



Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill

311—1

Report of the Justice Committee

December 2021

Contents

Recommendation.....	2
Introduction.....	2
Submissions received and issues raised.....	2
Access to justice.....	2
Protections are needed for those using free legal services.....	3
Questions over the definition of “free” or “pro bono” legal services.....	3
Employer’s agreement needed to provide outside legal services.....	4
The view of the New Zealand Law Society.....	4
The role of the Law Society in regulating free legal services.....	4
The view of Community Law Centres o Aotearoa.....	4
Proposal to place pro bono legal services by employed lawyers with Te Ara Ture.....	5
Our conclusion.....	5
New Zealand National Party differing view.....	6
Appendix.....	7

Ginny Andersen
Chairperson

Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill

Recommendation

The Justice Committee has examined the Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill and recommends, by majority, that the bill not be passed.

Introduction

The Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill is a Member's bill in the name of Chris Bishop MP. It would amend the Lawyers and Conveyancers Act 2006 to allow a lawyer who is an employee to do free legal work other than for their employer, on conditions set by the New Zealand Law Society. The bill's aim is to improve access to justice. Currently, under the Lawyers and Conveyancers Act, employed lawyers are guilty of misconduct if they provide free legal services to the public outside of their employment. The only exception to this is providing free legal services through community law centres or a citizens advice bureau.

We have closely examined the gaps this bill has highlighted in the access to justice for some of New Zealand's most vulnerable communities. We are grateful to the member for bringing them to our attention. We unanimously agree that more work needs to be done to solve the problems that this bill has highlighted.

The majority of us, however, do not believe that the methods set out in this bill are the right way to fix these problems. We believe the Government should look into this issue and investigate potential solutions to increase access to justice for disadvantaged communities.

Submissions received and issues raised

We received 22 written submissions on the bill and heard nine oral submissions. Following our hearings, we provided the departmental report prepared by the Ministry of Justice to two key stakeholders, the New Zealand Law Society and Community Law Centres o Aotearoa. We received an additional written and oral submission from each of these organisations.

Access to justice

This bill first and foremost seeks to plug a gap in the access to justice for New Zealand communities.

Submitters consistently agreed, in line with the bill's intent, that there is a need to improve access to justice in New Zealand. Many submitters highlighted that the cost of legal services is a key barrier to accessing justice. They observed that marginalised and vulnerable population groups face economic barriers to accessing justice, and current policy settings do

not help. One submitter noted that some people who could not afford legal representation were forced to represent themselves in court.

Some submitters in support of the bill highlighted that it has the potential to help increase access to legal services for those who cannot afford it. They noted that access to justice was a growing gap and urgent action was needed to make legal services more equitable. Others questioned how free legal services would be directed to those most in need.

Protections are needed for those using free legal services

A number of submitters highlighted the need to ensure that those using free legal services have adequate consumer protections. Some submitters told us that they believe that employed lawyers providing free legal services should have to meet the same requirements as lawyers practising privately. We heard that the consumer protection issues arise because employed lawyers do not have to meet the additional requirements that lawyers practising on their own account must meet when providing legal services to the public.¹ Submitters raised questions about supervision requirements, approval processes, client care obligations, and the handling of client monies.

Some submissions also pointed out that the bill does not state who should be liable if an employed lawyer offering free legal services provides poor legal advice. They commented that potential liability could deter employed lawyers from providing free legal services outside of their employment. Submitters who raised this issue agreed that the employer should not be liable and that their insurance should not extend to legal services provided outside of the lawyer's employment.

Submitters were split on whether employed lawyers providing free legal services should be required to hold professional indemnity insurance. Several submitters suggested that employed lawyers providing free legal services be required to inform potential clients whether or not they hold any insurance.

Questions over the definition of “free” or “pro bono” legal services

The bill focuses on the provision of “free” legal services provided by employed lawyers. Some submitters suggested that it should instead refer to more restrictive “pro bono” legal services. It was noted that free legal services, if not further defined, could include services that do not meet an unmet legal need. Submitters noted that this would be inconsistent with the aim of increasing access to justice for those who currently struggle to access the legal system.

Submitters also requested that a definition of pro bono legal services be included in the bill. They said it should not be unduly restrictive. The New Zealand Law Society included some potential definitions in its written submission.

¹ These requirements include experience, mandatory assessments, and approval by the New Zealand Law Society.

Employer's agreement needed to provide outside legal services

As introduced, the bill would require an employed lawyer to get the permission of their employer if they wanted to provide free legal services outside of their employment.

Submitters were split on the value of this provision. Some submitters suggested that the requirement for employer approval might limit the ability for an employed lawyer to provide free legal services. Others supported the provision, noting that employers could be the subject of complaints about the conduct of lawyers they supervise. Some submitters suggested that it should be explicitly stated in the bill that employers are not liable in relation to their employees providing free legal services.

The view of the New Zealand Law Society

As the body responsible for regulating lawyers in New Zealand, the Law Society made a written and oral submission to the committee. We later received an additional written and oral submission from the Law Society, after seeking its views on the departmental report.

The Law Society told us that it is generally supportive of the bill's intent, to increase access to justice. However, it believes further policy analysis is needed to determine whether the proposals set out in this bill are the most effective way of helping to increase access to justice. It told us that, if the bill were to continue in its current form, without any policy analysis, there could be a risk of channelling free legal services away from those who need them most.

At a minimum, the Law Society said, it would like to see the bill amended to ensure that actual unmet legal needs are addressed. It proposed doing this through the inclusion of a narrow definition of "pro bono" legal services.

The role of the Law Society in regulating free legal services

The bill as introduced envisions the Law Society being responsible for regulating the provision of free legal services by employed lawyers. The Law Society told us that the costs of setting up and administering such a scheme would mean that it would require additional funding. It told us that to cover this it would likely have to increase the practising fee, and introduce a fee, payable by employed lawyers seeking to provide free legal services.

We were told that the cost associated with the scheme, and the lack of policy work on the effectiveness of the proposals in the bill, mean that further consideration is warranted of the best methods to address unmet legal needs.

The view of Community Law Centres o Aotearoa

As the national organisation that supports providers of free community legal services in New Zealand, Community Law Centres o Aotearoa (Community Law) provided us with written and oral submissions. We later received additional written and oral submissions after providing Community Law with the departmental report. We were particularly interested in how this bill could interact with Community Law's new legal clearinghouse programme, "Te Ara Ture". Te Ara Ture is a new legal pro bono service supported by Community Law. It

seeks to plug a gap in the access to justice by connecting those who may otherwise be unable to gain legal representation with a volunteer lawyer.

Community Law agreed that there were issues relating to access to justice in New Zealand. It told us that barriers to justice are often centred on certain demographics. They include people with a disability, Māori, single parents, and those experiencing economic disadvantage. It told us that it would like to see any pro bono legal services directed at these demographics. Community Law told us that it could only support the bill, in any form, if it contained a definition of pro bono that links directly to socio-economic disadvantage.

Proposal to place pro bono legal services by employed lawyers with Te Ara Ture

Community Law recommended that the bill be amended to formally place pro bono legal services provided by employed lawyers into the remit of Te Ara Ture. It noted that by placing Te Ara Ture on a similar regulatory level as community law centres, it could employ lawyers, hold indemnity insurance, and provide supervision to employed lawyers who provide free legal services.

Community Law told us that this solution to the issue would ensure that any additional pro bono resources can be allocated to access to justice issues. It told us this would also increase the options for employed lawyers to do pro bono work.

Community Law told us that this solution would require additional government funding of around \$300,000. It noted, however, that funding from the Government would reduce the financial responsibility on the legal profession.

Our conclusion

The majority of us consider that although a clear problem with access to justice has been identified, this bill is not the appropriate way to adequately plug this gap.

In our consideration of the bill we considered two potential means of tackling the issue. The first was the broad scheme administered by the New Zealand Law Society, as proposed by the bill as introduced. We also considered a narrower scheme of amending the bill, to enable free legal services to be provided by employed lawyers through a clearinghouse supported by a community law centre. Under this proposal practising rules would be set by the Law Society. We note Community Law's support for this amendment. However, as this proposal would alter the policy intent of the bill, we believe that more policy work is needed to identify the scope of the problem and the best methods to support access to justice.

We would like to thank the Member in charge for bringing this issue to the committee's attention. While this proposal has potential to increase access to justice, the majority of us believe the issues outlined by the Law Society and the amount of policy work that would be required outweigh the potential benefits at this stage. It is our belief that the Government should implement policy work to investigate the scale of this problem and to find the best way to improve access to justice.

New Zealand National Party differing view

It is disappointing that the majority of the committee do not wish to proceed with the bill, which aims to improve access to justice by fixing an anomaly in the Lawyers and Conveyancers Act. Under the current law, employed lawyers are guilty of misconduct if they provide free legal services to the public outside of their employment. The only exception is providing free legal services through community law centres or citizens advice bureau.

Not progressing this bill is a missed opportunity to improve access to justice.

The current law is not widely known and is almost certainly frequently breached (without sanction). It means that lawyers employed by government departments, for example, cannot do legal work for the local tramping club; or their local residents' association; or essentially for any group or person in need of legal assistance.

The criticism by some submitters, such as the Law Society, that the bill should be amended, so that actual unmet legal needs are addressed is, with respect, nonsensical. It is basically an attempt to make the perfect the enemy of the good; an argument that if some employed lawyers do not do the right kind of work, then no employed lawyers should be permitted to do work outside of their employment. That is regressive.

The submission from Community Law Centres of Aotearoa is instructive. Community Law has recently established Te Ara Ture, a pro bono clearinghouse "connecting volunteer lawyers to people who need legal help".² In their further submission of 27 October 2021, they noted, in relation to Te Ara Ture:

The main part missing from Te Ara Ture's ambit is our ability to refer to employed and in-house lawyers. Under the current regulatory framework, Te Ara Ture can refer clients only to law firm principals or barristers acting on their own account. These people make up only 42% of the profession. Based on 2019 figures, this means 58% of the profession or 8,266 lawyers cannot participate in our programme.

In other words, the current law explicitly disenfranchises over 8,000 lawyers from participating in pro bono work through Community Law's pro bono clearinghouse. This bill would enfranchise those lawyers and provide greater access to justice for many people.

The committee looked at a variety of useful amendments that could have been made to the bill, such as requiring (rather than leaving it optional) for the Law Society to make rules for employed lawyers providing pro bono legal services, and directing the matters that the Law Society should look at as part of those rules (such as appropriate level of professional experience and appropriate limits on practice areas).

Ultimately a majority of the committee has decided not to progress these amendments.

The majority view of the committee that, "more work needs to be done to solve the problems the bill highlights" is regrettable. More work can always be done but the bill is before the House right now, and is a vehicle to manifestly improve the lamentable status quo.

² <https://www.tearature.co.nz/>

Appendix

Committee procedure

The Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill was referred to the committee on 24 March 2021. We called for submissions with a closing date of 7 May 2021. We received and considered 22 submissions from interested groups and individuals. We heard oral evidence from nine submitters at hearings in Wellington and by videoconference. Following the conclusion of our hearings of evidence we received additional written and oral submissions from the New Zealand Law Society and Community Law Centres O Aotearoa.

We received advice on the bill from the Ministry of Justice. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee members

Ginny Andersen (Chairperson)
Hon Simon Bridges (until 30 November 2021)
Simeon Brown (until 30 November 2021)
Hon Paul Goldsmith (from 30 November 2021)
Dr Emily Henderson
Nicole McKee
Hon Mark Mitchell
Simon O'Connor (from 30 November 2021)
Willow-Jean Prime
Vanushi Walters
Arena Williams

Advice and evidence received

The documents that we received as advice and evidence are available on the Parliament website, www.parliament.nz.