



THE RULES COMMITTEE TE KOMITI MŌ NGĀ TIKANGA KOOTI

JUDICIAL
SUBCOMMITTEE
ON ACCESS TO
CIVIL JUSTICE

TO | KI: Chief Justice Winkelmann; Justices Kós, Thomas, and Cooke; Chief Judge Taumaunu; Judge Kellar
FROM | NĀ: Sebastian Hartley, Clerk to the Rules Committee
DATE | RĀ: 6 October 2020
RE | KAUPAPA: Précis of Responses to Initial Consultation Papers on Access to Civil Justice

Introduction: An Encouragingly High Level of Engagement

1. The Rules Committee received 46 submissions in response to its initial consultation papers on Improving Access to Civil Justice (see **C 25 of 2020**).
2. Submissions were received from members of the legal profession, academics, community organisations, and other court users. Submitters addressed the technical proposals set out in the consultation papers; made alternative suggestions as to how to ensure proportionality between the procedure attaching to a case and the value of the dispute; and identified barriers to members of the community coming to court.
3. As the submissions run to over 400 pages in length, a summary was circulated for consideration at the Committee's meeting of 21 September 2020 (see **C 25 of 2020** at pages 437-502). Having reviewed those submissions, the Committee established this subcommittee to formulate the Committee's response.
4. In this memorandum, by way of further summary, I provide a necessarily high-level précis of the responses to the proposals set out in the consultation paper. I also briefly summarise other potential procedural innovations put forward by submitters and describe other barriers to accessing civil justice identified by submitters.

Reform is Overwhelmingly Supported, At Least in General

5. All submitters recognised that, as the New Zealand Law Society couched it, the "justice gap" has been "slow burning" for at least a generation. Virtually all (45 of 46) submitters recognised this requires a significant response by, among others, the Committee, and were supportive of the Committee acting to ensure the burden of civil procedure in each case is proportionate to the value and complexity of the dispute. Submitters expressed support for a range of potential reforms, namely:
 - a. increasing judicial control of the conduct of proceedings – both during case management and at hearings;
 - b. the introduction of either or both more 'inquisitorial' and expedited procedures in respect of at least some types of cases, insofar as many submitters supported

reducing the primacy presently afforded to viva voce evidence and affording judges some greater power to direct the matters on which oral evidence is to be given;

- c. prioritising early identification of the issues in dispute in each case to ensure that more onerous procedural obligations apply to those issues only; and
 - d. introducing a more express requirement to ensure that the procedure adopted in each case is proportionate to the value and complexity of the dispute.
6. As emerges from the above, there was no consensus among submitters as to which aspects of the rules of practice and procedure, if any, are responsible for the widening justice gap, and how the Committee might best respond. As noted, the common thread between submitters who expressed support for one or more proposals for reform is support for reforms that ensure the procedural requirements attaching to each proceeding are proportionate to the value and complexity of the dispute in that proceeding. That of course is simply the goal for reform and does not disclose a procedural mechanism capable of introduction as a means of achieving that goal.

Responses to the Detailed Proposals in the Consultation Papers Varied Widely

There is general support for exploring the use of more inquisitorial procedures along the lines set down by the greater use of case management in recent decades, but submitters expressed concern as to matters of detail

7. Nearly two-thirds of submitters engaged with the proposal to introduce more ‘inquisitorial’ type procedures in respect of at least some types of cases. Members of the wider community were especially supportive of this proposal, expressing the view this would address the difficulties faced by self-represented litigants in understanding substantive and procedural law.
8. Only a small number of submitters supported this reform applying to all proceedings. It is possible this apparently low level of support is a result of the use of the word “inquisitorial”. Two submitters suggested the use of this word might provoke more opposition to reforms of this type than would be the case if the reforms were instead couched as a further extension of the case management reforms already made in recent decades. That suggestion appears to be correct, given most submitters who engaged with this proposal accepted that increasing judicial control over proceedings may help reduce the length and cost of civil proceedings.
9. At the broadest, submitters in favour of these reforms favoured granting judges greater power to determine the issues for trial, the witnesses to be called (with particular reference to increasing judicial control over the use of expert witnesses), the length of the hearing, which subjects are addressed in evidence and for how long each witness gives evidence-in-chief, the extent of cross-examination, and the mode of submissions.

Submitters from within the legal profession tended to favour less expansive reforms, expressing an aversion to judges becoming involved in the questioning of witnesses on the basis this might result in judges becoming partial. Interestingly, members of the wider community were less averse to judges becoming more involved in questioning witnesses and exercising more control over the subject and extent of questioning.

10. Ten submitters expressly responded to the “Panckhurst Process” proposals. Of these, three submitters favoured the introduction of a similar process in respect of some High Court proceedings. One of these three was firmly of the view this process should only be applied by consent. That submitter considered (as did three other submitters opposed to any reform modelled on this process proceeding) the Panckhurst Process succeeded because of counsel for all parties having engaged in the Process in a co-operative, collaborative, and pragmatic manner, and that requiring consent would increase the likelihood of that commitment being observed in court proceedings. Of the seven other submitters who addressed the Panckhurst Process:

- a. four expressed scepticism as to whether that successful approach is applicable to other proceedings, considering that its success was contingent on those involved showing a common commitment to adopting a more flexible approach and expedition than in High Court litigation, and considering that emerged only through those actors’ repeated engagement with a single facilitator (Sir Graham Panckhurst) who actively elicited that co-operation; and
- b. six expressed concern as to the proposal that the same judicial officer who presides at the facilitation stage would preside at the adjudication stage, citing concerns that this may result in the adjudicator being seen to be partisan, and may also inhibit the willingness of parties to engage candidly in facilitation.

11. Nine submitters expressly discussed what they tended to refer to as the “Kós P proposal” for a more inquisitorial procedure in some proceedings. Of these, six supported further exploration of these proposals, at least in respect of low value proceedings. Four expressed reservations. In particular:

- a. Those in favour generally supported the proposal as a way of addressing concerns around lay-litigants’ participation in court processes and as a means of promoting early identification of the issues. Supportive submitters saw this as helping with “balancing the playing field” between represented and unrepresented parties. However, some of those in support, together with all of those opposed, expressed concerns as to whether the costs associated with appointing an assessor is the most effective use of scarce available resources.
- b. Those who did not support further exploration of the proposal did not, in summary, think the benefits that would be recognised from implementing the

proposal would be so great as to justify a potential dilution of the finite resources currently available for the provision of civil legal aid.

12. Five submitters expressly engaged with the question of how proceedings would be allocated to a more-inquisitorial process:
 - a. Only one suggested a bright-line approach based on the value of the claim. That submitter said an inquisitorial approach should apply for all claims worth less than \$500,000.
 - b. The other four opposed any bright-line approach, and in particular opposed any approach based solely on the value of the claim, saying this could produce a two-tiered justice system. Three of these submitters said the choice of procedure should instead be made at an early stage of case management based on the nature of the issues involved.
13. Four submitters identified the English Intellectual Property and Enterprise Court as providing a potential model for a more inquisitorial procedure in cases of less than a certain value. All four suggested that creating an inquisitorial division of the District Court or High Court applying this model will allow for the cheaper, quicker, but still just resolution of many proceedings.
14. Several submitters recommended adopting the Disputes Tribunal's processes as a model of an extent inquisitorial judicial dispute resolution forum. Three submitters made similar comments in respect of the Employment Relations Authority. In both cases, submitters accepted the outcomes produced by these processes are generally considered just and correct by those involved in a reasonably economic way. A number of submitters said the flexible and referee-led nature of these processes might usefully be adopted in some District and High Court proceedings.
15. Six submitters supported the Committee calling for an increase in the Disputes Tribunal's jurisdiction. These submitters suggested new limits ranging from \$50,000 to \$200,000, with \$100,000 being the most commonly supported figure.

Submitters generally favour introducing short-form trial processes and streamlining trial processes, but again differ as to matters of detail

16. Fourteen submitters engaged expressly with the Committee's proposal to introduce a short-form trial process and/or otherwise streamline trial processes. Submitters generally addressed these topics as one, identifying that any innovation realised in respect of a short-form trial process may well be applicable to all proceedings.
17. Of these fourteen submitters, all accepted generally that proceedings can be prolonged and made more needlessly expensive, without further promoting the just resolution of the dispute, by unnecessary case management and interlocutory steps and that, accordingly, the introduction of a shorter form trial process or the refinement of

existing procedures could be desirable. Five enthusiastically supported wide-reading reforms of this type, with five others agreeing that more limited proposals relating to the introduction of page limits, the management of the case from commencement to completion by a single judge and expediting the hearing of interlocutory matters are worthy of further exploration.

18. Four submitters expressed at least some scepticism as to whether any such reforms are in fact necessary, suggesting that more effective enforcement of existing rules may prompt a litigation cultural change that will produce necessary reforms.
19. Ten submitters engaged with the question of how proceedings to be determined using an expedited procedure would be identified. A diversity of views was expressed:
 - a. One thought the procedure should be applied only with both parties' consent.
 - b. Three supported the complexity and nature of the issues for trial being used, subject to the Court retaining an overriding discretion.
 - c. Four said that the expedited procedure should apply by default, at least to all cases answering to specified criteria, so as to avoid issues arising out of lawyers' understandable reticence, at an early stage of the proceeding, at identifying their case as a simple one.
 - d. Two submitters express concern that the introduction of an interlocutory procedure to allocate proceedings onto one track or another likely simply prompt appeals and disputes, reducing or negating any benefits realised.
20. The New Zealand Bar Association's proposed short form process attracted comment from nine submitters:
 - a. Two supported further exploration by the Committee of the introduction of that particular process.
 - b. Three considered features of the proposal noted at paragraph 17 above warrant further consideration without expressly supporting the particular proposal.
 - c. One proposed other expedited hearing processes incorporating features of, but not exactly resembling, the Bar Association's proposed process.
 - d. Two proposed the introduction of other potential short form processes of their own design (one based on the short form trial procedure in the District Court and the other on the summary judgment procedure).
 - e. The remaining submitter did not support the introduction of a short-form trial process, saying the District Court short form trial process has produced only modest benefits, and that judicial resources would be better applied to more robust case management of proceedings under the existing rules.

21. Thirteen submitters addressed the related issues of will-say statements, written briefs of evidence, and the presumptive mode of giving evidence. Submitters generally agreed that the preparation of briefs of evidence presently produce much of the expense associated with preparing a case for trial. A variety of views were expressed, however, as to the extent to which this is a matter requiring the Committee's attention:

- a. Eight submitters considered that briefs, in principle, are important and should be retained. This because, they said, of the need to avoid trial by ambush; because preparing briefs is an important part of trial preparation that will need to be undertaken whether required by the rules or not; and because briefs help clarify the issues for trial. These submitters did not favour the introduction of will-say statements in any proceeding. None of these submitters, however, saw any benefit in requiring briefs of evidence to be read aloud, and supported the proposal that briefs of evidence be taken as read. Four of these submitters also identified the need for greater judicial control over the contents of briefs to address concerns that briefs are prolix and generally unhelpful.
- b. One submitter, a member of the wider community, expressed concern at briefs being prepared by lawyers, and favoured all parties being required to draft their own written evidence as the primary means of evidence being given.
- c. Four submitters favoured the use of will-say statements on the Western Australian model in at least some cases, though only two strongly supported removing the requirement for briefs in all proceedings.

22. Nine submitters addressed the issue of discovery. Again, a variety of views were expressed:

- a. Four submitters, each practitioners or institutional submitters, identify that discovery remains a significant driver of the high costs of civil justice, particularly in commercial disputes of less than \$1,000,000 in value. This because of the proliferation of digital communications and documents in recent decades. These submitters supported, whether on the English pilot scheme model or otherwise, a relaxation of the discovery requirements in respect of low-value cases. Equally however, each of these submitters considered that discovery serves a valuable function, with the "cards on the table" approach an important part of ensuring fair process in civil disputes.
- b. One submitter made similar observations, but instead thought this was most likely to be an issue in respect of high value commercial claims rather than low-value claims. The submitter thought this most appropriately addressed by the tailoring of procedural requirements in each high-value case.
- c. Four submitters were of the view that the discovery rules have functioned well since the 2011 reforms, and that the burdens associated with discovery are

generally proportionate to the valuable role discovery plays in ensuring the just resolution of proceedings. Any concerns, each suggested, can be addressed by more robust case management.

23. Two submitters expressed strong opposition to restrictions on the length of pleadings, witness statements, and affidavits outside of a short-form procedure. Both said prolix pleading is a matter of bad practice not bad procedure and saying that parties may feel unfairly constrained by such limitations.
24. Four submitters expressly addressed the idea of increasing judicial control over fixture length outside of a short-form procedure. The Law Society and Bar Association opposed the proposal, saying that counsel should not be punished for what are necessarily impressionistic estimates. Two submitters (a law firm and a barrister) supported the proposal, saying that parties should have to justify their requested allocation, with the judge taking a robust and involved approach, so as to ensure hearing lengths and fees are kept in check and to reduce demands on judicial time.

Limited support exists for the introduction of a summary judgment-like triage procedure

25. The proposal that all proceedings be required to commence with something like an application for summary judgment attracted the least enthusiasm from submitters. Thirteen respondents addressed this proposal:
 - a. Eleven accepted that achieving earlier clarification of the issues in dispute and the adequacy or otherwise of evidence in a proceeding as desirable objectives of procedural reform but considered this a less than optimal means of realising these objectives. More particularly:
 - i. While some of those opposed thought some benefits might be realised by the introduction of this mechanism, all eleven considered any benefits would be outweighed by the costs and delay associated with the process and might simply result in the front-loading of expense for the parties.
 - ii. Submitters opposed to this proposal were particularly divided in their views of the value of the availability of an initial judicial reaction. Some considered this might assist in discouraging unmeritorious litigation or encouraging early settlement. Others questioned whether, given the early stage at which this impression would be conveyed, a truly informed judicial reaction would in fact be given; either because of judicial reticence, or because of the Court's arguable inability to fully appreciate the strength of the plaintiff's case and any defence at an early stage in the proceeding.

- b. Two respondents supported this proposal took. These respondents, compared to those who responded negatively, a more positive view of the Court's ability to offer an informed judicial reaction at the early stage, and saw the benefits of achieving earlier clarification of the issues and the adequacy of the evidence as outweighing any additional expense.

Submitters Identified Other Potential Procedural Innovations

26. Submitters, responding to the Committee's invitation to do so, identified a number of other potential procedural innovations, namely:

- a. judges being encouraged or required to proactively consider whether to refer the parties to a court proceeding to alternative dispute resolution processes such as mediation, expert determination, and early neutral determination, and the introduction of costs sanctions for parties that opposed such a referral without good reason or who failed to independently take such steps.
- b. expanding the application of the originating application process to other types of defended proceedings as an alternative to establishing a novel short form trial process or increasing the responsibility of the Court for case-management.
- c. the deposition procedure found in United States civil procedure being used as a means of allowing parties to identify, early in the life of the proceeding, the potential evidence of witnesses as part of a flexible alternative or supplement to discovery.
- d. the introduction of pre-action protocols such as those required to be complied with in England and Wales before the commencement of proceedings, which Judge Kellar suggests may be of particular benefit in avoiding some of the unfairness arguably associated with District Court debt-collection claims.
- e. introducing greater control over the use of expert witnesses in litigation, such as that found in pt 35 of the Civil Procedure Rules (Eng).

Community Members and Organisations Identified Barriers to People Coming to Court and Ways in Which the Civil Justice System Departs from Ideals of Civil Justice

27. Nine submitters – including practitioners, academics, community organisations, and members of the wider community – identified considerations such as the expense of retaining counsel, the high levels at which filing and court fees are set, the risk of adverse costs awards, and the unavailability in most cases of full recovery of costs as being the primary barrier to members of the community seeking civil justice in court. These submitters identified that, in many cases, the decision to self-represent or settle a claim is not an exercise of autonomy but a choice forced by economic constraints.

28. In this connection, Dr Toy-Cronin notes in her submission, while identifying that this is beyond the Rules Committee's ambit to address, that legal fees are rising more rapidly than general incomes. A number of members of the community, and members of the legal profession, said that civil justice in the courts is unaffordable to all below members of the upper middle class.
29. Relatedly, four community law centre submitters identify many litigants, especially litigants in person, as anxious that they will be denied relief for their (in their view) meritorious claim, or their meritorious defence will be ignored, because of technical defects in their manner of proceeding or their inability to obtain cogent evidence.
30. Moreover, these submitters also reported that the complexity of civil procedural requirements, and of substantive law, meant that individuals from Māori, Pasifika, migrant, refuge, and socioeconomically disadvantaged backgrounds, as well as disabled individuals, mentally ill individuals, and those from other marginalised segments of the population, faced real difficulty in making informed decisions about how to proceed if unable to afford legal representation. These individuals, these submitters noted, often lack sufficient ability with English or formal education to effectively understand relevant documents and court processes. This compounds, particularly in the case of Māori, but also other marginalised communities and non-Pākehā communities, a sense among many in the community that they will not be listened to or respected.
31. Moreover, the Waitematā Community Law Centre among other submitters noted that the adversarial court system is alien to the cultural practices of Te Ao Māori, in which humility is a virtue and dispute resolution is not predicated on a combative assertion of right. Many of their clients are Māori. The Waitematā Community Law Centre identified that the greater use of facilitation and mediation-based approaches, whether within an inquisitorial framework or otherwise, might help address this disconnection between the cultural practices of court users and court systems.
32. This element of cultural alienation, together with the other difficulties Māori and other marginalised individuals face in articulating their positions within the framework and practices of the civil justice system noted above, was seen by three community law centre submitters and the New Zealand Law Society as contributing to many court participants feeling anxiety and shame/whakamā.
33. Additionally, Community Law Canterbury identified that many of their clients, particularly those born outside New Zealand, are afraid to give information to the courts, having a high level of mistrust of government. While these clients trusted the judiciary, they were frightened of dealing with non-judicial court personnel, and of their information being passed on to other government agencies.
34. While accepting this is outside the Committee's jurisdiction, for the reasons given in the preceding paragraphs, a number of submitters identified the unavailability of civil

legal aid as a more material impediment to people seeking civil justice than the rules of practice and procedure.

35. Several members of the community and legal profession identified the existence of the barriers noted in the preceding paragraphs as corrosive of the rule of law and the legitimacy of the courts because of their inconsistency with widely held ideals as to justice and the legal system. A theme common to the submissions of several members of the wider community, two community law centres, and a barrister representing clients in small-value claims, is that the public at large regards justice as concerned with the pursuit of truth by a fair tribunal, but that the justice system is seen as concerned with the interpretation and application of seemingly arcane legal rules. Those who are part of marginalised communities, and those of non-Pākehā cultural backgrounds, are reported to feel a particular disconnection between their ideals of justice and their experience of the civil justice system.
36. For these and other reasons, the great majority of submitters identified limitations on the extent to which the Committee can address the justice gap through amending the rules of practice and procedure.
37. Some of this scepticism relates to the contribution towards the “justice gap” of the wider socioeconomic and socio-political phenomena noted in paragraphs 27-33 above. However, other reasons for such scepticism also emerged from submissions. Primary amongst these, and found in the comments of eleven submitters, is the viewpoint that co-ordinate changes to litigation culture and practice to accompany any rules reform. Each of these submitters identified the need for any reformed rules to be expressed in robust terms so as to help ensure practitioners do in fact pursue for their clients the greater efficiencies new procedures can provide. Overall, the submitters identified the likely need for judicial leadership and active case management in changing the culture of litigation in New Zealand.

Conclusion: A Clear Impetus for Change

38. As emerges from the above, there is a clear mandate for the Committee to seek to address the justice gap by amending the rules of practice and procedure to ensure the procedural requirements attaching to each proceeding are proportionate to the value and complexity of the dispute in that proceeding. There is also a recognition that it is appropriate to use, and some support for using, rules changes to impel a change in litigation culture to help address other causes of the justice gap.
39. Whilst there was no clear consensus supporting the proposals consulted on, there are common themes among the submissions. These include the support for proportionality as a guiding principle, the greater use of inquisitorial style processes, the desirability of early judicial engagement in a proceeding, and a reduction in the

formality of some of the current requirements. These common themes may provide the basis for considering the next steps.