

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

Working paper No. 13 - Data, evidence and measuring change

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# Table of contents

Context.....	3
Data & evidence.....	4
Disaggregated data .....	5
Evidence about what works .....	6
Impact Assessments .....	8
Child Impact assessment.....	8
Justice impact assessment.....	10
Social impact assessment .....	11
Aboriginal Justice Impact Assessments .....	12
Monitoring and evaluation .....	14
Compliance with rights, legal standards, policies and procedures.....	14
Existing programmes and services .....	15
Evaluating new services or programmes .....	16
References.....	17

# Context

This working paper considers the role of data, evidence and measuring in closing the justice gap for children and young people in Aotearoa New Zealand. 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 reports and working papers are available at: <https://www.cypaccesstojusticenz.com/>

## Data & evidence

A lack of data, particularly data that is disaggregated by different demographic and experiential characteristics<sup>1</sup> is a considerable barrier to understanding children and young people in Aotearoa's experiences 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 all of the information I sought because this data either wasn't collected, wasn't collected consistently, or was stored in a different way.<sup>2</sup> I also identified lack of data as a particular barrier for some groups of children and young people including children and young people in care and with care experience,<sup>3</sup> disabled and neurodiverse children and young people,<sup>4</sup> tamariki and rangatahi Māori,<sup>5</sup> Pacific children and young people,<sup>6</sup> and in relation to intersectionally marginalised children and young people.<sup>7</sup>

The importance of data for access to justice is also clear from the international research and literature. For example, the data justice agenda developed by Pathfinders for Peaceful, Just and Inclusive Societies and the World Justice Project identifies three data priorities to strengthen people-centred justice:<sup>8</sup>

1. Understand the scope, nature, and impact of justice problems. We need to understand who has justice needs, what those needs are, where and when they are experienced, their underlying causes, and their impacts and costs in order to advance access to justice.
2. Design and deliver people-centred justice strategies. Justice strategies are often disconnected from the needs and capabilities of those facing justice problems. Justice actors need administrative and survey data to strengthen legal capability, prevent problems, and correct systemic injustices.
3. Measure what works, then learn and adapt. The justice sector lags behind other social sectors in evaluating what works. Effective and appropriate evaluation of access to justice efforts is key for adapting strategies, allocating resources, and advancing justice for all.

The following two sections set out some aspects of data and evidence that are particularly important to access to justice efforts.

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<sup>1</sup> Demographic characteristics include age, disability status, ethnicity, gender and sexual identity, and socio-economic status. Experiential characteristics include care experience and the experience of trauma.

<sup>2</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](#). My difficulty obtaining data in relation to children and young people generally is discussed further in *Access to justice for children and young people in Aotearoa New Zealand: Part 2: Justice problems and barriers for all children and young people* at 73-74.

<sup>3</sup> See *Working paper no. 1: Children and young people in care or with care experience*.

<sup>4</sup> See *Working paper no. 2: Disabled and neurodiverse children and young people*.

<sup>5</sup> See *Working paper no. 3: Tamariki and rangatahi Māori*.

<sup>6</sup> See *Working paper no. 4: Pacific children and young people*.

<sup>7</sup> See *Working paper no 10: Intersectionality*.

<sup>8</sup> Chapman, P., Alabab-Moser, J., Frerichs, E., González, K., Hulseman, K.G., Islam, S., Jandl, M., de Langen, M., Long, S., Namoradze, Z., & Ponce, A. (2021). [Grasping the Justice Gap: Opportunities and Challenges for People-Centered Justice Data. Working Paper](#). Pathfinders for Peaceful, Just and Inclusive Societies & World Justice Project at 11.

## Disaggregated data

The research and literature highlights a number of benefits of disaggregated data:<sup>9</sup>

- It can lead to dialogue between those concerned with the issue including by providing an evidence base to advocate for change;
- It enables us to understand the problem including its scale including by revealing differences between and within population groups; and
- Having a better understanding of the problem then enables us to develop informed solutions or responses that are targeted to the problem and its causes.

As Davidson et al. argue, age disaggregated data is a critical part of understanding children and young people's experiences in the justice system:<sup>10</sup>

*Evidence is integral to ensuring justice for children because it helps keep reforms on track by directing continuous improvements of effective policy interventions and action. Data informs this evidence....Age disaggregated evidence and data are essential...children need to be specifically included and identified in quantitative and qualitative evidence and data gathering to improve justice for all, and the commitment to address the furthest behind first needs a clear focus on the most disadvantaged and least visible and most at risk.<sup>53</sup> ...Those on the margins of society – overwhelmingly the position of children – are virtually invisible in the creation and operation of justice systems.*

This includes a need for both quantitative and qualitative data and “where datasets do not include this age group, explicit efforts should be made to identify alternative data sources that could provide proxy measures that enable children as a demographic to be considered in the analysis.”<sup>11</sup> As Davidson et al. note, legal needs and victimization surveys generally are not designed to capture children's justice distinct needs.<sup>12</sup> This is certainly true in New Zealand, with both the Ministry of Justice's Legal Needs surveys and the New Zealand Crime and Victims Survey failing to include children under 15.<sup>13</sup>

Davidson et al. also identify the need for data that takes into account the intersectionality of children's experiences in order to understand structural injustices and “inform more sharply focused and more effective policies and programmes”.<sup>14</sup> It is also important to collect data in relation to multiple points of system contact and/or at different stages of justice related processes in order to identify where disparities occur e.g. “from the likelihood of police contact and detention, to charges filed (or cases dismissed), and ultimately the harshness of punishments meted out to white youth vs. youth of color.”<sup>15</sup> However, much as it is important to collect this data, we also need to be conscious of what the data does and does not show. For example, as Boswell argues, “while recidivism as a metric purports to capture individual

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<sup>9</sup> Govender, K. (2021). [Equity is safer: Human rights considerations for policing reform in British Columbia](#). British Columbia's Office of the Human Rights Commissioner at 31; Vermeire, D. T., Merluzzi, N. & Ridolfi, L. J. (n.d.). [Balancing the Scales of Justice: An Exploration into How Lack of Education, Employment, and Housing Opportunities Contribute to Disparities in the Criminal Justice System](#). ACLU of Northern California & the W. Haywood Burns Institute at iii; Chapman et al., [Grasping the Justice Gap: Opportunities and Challenges for People-Centered Justice Data. Working Paper](#) at 9.

<sup>10</sup> Davidson, J.; Foussard, C.; Goudie, A.; Hope, K.; Shields, S. (2022). [Justice for Children: Agenda for Change](#). Glasgow: University of Strathclyde at 10-11.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> See [Access to justice for children and young people in Aotearoa New Zealand: Part 2: Justice problems and barriers for all children and young people](#).

<sup>14</sup> Davidson et al., [Justice for Children: Agenda for Change](#) at 10.

<sup>15</sup> Rowner, J. (2021). [Racial Disparities in Youth Incarceration Persist](#). The Sentencing Project at 11-12.

actions—whether someone was arrested, prosecuted, etc.—in reality it is primarily a measurement of institutional decisions: police deployment and arrest policies, data collection, prosecutorial discretion, city-wide crime policies, and so on.”<sup>16</sup> Another common issue is that low reporting rates mean that police offence data is inherently skewed.<sup>17</sup> The New Zealand Ministry of Education is very careful to make this point in relation to disciplinary disparities.<sup>18</sup>

It is also important that we are aware of the risks associated with the collection and use of demographic data. Govender identifies the following potential risks or factors to consider:<sup>19</sup>

- Collection of data in relation to indigenous groups may violate their data sovereignty if they do not own and control it.
- Demographic data can reinforce prejudice against marginalised groups, for example if a particular group has a disproportionately high offending rate this could lead to stereotyping of that group.
- Data can also be presented in a way that reinforces the idea that individuals and groups are responsible for their own marginalisation by portraying them as lacking in some way instead of revealing the process of marginalisation. For example, child poverty rates being higher in a particular demographic group.
- Although disaggregated data is usually de-identified, advances in technology could create the risk of re-identification raising privacy concerns.
- Researching social inequities without taking follow up action to address them can cause harm.

## Evidence about what works

As Toy-Cronin et al. argue in *Wayfinding for Civil Justice: Draft National Strategy*, “justice reform needs to be based on evidence of what works and what does not work”.<sup>20</sup> However, we currently have limited evidence of this and as a result, the draft national strategy includes a waypoint focussed on building the evidence base needed to guide reform and an indicator for measuring progress.<sup>21</sup> Toy-Cronin et al. also emphasise the need to pay close attention to “the methodologies and methods being employed, including an emphasis on Kaupapa Māori and inclusive research methods such as co-design and other participatory models. Weight should be given to qualitative research as well as quantitative.” Proposed actions include:<sup>22</sup>

- *Invest in capturing data that can be used to monitor and evaluate dispute resolution schemes and legal assistance delivery, including longitudinal data.*
- *Invest in research that explores and supports the decolonisation of our civil justice system.*
- *Share data about successful dispute resolution schemes and how these can be applied in other settings, including online schemes and pilots.*

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<sup>16</sup> Boswell, S. (2022). [They Can't Quit Recidivism: A New Vision for Evaluating Community Safety Work](#). Center for Court Innovation at 3-4.

<sup>17</sup> Ibid at 3.

<sup>18</sup> See Bourke, R., Butler, P. & O'Neill, J. (2021). [Children With Additional Needs](#). Massey University at 4, 34.

<sup>19</sup> Govender, [Equity is safer: Human rights considerations for policing reform in British Columbia](#) at 33.

<sup>20</sup> Toy-Cronin, B., Asher, R., Mita W.P., O'Brien, G. & Waapu, A. (2022). [Wayfinding for Civil Justice: Draft National Strategy](#). Ministry of Justice at 7.

<sup>21</sup> Ibid at 11. The indicator is increases in “knowledge of how the system is currently operating, including mechanisms to monitor and provision for evaluation” and “pathways to share knowledge about the system”.

<sup>22</sup> Toy-Cronin et al., [Wayfinding for Civil Justice: Draft National Strategy](#) at 12.

- *Create or strengthen institutions that can analyse and share data about dispute resolution schemes to increase system-wide learning and knowledge.*
- *Develop a register of work that is continually updated to provide a high-level overview, encourage collaboration, and reduce duplication.*
- *Develop an economic analysis of the impact of a legal problem on society via productivity and increased use of other services such as health services (mental wellbeing as one aspect).*

While I agree with these actions, albeit extended beyond the civil justice system, as Davidson et al. argue, “[o]nly an evidence and data framework that has a focus on children will enable tracking progress toward the national vision to advance justice for children... children need to be specifically included and identified in quantitative and qualitative evidence and data gathering to improve justice for all”.<sup>23</sup>

The Access to Justice Research Hub recently launched by the Law and Justice Foundation of New South Wales is an example of a register of work as suggested by Toy-Cronin et al.<sup>24</sup> The research hub groups research and evidence into six key areas:<sup>25</sup>

- Understanding legal needs;
- Locating legal needs;
- Identifying what works;
- Harnessing service data;
- Learning from clients; and
- Assessing impact.

Children and young people are not identified as one of the groups most vulnerable to legal problems,<sup>26</sup> but there is a collection of resources in relation to young people.<sup>27</sup>

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<sup>23</sup> Davidson et al., *Justice for Children: Agenda for Change* at 10-11.

<sup>24</sup> Law and Justice Foundation of New South Wales. (2023). *Access to justice research hub*. <https://ljfresearchhub.au/>

<sup>25</sup> Ibid.

<sup>26</sup> Law and Justice Foundation of New South Wales. (2023). *Understanding legal needs*. <https://ljfresearchhub.au/identifying-legal-needs/> The groups identified are people with a disability, single parents, unemployed people, people living in social housing, and business owners.

<sup>27</sup> Law and Justice Foundation of New South Wales. (2023). *Resource category: young people*. [https://ljfresearchhub.au/resource\\_category/young-people/](https://ljfresearchhub.au/resource_category/young-people/)



# Impact Assessments

Impact assessments are “a structured, evidence-based process for considering how a proposal or measure will affect a defined group of people”.<sup>28</sup> Various forms of impact assessments are identified in the literature including child impact assessments (or child rights impact assessments), justice impact assessments, social impact assessments, and aboriginal justice impact assessments. Each is discussed briefly below followed by my recommendations for their future use.

## Child Impact assessment

Child impact assessments are a feature of a number of jurisdictions although many guidance documents focus on children’s rights rather than wellbeing.<sup>29</sup> The United Nations Children’s Fund guidelines set out a series of seven steps:<sup>30</sup>

### *Step 1: Defining the problem and objectives of assessment*

- *Initial screening*
- *Context analysis & stakeholder mapping*
- *Core questions*

### *Step 2: Ensuring stakeholder and child participation*

### *Step 3: Outlining alternative policy options*

### *Step 4: Assessing the impact of identified policy options*

- *Stage 1: General screening*
- *Stage 2: Detailed compatibility analysis*
- *Stage 3: Thematic review*

### *Step 5: Comparing options and proposing scenarios*

- *Synthesis from steps 3 & 4*

### *Step 6: Communicating findings and recommendations*

### *Step 7: Ensuring follow-up, linking with monitoring and evaluation*

The New Zealand model is based on the Scottish Government’s *Child Rights and Wellbeing Impact Assessment (CRWIA)*.<sup>31</sup> Although the title of the Scottish assessment refers to child

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<sup>28</sup> Payne, L. (2020). [Common Framework of Reference on Child Rights Impact Assessment: A Guide on How to carry out CRIA](#). European Network of Ombudspersons for Children at 3.

<sup>29</sup> See Mukherjee, S., Pothong, K., & Livingstone, S. (2021). [Child Rights Impact Assessment: A tool to realise child rights in the digital environment](#). 5Rights Foundation at 14-19 for a summary of developments internationally and in the United Kingdom. See also the various guidance documents explaining how to undertake one including Payne, [Common Framework of Reference on Child Rights Impact Assessment: A Guide on How to carry out CRIA](#); Scottish Government. (2021). [Child Rights and Wellbeing Impact Assessment \(CRWIA\): External Guidance](#). Scottish Government; United Nations Children’s Fund. (2014). [EU-UNICEF Child Rights Toolkit: Integrating Child Rights in Development Cooperation: Module 5 Child Impact Assessments](#). UNICEF.

<sup>30</sup> United Nations Children’s Fund, [EU-UNICEF Child Rights Toolkit: Integrating Child Rights in Development Cooperation: Module 5 Child Impact Assessments](#) at 11.

<sup>31</sup> Ministry of Social Development. (2018). [Improving the wellbeing of children and young people in New Zealand: Child Impact Assessment Tool](#) at 1.



rights, in practice assessments tended to have little engagement with children's rights as a recent paper by McCall Smith explains:<sup>32</sup>

*Both 2019 studies demonstrated that practical engagement with the UNCRC by the CRWIA assessors was very limited. Conducting CRWIA without substantive training in or advanced understanding of the UNCRC is problematic for a number of intertwined reasons. As de Beco notes, civil servants 'can play a dynamic role in adapting their State's behaviour' as 'governmental norm sponsors'.<sup>62</sup> To fulfil this role, however, they must understand the basis of the norms and how to apply them. Misidentification of UNCRC articles and a failure to recognise the interrelated and indivisible nature of children's rights offered by the UNCRC impacts every stage of the CRWIA process, from the identification of appropriate children's rights indicators to consultation through participation to the formulation of recommendations based on the evidence gathered.<sup>63</sup>*

McCall Smith also raised concerns about the lack of children's participation in the CRWIA process with officials tending to consult experts in the field, including individuals or civil society, rather than involving children directly. A 2021 webinar that featured the Scottish Children's Commissioner also identified the Government's failure to use child impact assessments during the Covid pandemic.<sup>33</sup> The Scottish Government have now updated the assessment template<sup>34</sup> and guidance on CRWIA with further work underway on children's rights training and a further review to come to bring the CRWIA in line with future legislation to incorporate the UNCRC into Scottish law.<sup>35</sup> More generally, the Scottish Government has now moved away from the wellbeing approach to focus on the rights.<sup>36</sup>

In my view, the New Zealand Government's child impact assessment template should also be reviewed and updated including to reflect the changes made to the Scottish model upon which it was based. The UN Committee on the Rights of the Child has also recommended that the Government make "compulsory the application of the Child Impact Assessment Tool in the development of policy and legislation affecting children, ensuring that government officials, legislators, and non-government service providers are trained on its use".<sup>37</sup> The UN Committee also made recommendations in relation to strengthening training on the UNCRC as discussed further in [cross reference].<sup>38</sup>

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<sup>32</sup> McCall-Smith, K. (2021). Entrenching children's participation through UNCRC Incorporation in Scotland, *The International Journal of Human Rights*. <https://doi.org/10.1080/13642987.2021.1969920> at 13-14.

<sup>33</sup> Diplomacy Training Programme. (2021). Applying the CRC to policy and practice - the Scottish Experience webinar 9 Feb 2021. *Youtube*. <https://www.youtube.com/watch?v=tVJSjmAdC-E&t=2s>

<sup>34</sup> Scottish Government. (2021). *Children's Rights and Wellbeing Impact Assessment guidance*. <https://www.gov.scot/publications/childrens-rights-wellbeing-impact-assessment-guidance/documents/>

<sup>35</sup> Scottish Government, *Child Rights and Wellbeing Impact Assessment (CRWIA): External Guidance* at 2.

<sup>36</sup> The Scottish Parliament having now passed legislation incorporating the CRC into Scots law. However, although the UNCRC Bill was passed unanimously by the Scottish Parliament on 16 March 2021, but could not be made law because of a legal challenge brought by UK Government. The Supreme Court ruled that certain parts of the Bill fall outwith the competence of the Scottish Parliament and the Scottish Government is now considering the judgment and how to take the work forward. See: Scottish Government. (n.d.). *United Nations Convention on the Rights of the Child implementation: introductory guidance*. <https://www.gov.scot/publications/implementing-united-nations-convention-rights-child-introductory-guidance/pages/5/>

<sup>37</sup> 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 at 2.

<sup>38</sup> *Ibid*.

The United Nations Secretary General's draft guidance note on child rights mainstreaming (currently under consultation) reinforces these specific recommendations on the use of child impact assessments:<sup>39</sup>

*The CRC requires that the best interests of the child be a primary consideration in all decisions and actions likely to affect children. ... This requirement demands a continuous process of child rights impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child rights impact evaluation (evaluating the actual impact), built into all relevant processes (both external and internal) from the outset. It also requires that all due diligence processes include full consideration for child rights, as well as child safeguarding.*

The draft guidance note goes on to note that child rights impact assessments can be conducted either separately or as part of a human rights or social impact assessment and that impact assessments should be followed by “child rights impact evaluations to evaluate the actual impact afterwards” and “include an analysis of intersecting vulnerabilities affecting children.”<sup>40</sup>

In my view, it would be timely to review the methodology and use of Child Impact Assessments against international best practice including to increase the focus on children's rights. Child impact assessments should also be made compulsory and be supported by training on both children's rights and the assessment process.

## Justice impact assessments

Other forms of impact assessments include justice impact assessments and social impact assessments. Justice impact assessments consider:<sup>41</sup>

*[H]ow different law, policy and funding levers intersect to either combat or exacerbate disadvantage through the justice system. This test would help to better account for the downstream impacts of new laws and policies on the justice system, ensuring its smoother operation, particularly in assisting disadvantaged groups.*

The Law Council of Australia describes how changes to laws and policies can have a range of impacts on already stretched legal assistance services as well as on courts and tribunals, “contributing to strains on court resources, lengthy delays and increases in the time people are held on remand” which in turn results in “pressures on other areas of the justice system – for example, overcrowding and expenditure blow-outs in prisons.”<sup>42</sup> There is a risk that these impacts will result in unanticipated costs if they are not specifically considered during the law and policy making process.<sup>43</sup> The United Kingdom Government's guidance on justice impact assessments limits them to policy proposals from other government departments with the goal being to “find the best way of achieving their policy aims whilst minimising the impact on the justice system” with an apparent focus on any additional costs resulting from any impacts on the justice system and how they will be funded.<sup>44</sup>

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<sup>39</sup> United Nations Secretary-General. (2023). [Guidance Note of the Secretary-General on Child Rights Mainstreaming - Draft](#). United Nations at 3.

<sup>40</sup> Ibid at 7.

<sup>41</sup> Law Council of Australia. (2018). [The Justice Project: Final Report Part 2 Governments and Policymakers](#) at 14.

<sup>42</sup> Ibid at 14.

<sup>43</sup> Law Council of Australia. (2013). [Policy Statement: Justice Impact Assessments](#) at 2. This policy statement contains further information on justice impact assessments and where they are being used.

<sup>44</sup> Ministry of Justice. (2018). [Justice Impact Test Guidance](#) at 4.

While I can certainly understand the rationale for the United Kingdom’s approach, I prefer the slightly broader focus suggested by the OECD which also includes access to legal assistance:<sup>45</sup>

*[T]he types and volumes of legal inquiries, disputes and legal needs; access to legal assistance and other justice services (e.g. alternative dispute resolution processes); the resources or workload of courts or quasi-judicial bodies; and the cost of, and access to, criminal and civil jurisdictions, or the justice system as a whole.*

The OECD recommends that justice impact assessments be integrated into the early stages of this process, possibly as part of the broader regulatory impact assessment process, in order to promote evidence based decision making.<sup>46</sup>

## Social impact assessments

While there is value in assessing impact on the justice system, it is also important to assess the impact of any new law or policy on justice itself i.e. whether the proposal has any impact on whether society is fair and just. This sort of assessment is generally described as a social impact assessment. As the Law Council of Australia explains:<sup>47</sup>

*[A] wide range of laws, policies and practices have been identified at the Commonwealth, state and territory levels which disproportionately impact upon different disadvantaged groups, entrenching and compounding their disadvantage. Perceptions amongst disadvantaged groups that the law treats them unjustly are also likely to further undermine their trust of the justice system, and to weaken the rule of law within the Australian community.*

As a result, many submitters argued that “it was not only the effects of new laws and policies upon the justice system which should be more clearly and transparently considered in future, but also their social impact.”<sup>48</sup>

In Aotearoa New Zealand Regulatory Impact Assessments do require officials to consider the impact of options being considered including on different groups of people. For example, Treasury guidance on best practice impact assessments states:<sup>49</sup>

*The incidence of the impacts of each option also needs to be assessed, that is, what would happen as a result of each option and who would be affected. While it may be appropriate to consider ‘who’ before ‘what’ or ‘how’, both the impacts and their incidence should be identified before the individual impacts are valued to determine net-benefits. ...The different types of people and groups relevant to the analysis will vary depending on the options being considered.*

However, Treasury guidance does not specifically require consideration of whether the proposal (or options) has any differential impact on particular groups and/or whether it has an impact on existing inequities etc. etc. Overall, the language is more focussed on commercial impacts than social ones for example, the guidance notes that “[a]ssessing the impact of options on different parties should consider the competition effects”.

In order to understand how a regulatory impact assessment process operates in practice I reviewed a 2022 regulatory impact assessment *Regulatory Impact Statement: Improving*

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<sup>45</sup> OECD. (2021). [Good Practice Principles for People-centred Justice](#) at 10.

<sup>46</sup> Ibid.

<sup>47</sup> Law Council of Australia, [The Justice Project: Final Report Part 2 Governments and Policymakers](#) at 26.

<sup>48</sup> Ibid.

<sup>49</sup> The Treasury. (2017). [Guidance Note: Best Practice Impact Analysis](#). New Zealand Government at 14.

access to legal assistance for low income New Zealanders.<sup>50</sup> The most obvious issue arising was that this Regulatory Impact Statement was completed after funding was allocated making it an ex post facto justification / tick box exercise with little or no practical effect.<sup>51</sup> In terms of its consideration of the potential impact of the decision, the assessment noted that policy work had not been done on the alternative options again meaning that there was not a real comparison.<sup>52</sup> Another key issue in terms of assessing the impact of the chosen option on different groups of people is that key demographic data is not collected as part of a legal aid application.<sup>53</sup> Another recent example of a regulatory impact assessment is the *Supplementary Analysis Report: Incitement of Hatred Amending the Human Rights Act 1993 to include ground of religious belief*.<sup>54</sup> This report also identifies the lack of data in relation to the problem under consideration as a limitation.<sup>55</sup>

## Aboriginal Justice Impact Assessments

Several submitters to the Law Council of Australia Justice Project called for Aboriginal Justice Impact Assessments for example:<sup>56</sup>

*The National Congress of Australia's First Peoples supported calls for the implementation of Aboriginal Justice Impact Assessments in all areas of government policy, so that the effects of reforms upon Aboriginal and Torres Strait Islander peoples are properly considered.208 In doing so, it highlighted that the causes of crime and over-incarceration of Aboriginal and Torres Strait Islander peoples were inextricably linked to other policy areas.*

Several American states have adopted 'minority impact statements' which consider the impacts of law and order proposals on minority populations including whether and how they might exacerbate existing disparities.<sup>57</sup> Rowner explains how a form of minority impact assessments, racial impact assessments, could be used to predict potential impacts of changes to the law:<sup>58</sup>

*Racial impact statements on raise-the-age legislation would show how many youth of different demographics would be moved from the adult criminal legal system to the youth justice system. Racial impact statements would predict how any decision matrix (i.e., objective measures to dismiss charges, to detain and to commit) might impact disparities. For example, risk assessment instruments that are often used to assess whether or not to detain a youth or release a youth from custody have been identified as measures that potentially exacerbate disparities if the underlying formula uses inputs such as single parenthood<sup>33</sup> or employment<sup>34</sup> that also have sharp racial and ethnic disparities. Racial impact statements could analyze and demonstrate such potentially differential impacts on youth of color prior to the implementation of policies and practices - especially those that appear to be race neutral on their face but actually operate within a highly racialized context.*

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<sup>50</sup> Ministry of Justice. (2022). [Regulatory Impact Statement: Improving access to legal assistance for low income New Zealanders](#).

<sup>51</sup> Ibid at 2.

<sup>52</sup> Ibid at 13-14.

<sup>53</sup> Ibid at 2.

<sup>54</sup> Ministry of Justice. (2022). [Supplementary Analysis Report: Incitement of Hatred Amending the Human Rights Act 1993 to include ground of religious belief](#).

<sup>55</sup> Ibid at 2.

<sup>56</sup> Law Council of Australia, [The Justice Project: Final Report Part 2 Governments and Policymakers](#) at 36.

<sup>57</sup> Ibid at 37.

<sup>58</sup> Rowner, [Racial Disparities in Youth Incarceration Persist](#) at 11.

Given the racial disparities across a range of areas including disciplinary decisions in schools and involvement in the child protection and youth justice systems, such a tool could be of considerable value in Aotearoa New Zealand.



# Monitoring and evaluation

## Compliance with rights, legal standards, policies and procedures

Monitoring is closely linked to accountability as the Scottish Human Rights Commission explains: “accountability [is] about monitoring human rights standards and ensuring that appropriate mechanisms are available to secure human rights.”<sup>59</sup> Policies and procedures, for example anti-harassment policies and against other prejudicial behaviour, also need to include safe and accessible monitoring and reporting systems to ensure prohibited behaviour is not tolerated and policies are complied with.<sup>60</sup>

One of the Chief Victims Advisor to the New Zealand Government’s comprehensive recommendations for change to better support victims included establishing an independent body that can “monitor the criminal justice system and develop a continuous system improvement feedback loop to provide impetus for ongoing system improvements”.<sup>61</sup> An issues paper prepared for the Chief Victims Advisor to Government on the implementation of the Victims Rights Act 2002 also identified the lack of monitoring<sup>62</sup> and made recommendations for change including the creation of an “independent entity or mechanism with responsibility for monitoring how agencies have collectively implemented victims’ legislative rights and ultimately, their level of compliance with the Act” with the responsibility for:<sup>63</sup>

*[R]eceiving quantitative data reporting from agencies on their level of compliance with the Act (discussed in further detail in the following recommendation). Based on this reporting, and relevant qualitative feedback from agencies, this entity will then be able to identify which operational processes currently in place to uphold the rights of victims are effective or require improvement. In collaboration with relevant staff at the agencies, the operational detail of these improvements can then be formulated and implemented.*

There are a range of entities with some form of monitoring responsibilities relation to children and young people including the Independent Monitor which has specific functions for monitoring Government compliance with the National Care Standards, the Education Review Office which has specific functions in relation to schools, and the Child & Youth Wellbeing Unit which monitors the Child and Youth Wellbeing Strategy implementation. The Children and Young Person’s Commission also has the responsibility of “monitoring the application of the Children’s Convention by departments and other instruments of the Crown and making reports to the United Nations”.<sup>64</sup> It remains to be seen how it will exercise this responsibility although this is likely to be heavily influenced by the extent to which it is resourced to do so by the Government.

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<sup>59</sup> Hubsch, J-F. (2022). [Theory of Change for Making Children’s Rights Real in Scotland: Rapid review of change process no. 4 “Keeping children’s rights real by ensuring a system of information, advocacy, complaints, redress and effective remedy for children”](#). Interdisciplinary Research Laboratory on the Rights of the Child University of Ottawa (Canada) at 3-4.

<sup>60</sup> Global Initiative on Justice with Children & Child Friendly Justice European Network. (2022). [Towards LGBTI+ sensitive justice systems for children in Europe: Challenge Paper](#) at 30.

<sup>61</sup> Office of the Chief Victims Advisor to Government. (2019). [Te Tangi o te Manawanui: Recommendations for Reform](#). Ministry of Justice at 36. The independent body would also have a range of other accountability related functions.

<sup>62</sup> Office of the Chief Victims Advisor to Government. (2020) . *The Victims Rights Act 2002: How was the Act implemented and how is compliance with the Act monitored?* (Issues paper for the Chief Victims Advisor to Government) at 51-55.

<sup>63</sup> Ibid.

<sup>64</sup> [Children and Young People’s Commission Act, s21](#).

More generally, there is no entity with the overall responsibility to monitor children and young people's experiences of justice.

## Existing programmes and services

Existing programmes need to be monitored and evaluated so we know if they work and to establish baselines against which change can be measured. The Australian Access to Justice Taskforce recommended that the Productivity Commission be commissioned "to undertake a review of the efficiency of the courts and tribunals in the context of the civil justice system in Australia. The scope of the review would be identification of relevant measures and data requirements necessary for ongoing monitoring of the justice system."<sup>65</sup>

The OECD's *Draft Recommendation of the Council on Access to Justice and People-centred Justice Systems* also recommend that States commit to evidence-based planning, monitoring and evaluation including by:<sup>66</sup>

*a) Enhancing the role of evidence for operational, policy and decision-making purposes by:*

*i. Improving data availability and quality to inform decision making, planning, investment and reforms in the justice sector, using a comprehensive range of data sources that can be easily accessed and used;*

*ii. Developing a sound data ecosystem interoperable across all levels of the justice system and related services, supported by appropriate data security and privacy safeguards, as well as tools and protocols to facilitate data collection, analysis, exchange and use;*

*iii. Integrating justice impact assessment into the early stages of the policy, budget and service delivery process;*

*b) Developing and implementing monitoring and evaluation mechanisms for peoplecentred justice strategies and initiatives by:*

*i. Regularly conducting robust evaluation and assessment of the performance and effectiveness of people-centricity of justice services and strategies, including at the systemic level;*

*ii. Encouraging and providing support for people-centred justice research, data collection and collaboration;*

*iii. Building the skills and capacity of relevant institutional actors to collect and disseminate up-to-date and reliable information and data;*

*c) Establishing mechanisms to enable accountability and actively provide oversight of people-centred justice procedures and goals.*

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<sup>65</sup> 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 73.

<sup>66</sup> OECD. (2022). *Draft Recommendation of the Council on Access to Justice and People-centred Justice Systems*. [https://www.oecd.org/governance/global-roundtables-access-to-justice/gov\\_pgc\\_2022-25\\_annex\\_eng.pdf](https://www.oecd.org/governance/global-roundtables-access-to-justice/gov_pgc_2022-25_annex_eng.pdf) at 4.



## Evaluating new services or programmes

*The lack of systematic and comprehensive evaluation of reforms—and monitoring of cross-examination more generally—has made it difficult for stakeholders to appreciate how the process has, or has not, changed. A lack of empirical monitoring also means that problems developing slowly over time can easily be overlooked.<sup>67</sup>*

We also need to ensure that new programmes and services are evaluated and learning from the evaluation process needs to inform any changes and the development of policies, services and practices. As such, monitoring and evaluation are a key part of any access to justice reform process. For example, the Access to Justice Taskforce recommended that the standard practice should be for implementation of changes to “include consideration of data collection necessary to enable evaluation of the impact of these changes”.<sup>68</sup> Effective evaluation or monitoring of the actual impact of changes to the justice system or processes requires good baseline and follow up data including disaggregated data to enable any disparities to be identified.<sup>69</sup> Monitoring and evaluation also needs to involve the people most directly affected by whatever is being evaluated.<sup>70</sup>

Evaluation and monitoring can also be used to identify who is ‘left out’ or ‘left behind’ or what works and for whom as McDonald et al. explain in the context of online self-help resources:<sup>71</sup>

*As a first step to gauging the impact of digital solutions, baseline evidence about uptake and utility is required. In the case of legal self-help, how often are SHRs used? Who uses them? For what types of legal problems? How useful are they? What other types of action are taken? What outcomes are achieved?*

Where appropriate, evaluation can also identify where any changes are required to address issues identified in the evaluation.<sup>72</sup> Evidence from the evaluation process should also inform any further development or changes to policy, services or practice.<sup>73</sup>

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<sup>67</sup> Zajac, R., Westera, N. & Kaladelfos, A. (2018). The “Good Old Days” of Courtroom Questioning: Changes in the Format of Child Cross-Examination Questions Over 60 Years. *Child Maltreatment*, 23(2) 186-195 at 193.

<sup>68</sup> Access to Justice Taskforce, [A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action](#) at 73.

<sup>69</sup> Byrne, B. & Lundy, L. (2019). Children’s rights-based childhood policy: a six-P framework, *The International Journal of Human Rights*, 23(3), 357-373 at 362.

<sup>70</sup> Ibid at 362; New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2021). [Whakamahia te tūkinō kore ināianeī, ā muri ake nei: Acting now for a violence and abuse free future](#) at 37; 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 22-23.

<sup>71</sup> 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 at 5.

<sup>72</sup> Payne, [Common Framework of Reference on Child Rights Impact Assessment: A Guide on How to carry out CRIA](#) at 3.

<sup>73</sup> Department of Children, Equality, Disability, Integration and Youth. (2021). [Participation Framework National Framework for Children and Young People’s Participation in Decision-making](#). Government of Ireland at 24.

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