most effective and efficient for people affected by trauma. Just as importantly, you will understand the ways that you can adapt your approach to legal practice and communication skills to take account of the impact of trauma in order to work effectively with colleagues and clients, including minimising the risks of re-traumatisation while also preserving your own wellbeing against vicarious trauma.*

I am not aware of any trauma-focussed training for lawyers in Aotearoa New Zealand. However, there has been a series of Government funded professional development sessions that include some trauma related content:

- Questioning Vulnerable People - Part 2 in November 2020;<sup>125</sup>
- Family Violence Dynamics Forum in May 2021;<sup>126</sup>
- Family Violence Dynamics Forum Part 2 in November 2021;<sup>127</sup>
- Family Violence Forum in June 2022;<sup>128</sup> and

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<sup>121</sup> Cossins, [Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial](#) at 559-560.

<sup>122</sup> Ibid at 611-612.

<sup>123</sup> Inns of Court College of Advocacy. (n.d.). *Advocacy & The Vulnerable (Crime)*. <https://www.icca.ac.uk/post-qualification-training/cpd/advocacy-training/advocacy-the-vulnerable-crime/#:~:text=The%20A%26V%20course%20was%20designed,in%20which%20the%20advocate%20appears>.

<sup>124</sup> Law Society of Scotland. (2023). *Trauma-Informed Lawyer Certification Course*. <https://www.lawscot.org.uk/news-and-events/events/trauma-informed-lawyer-certification-course/>

<sup>125</sup> NZLS CLE Limited. (2020). *Questioning Vulnerable People - Part 2*. <https://www.lawyerseducation.co.nz/shop/Archives/2020+Archive/Forums+2020/21QVW.html> The objectives of this forum included increasing participants’ understanding of the reasons complainants and other witnesses in sexual violence cases may be vulnerable and ensuring their practice accords with the requirements of the Evidence Act.

<sup>126</sup> NZLS CLE Limited. (2021). *Family Violence Dynamics Forum*. <https://www.lawyerseducation.co.nz/shop/Archives/2021+Archive/Forums2021/21FVF.html>

<sup>127</sup> NZLS CLE Limited. (2021). *Family Violence Dynamics Forum Part 2*. <https://www.lawyerseducation.co.nz/shop/Archives/2021+Archive/Forums2021/22FVF2.html>

<sup>128</sup> NZLS CLE Limited. (2022). *Family Violence Forum*. <https://www.lawyerseducation.co.nz/shop/Archives/2022+Archive/Forums2022/22FVF.html>

- Sexual Violence Legislation Forum in November 2022.<sup>129</sup>

However, although each of these fora were valuable learning opportunities, they were specific to sexual and family violence law and none were specifically focussed on trauma. Attendance was also voluntary. It may be that the two research projects on vicarious trauma discussed above will lead to recommendations for further training.

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<sup>129</sup> NZLS CLE Limited (2022) *Sexual Violence Legislation Forum*.  
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