



Pro Bono Practices and Opportunities in New Zealand¹

INTRODUCTION

New Zealand's population of approximately 4.4 million residents is served by approximately 12,480 lawyers, amongst which just under 12,000 lawyers practise locally, with a further 550 based overseas holding a practising certificate issued by the New Zealand Law Society ("NZLS").² Two thirds of law firms spend 1-5% of practice time on pro bono work, and the value of pro bono work in New Zealand is estimated to be between approximately \$13 million and \$68 million annually.³ Community Law Centres ("CLCs") provide certain categories of legal services at no cost to people who are unable to meet the cost of a private lawyer or do not have access to legal aid. Direct pro bono work undertaken by CLCs equates to almost \$1.4 million annually.⁴

OVERVIEW OF THE LEGAL SYSTEM

The Justice System

Constitution and Governing Laws

New Zealand is an independent state. It is a democracy and a constitutional monarchy, meaning that the Queen of England, as head of state, is the source of legal authority in New Zealand, but that she and her representative, the Governor-General, act on the advice of the democratically elected government, in all but the most exceptional circumstances. It has inherited a Westminster system of government, maintaining a separation of powers between the legislature, the executive and the judiciary. New Zealand does not have a full and entrenched written constitution, and the sources of its constitution include various statutes with constitutional significance (e.g. the Constitution Act 1986, the Electoral Act 1993, the New Zealand Bill of Rights Act 1990), British laws adopted by New Zealand through the Imperial Laws Application Act 1988, such as the Magna Carta, court decisions, constitutional conventions, the Treaty of Waitangi and the prerogative powers of the Queen.⁵

The Courts

Court system

New Zealand has a hierarchical court system. At the top is the Supreme Court. Below it, in descending order, are the Court of Appeal, the High Court and the District Courts. These are "courts of general jurisdiction", which handle both criminal and civil matters. There are also a number of specialist courts dealing with employment matters, family issues, youth offending, Maori land disputes as well as environmental issues. Separately, the Waitangi Tribunal operates as a permanent commission of inquiry that examines claims made by a Maori or groups of Maori who may have been prejudiced by laws and

¹ This chapter was drafted with the support of Bell Gully.

² NEW ZEALAND LAW SOCIETY, Snapshot of the Profession 2015, available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/87388/NZLS-Snapshot-of-the-Profession-2015.pdf (last visited on September 4, 2015) (Feb, 2015).

³ LAW FOR CHANGE, Profession's gift to the community, Law Talk 820, available at <http://www.lawforchange.co.nz/wp-content/uploads/2013/07/Pro-Bono-Law-Talk-1.pdf> (last visited on September 4, 2015) (Jun, 2013).

⁴ Ibid.

⁵ CONSTITUTIONAL ADVISORY PANEL, New Zealand's constitution: The conversation so far, available at http://www.ourconstitution.org.nz/store/doc/The_Conversation_So_Far.pdf (last visited on September 4, 2015) (Dec, 2012).



regulations or by acts, omissions, policies, or practices of the Crown since 1840 that are inconsistent with the principles of the Treaty of Waitangi.⁶

Appointment of Judges

Judicial appointments are made by the Governor-General, the Sovereign's representative and nominal chief executive, on the recommendation of the Attorney-General, the chief law officer of the Crown who also has ministerial jurisdiction over the Crown Law Office, the Parliamentary Counsel Office and the Serious Fraud Office. Although judicial appointments are made by the Attorney-General (as part of the executive), there is strong constitutional convention for the Attorney-General to act independently of party political considerations. Judges are appointed according to their qualifications, personal qualities, and relevant experience.

The Practice of Law

Education

Completion of a law degree is a pre-requisite to admission as a barrister and solicitor in New Zealand. The New Zealand Council of Legal Education further requires that lawyers complete practical legal training prior to being admitted to the profession, which can be completed by undertaking an accredited practical legal studies course.

Licensure

All legal practitioners are admitted to the High Court of New Zealand as both barristers and solicitors, such that no person may be admitted as a barrister or a solicitor only.⁷ All lawyers must obtain a practicing certificate from the NZLS in order to practice as a lawyer. A minimum of ten hours of Continuing Professional Development (“CPD”) each year is required of all lawyers.⁸

Once admitted, a lawyer may practice either as (i) a barrister and solicitor or (ii) a barrister sole. A barrister - solicitor may be employed by a law firm or employed by an incorporated law firm⁹ as an in-house counsel, a director and/or shareholder in an incorporated law firm or practice on his/her own account as a sole practitioner or partner in a law firm. Barristers sole are not permitted to practice in partnerships but may employ other barristers. An incorporated law firm structure is also open to barristers, as long as the barrister is the sole director and shareholder.

Demographics

Of New Zealand-based lawyers, 59% practise in law firms with more than one practising certificate. Another 8% are in sole practice (SP), while 21% are in-house lawyers (IHL) employed by an organization. The remainder are barristers (11%) or not currently working.¹⁰

Legal Regulation of Lawyers

The number of lawyers per capita is 367.¹¹ Lawyers can only provide legal aid services if they have a contract with the Ministry of Justice. Regulation of New Zealand lawyers is governed by the Lawyers and

⁶ COURTS OF NEW ZEALAND, Diagram of the Courts Structure, available at <https://www.courtsofnz.govt.nz/about/system/structure/diagram/courts-diagram.pdf> (last visited on September 4, 2015) (Jul, 2006).

⁷ Section 48(1), Lawyers and Conveyancers Act 2006.

⁸ Section 6, Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013.

⁹ NEW ZEALAND LAW SOCIETY, Incorporated law firms, available at <https://www.lawsociety.org.nz/for-lawyers/legal-practice/incorporated-law-firms> (last visited on September 4, 2015): An incorporated law firm is distinctive from a law firm, the concept of law incorporation was introduced by the Lawyers and Conveyancers Act 2006 (LCA). Under the LCA and its associated regulations, an incorporated law firm has a separate legal identity, which continues to exist regardless of any changes in its membership. Incorporation also allows its members to enjoy limited liability.

¹⁰ Ibid.

¹¹ Calculated based on number of lawyers practicing in New Zealand.



Conveyancers Act 2006 (“**LCA**”) and the regulations and rules made thereunder. The New Zealand Law Society carries regulatory functions and powers conveyed to it by the LCA.¹²

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The Right to Legal Assistance

In Civil Proceedings¹³

Civil legal aid is available for private disputes and other non-criminal disputes that could go to court or a tribunal, including proceedings over debt recovery, breach of contract, defamation and bankruptcy. Although legal aid is available for proceedings before tribunals or specialist courts such as the Human Rights Tribunal and the Employment Court, it is not available for matters relating to cases before the Disputes Tribunal or the Motor Vehicle Disputes Tribunal, problems with educational institutions or matters for companies or groups of people.

In Criminal Proceedings¹⁴

Criminal legal aid is available to anyone who cannot afford a lawyer and has been charged with an offence that could be punished with a prison term of at least six months. Legal aid may also be available for the appeal of such conviction or sentence. Non-serious criminal charges where a duty solicitor can assist the defendant do not qualify for legal aid, such as driving offences. However, legal aid may be available for certain non-serious charges if the defendant faces a special barrier of disability, which includes difficulties with reading or writing, or mental illness.

State-Subsidized Legal Aid¹⁵

New Zealand has a legal aid system that uses public funds to provide free legal services to those who cannot afford a lawyer. Individuals who qualify for legal aid, save for those involved in non-serious criminal cases, will be able to select a lawyer from any practicing lawyers authorized to serve as a legal aid provider to advise and represent them. The Ministry of Justice oversees the legal aid programs.

Eligibility Criteria

The eligibility requirements for legal aid services are set out in the Legal Services Act 2011¹⁶ (the “**LSA**”) and the Legal Services Regulations 2011 (the “**LSR**”). There are four key considerations for establishing eligibility: (i) status of the applicant, (ii) financial eligibility, (iii) merits and (iv) nature of the proceeding.¹⁷ Firstly, with respect to status, according to the LSA¹⁸ the applicant does not have to be a resident in New Zealand when making the application. If the applicant is overseas and unable to sign the application, their

¹² Part 4, Lawyers and Conveyancers Act 2006.

¹³ MINISTRY OF JUSTICE, Civil Legal Aid, available at <http://www.justice.govt.nz/services/legal-help/legal-aid/civil/eligibility> (last visited on September 4, 2015).

¹⁴ MINISTRY OF JUSTICE, Criminal Legal Aid, available at <http://www.justice.govt.nz/services/legal-help/legal-aid/criminal/eligibility> (last visited on September 4, 2015).

¹⁵ Authors should ensure that the concepts of “legal aid” and “pro bono” are kept completely separate. The former is state-funded legal aid and the latter is the voluntary contribution of private attorneys. This report is focused solely on pro bono. The legal aid system in a jurisdiction should be discussed only to give context to the opportunities for the provision of pro bono services in that jurisdiction.

¹⁶ Sections 6 to 8, Legal Services Act.

¹⁷ MINISTRY OF JUSTICE, Eligibility Guidelines, available at <http://www.justice.govt.nz/services/service-providers/information-for-legal-professionals/information-for-legal-aid-providers/documents/manuals-and-policies/grants-manual/Eligibility%20manual.pdf> (2014) (last visited on September 4, 2015).

¹⁸ Section 10(1)(a), Legal Services Act 2011.



lawyer may make the application. However, if the applicant is overseas and the proceedings might reasonably be brought in an overseas jurisdiction, then legal aid in New Zealand may not be available to the applicant.¹⁹ Secondly, in determining whether an applicant in a civil matter is financially eligible, the following factors are considered: gross annual income taking into account family size and composition,²⁰ disposable capital,²¹ whether insurance funding is available²² etc. In relation to criminal matters, legal aid is granted where the Legal Services Commissioner (the “**Commissioner**”) is of the opinion that the applicant does not have sufficient means, having regard to the applicant’s income and disposable capital.²³ Thirdly, when assessing the merits of the case, aid for civil matters will be refused if the applicant cannot show that they have reasonable grounds for taking or defending the proceedings or for being a party to the proceedings.²⁴ The applicant will have to show they have a significant personal interest in the outcome which justifies pursuing the matter or that the proceedings involve domestic violence or mental health.²⁵ In relation to criminal matters, the Commissioner may grant aid if it appears that the interests of justice require aid to be granted.²⁶ Lastly, the applicant of a civil matter meets the criterion for aid if he or she can show that the nature of the proceeding requires legal representation (having regard to the nature of the proceedings and to the applicant’s personal interest) and that he or she would suffer substantial hardship if aid were not granted.²⁷ In relation to criminal matters, aid is generally available if it relates to a criminal charge, sentencing or appeal to be heard in the District Court, High Court, Court of Appeal or Supreme Court.²⁸ As of September 2, 2013, criminal offenders are entitled to aid and to be legally represented²⁹ on a range of matters if the case appears before the New Zealand Parole Board, including conditions of release on the statutory release date, parole, residential restrictions etc.

Mandatory assignments to Legal Aid Matters

Private legal practitioners are not required to accept matters assigned to them by a court or the Ministry of Justice. Lawyers can only provide legal aid services if they have a contract with the Ministry of Justice. More specifically, New Zealand provides a Public Defence Service to help defend individuals on criminal charges who are eligible for legal aid. The Public Defence Service also oversees the duty lawyer service in the courts where it operates. The object of the duty lawyer service is to ensure that a sufficient number of lawyers are available at each District Court for the purpose of assisting, advising, and representing unrepresented defendants charged with an offence.³⁰

¹⁹ Section 10(4)(c), *ibid.*

²⁰ Regulation 5, Legal Services Regulations 2011.

²¹ Regulation 6, *ibid.*

²² Section 13, Legal Services Act 2011.

²³ Section 8, *ibid.*

²⁴ Section 10(3), *ibid.*

²⁵ Section 11(4), *ibid.*

²⁶ Section 8(1)(c), *ibid.*

²⁷ Section 7(1)(e), *ibid.*

²⁸ Section 6, *ibid.*

²⁹ Section 49 (3)(c), Parole Act 2002.

³⁰ MINISTRY OF JUSTICE, Duty Lawyer Service Operational Policy, available at http://www.google.com.hk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCMQFjAB&url=http%3A%2F%2Fwww.justice.govt.nz%2Fservices%2Fservice-providers%2Finformation-for-legal-professionals%2Finformation-for-duty-lawyers%2Fdocuments%2Fduty-lawyer-service-operational-policy.pdf%2Fdownload%2Ffile&ei=GZmQVbG4EsewoqTj3JqWAg&usq=AFQjCNHCr6A3_LOxGqSVpE-SocMdVVgDbQ&sig2=Knaf82ckDRiEfMLAfDbd5w (2012) (last visited on September 4, 2015).



Unmet Needs and Access Analysis

In addition to these programs, there are 24 CLCs across Aotearoa New Zealand. Since CLCs provide outreach services to suburbs and smaller towns, they have a presence in over 140 locations, covering major city centres as well as rural communities. CLCs are independent. They run either as charitable trusts or incorporated NGO organisations. CLCs generally provide free legal consultation and representation to everyone, with a focus on individuals with limited financial resources. CLCs provide potential access to the justice system for up to 20% of New Zealand households – nearly 326,000 households, a large proportion of which are Māori and Pacific Island households.³¹ CLCs operate as gateways to the legal system for those with an unmet legal need, serving members of the community who struggle to afford private legal assistance but are not covered by legal aid.

Alternative Dispute Resolution

Mediation, Arbitration, Etc.

Internationally and in New Zealand, alternative dispute resolution (“ADR”), including, inter alia - arbitration, negotiation and mediation, has been promoted as encouraging early civil case settlement and delivering consequent benefits to both the courts and disputants.

Ombudsman

Apart from ADR, the Office of the Ombudsman (the “Ombudsman”) handles complaints and investigates the administrative conduct of state sector agencies. The Ombudsman has authority to investigate approximately 4000 entities in the state sector, including government departments and ministries; local authorities and state-owned enterprises. Making a complaint to the Ombudsman is free; as such, it acts as an alternative means for indigent individuals to resolve disputes with a state section agency.

PRO BONO ASSISTANCE

Pro Bono Opportunities

Law Firm Pro Bono Programs

There is no mandate for private attorneys to engage in pro bono work in New Zealand. Regardless, law firms have developed pro bono programs to facilitate pro bono work. As firms and companies with global brands expand into New Zealand, many are bringing their existing pro bono programs with them. For example, DLA Piper New Zealand targets to provide pro bono services with a notional value of at least 3% of the firm's annual revenue, and counts all hours spent on pro bono projects towards its lawyers' billable targets.³² Bell Gully publishes a Pro Bono & Community Report annually and targets to contribute approximately \$660,000 annual fee equivalent to pro bono work.³³

Bar Association Pro Bono Programs

Despite being limited, there is a pro bono legal assistance service in Auckland that provides free, limited assistance to persons without legal representation with the drafting and preparation of initial Court

³¹ NEW ZEALAND INSTITUTE OF ECONOMIC RESEARCH, NZIER report to Community Law Centres of Aotearoa, Benefits of Community Law, available at <http://www.scoop.co.nz/stories/AK1207/S00368/community-law-provides-sound-value-for-money.htm> (last visited on September 4, 2015)

³² DLA PIPER, Pro Bono, available at <https://www.dlapiper.co.nz/about-us/corporate-responsibility/pro-bono> (last visited on September 4, 2015).

³³ BELL GULLY, A Helping Hand: Bell Gully's Pro Bono & Community Report, available at <http://www.bellgully.co.nz/resources/pdfs/Pro-bono-report-2014-2015.pdf> (2015) (last visited on September 4, 2015).



documents (either a statement of claim or statement of defence) at the Auckland Employment Court.³⁴ Apart from the CLCs, the Citizens Advice Bureaux provides free legal services where members of the public can receive free legal advice from a lawyer during specified times. All Bureaux are also able to put individuals in need in contact with other free legal services available in their area such as the local CLC or lawyers in the community who offer pro bono legal advice.

University Legal Clinics and Law Students

The University of Canterbury Law School has implemented 100 hours of community/professional engagement over the life of the degree as a graduating requirement from 2015.³⁵ Based on the “Harvard model”, graduation ceremonies at the University of Canterbury Law School will formally recognize students in two higher tiers: those who do more than 400 hours and those who do more than 750 hours of pro bono work.³⁶

Historic Development and Current State of Pro Bono

Historically, New Zealand’s pro bono has been relatively individualistic. In the 1970s, Sir Edmund Thomas led pro bono work aiming to raise awareness of apartheid South Africa and to protest against New Zealand’s ties with the country; while in the 1980s, Sian Elias together with David Baragwanath spearheaded litigation to protect indigenous rights.³⁷ Consistent with the increasing focus on corporate social responsibility internationally, in the 21st century the profession has moved towards formalizing and appropriately recognizing pro bono contributions. While pro bono work has always been undertaken by the New Zealand profession, it now has a higher profile and is more quantifiable than it was previously. That said, there is no mandatory or centralized reporting of pro bono work and the extent of pro bono efforts and reporting is an individual decision for each practitioner or firm.

Despite still being criticized for the lack of structured support networks and funding pools for recent pro bono lawyering, there have been some promising developments over the past few years.

Despite contrary suggestion by the New Zealand Attorney-General in 2010, it is not compulsory for any practicing lawyers to do pro bono law work at present.³⁸ However, according to the University of Waikato Institute for Business Research inter-firm comparison research in 2011, two-thirds of responding firms spent between one and five percent of time on pro bono work. Extrapolated nationally, the value of pro bono work could be between \$20 and \$100 million annually. New Zealand’s three largest law firms – Russell McVeagh, Bell Gully and Chapman Tripp, all have formal pro bono teams. Awards such as the Corporate Citizen Firm of the Year and the Community Service in Law Award³⁹ serve as encouragement for more active participation in pro bono.

Last but not least, the New Zealand Centre for Human Rights Law, Policy and Practice as well as the New Zealand Human Rights Lawyers’ Association were established in 2012 to provide pro bono services

³⁴ EMPLOYMENT COURT OF NEW ZEALAND, available at <http://www.justice.govt.nz/courts/employment-court/information-and-guidance/professional-assistance> (last visited on September 4, 2015).

³⁵ UNIVERSITY OF CANTERBURY SCHOOL OF LAW, Strategic Objectives 2013-2015, available at <http://www.laws.canterbury.ac.nz/documents/law-strategic-plan-2013.pdf> (last visited on September 4, 2015).

³⁶ Ibid.

³⁷ OXFORD HUMAN RIGHTS HUB, Pro Bono Law in New Zealand: A Work in Progress, available at <http://ohrh.law.ox.ac.uk/pro-bono-law-in-new-zealand-a-work-in-progress/> (last visited on September 4, 2015).

³⁸ Ibid.

³⁹ BELL GULLY, Pro Bono, available at <http://www.bellgully.co.nz/aboutus/probono.asp> (last visited on September 4, 2015).



with a focus on human rights cases. JustSpeak was also set up in 2011 to build awareness of and to encourage contribution to criminal justice policy.⁴⁰

CONCLUSION

Although New Zealand's pro bono framework remains somewhat unstructured, many organizations and individuals are currently working to build effective programs. Opportunities exist for law students and young lawyers to get involved with projects that will have a lasting impact on New Zealand's legal system. However, there are challenges facing legal aid reform, for example: (1) the inadequate fixed fee pay structure and the reduced legal aid budget leading to a low revenue for legal aid lawyers may disincentivize them and compromise the quality of their work, (2) the overall economic unviability of legal aid work may lead to a shortage of criminal lawyers in the long run, and (3) the eligibility test does not sufficiently provide for all the people facing legal issues. As such, the legal needs of many New Zealanders remain unmet. Pro bono services programs must grow on a community level as well as a national level to widen access to justice in New Zealand.

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⁴⁰ OXFORD HUMAN RIGHTS HUB, Pro Bono Law in New Zealand: A Work in Progress, available at <http://ohrh.law.ox.ac.uk/pro-bono-law-in-new-zealand-a-work-in-progress/> (last visited on September 4, 2015).