The Rules Committee
Te Komiti mō ngā Tikanga Kooti

M E M O R A N D U M

TO:	Rules Committee
FROM:	Julia Wiener
DATE:	08 September 2021
RE:	Executive Summary of Responses to Second Consultation Paper on Access to Civil Justice

[1] The rules committee received fifty-seven submissions in response to its second consultation paper on improving access to civil justice. The opinions expressed in the submissions varied widely.

DISPUTES TRIBUNAL ("DT")

[2] Most submitters were in favour of the proposed changes to the Disputes Tribunal outlined by the Consultation Paper. Regardless of their views on the particular reforms, most submitters reported a need for an increase in administrative and fiscal support for the Disputes Tribunal to enable it take on a greater workload and increase the fees to be paid to referees in order to attract high quality staff.

Jurisdiction

[3] The majority of submitters who commented on this proposal favoured an increased jurisdictional limit of $50,000, with some supporting an upper limit of $100,000. However, most submitters who proposed the $100,000 limit acknowledged the increased burden that this would place on the Tribunal and its Registry and the consequential need for increased support and resourcing for the DT.

[4] If the jurisdiction is increased, only a few submitters considered that lawyers ought to be involved. There was some support for lawyers having a role for claims in

the DT with a value over $50,000 although most considered that it should be a submission only role.

Right of appeal

[5] There was some dispute about the extent to which the Disputes Tribunal should become a de facto third tier District Court. Some submitters believed that this would be counterproductive. Many commented that a major advantage of the Disputes Tribunal was its relative simplicity and ease of access which should not be lost by increasing its jurisdiction.

Renaming the court

[6] Views on the name change were evenly divided between the views that:

(a) no change is needed (especially amongst the community groups who submitted);

(b) the DT should return to its former name (Small Claims Court); and

(c) the DT should be renamed the Community Court.

Other procedural reforms

[7] All submitters who commented on the suggestion agreed that enforcement provisions in the Disputes Tribunal should be made easier, with one community group suggesting that Court itself undertake enforcement such as they do for police fines.

[8] There was an acceptance that the DT should conduct some hearings in public, but the majority of submitters saw a continued benefit in maintaining private hearings for cases with anxious or unwilling witnesses or other issues raising privacy concerns. One community group submitted that there was a need for security in the hearings because tensions can run high in smaller civil claims. Another commented on the risks that hearings posed to the victims of domestic violence and suggested the need for

proper training for referees/adjudicators on this and other aspects of dealing with the disadvantaged.

[9] There was support for DT referees to be renamed adjudicators, and to be legally trained and to make decisions in accordance with the law. Existing referees who are not legally trained could be "grandfathered" into the changed scheme.

[10] Most submitters supported the Tribunal's ability to waive fees and make disbursements orders where appropriate (bearing in mind that costs are a factor).

[11] Some of the submitters supported a limited costs jurisdiction, but there was no consensus on implementing an overall costs jurisdiction.

[12] Some submitters were concerned to ensure that the efficiency of the DT will not be lost by any of the proposed changes.

[13] The submission of Bridgette Toy-Cronin raised the issue of the lack of data about the Disputes Tribunal and the likely impact of expanding its jurisdiction. She says that questions should be asked about whether an expanded jurisdiction would change the nature of the parties (i.e. more insurers), and what effect an expanded jurisdiction would have on issues such as the balance of power between parties, the speed of Tribunal's decision making and the types of issues on which it equipped to adjudicate. She recommends further data collection in conjunction with the changes.

DISTRICT COURT ("DC")

[14] Most of the submitters were in favour of the proposed changes to the civil jurisdiction of the District Court. Almost all submitters commented that the current civil justice system in the DC was not working well but most felt that the current rules were fit for purpose. Some noted that it was difficult to tell whether they worked well given the atrophy of the civil jurisdiction within the District Court.

Principal District Court Judge

[15] All submitters who commented on this proposal were in favour of a new Principal District Court Judge.

Restoring Civil Registry Expertise

[16] Almost all submitters noted that the proposals would not work without significant financial investment in improving the strength and expertise of a civil registry and ensuring that there were sufficient District Court judges with civil expertise and/or part time judges with civil expertise in order to see that the cases were carried through to their conclusion.

Part time Deputy Judges/Recorders

[17] Most parties supported this proposal. However, some submitters noted that it would be better if all practitioners with sufficient expertise in civil law could apply.

[18] It was suggested that to avoid conflicts part-time judges should sit in a centre other than their own principal area of work. Some felt that part-time judges/recorders should be properly trained, including on how to deal with vulnerable, less educated litigants with whom they may not have had much experience in practice.

Pre-action protocols

[19] There was general support for this proposal, but many submitters wanted to see the actual detail of any proposed protocols. Some submitters, like the Auckland City Council, pointed out that they already undertake a form of pre-action protocol in almost every case. They suggested that the efficiency of the debt collection process would be significantly improved if the "statutory demand" type procedure was introduced for individuals, negating the need to file proceedings and reduce the processing workload of the District Court. However, they could not undertake this "personal demand" without complying with the pre action protocols.

Inquisitorial process

[20] The use of inquisitorial processes were generally not favoured although The Hon. Raynor Asher QC commented strongly that he felt that it was a waste of opportunity not to adopt the German civil system with its success in resolving issues.

HIGH COURT ("HC")

[21] Submissions on the proposals relating to the High Court were generally positive. Many submitters agreed that the current operation of the High Court Rules was not fit for purpose. A few submitters agreed with the proposals in principle but did not see them as practically feasible without both a significant increase in judicial resourcing and a change in the culture of litigation and judging.

Disclosure in place of discovery

[22] Twenty-one submitters commented on the proposal to replace the discovery regime with an expanded initial disclosure obligation. Eleven supported the proposal and ten opposed it.

[23] Some submitters were concerns that the effect of bringing disclosure obligations forward would frontload costs, with a number of adverse consequences, namely:

(a) Unnecessary expenditure in cases that would otherwise have settled before discovery, and losing the incentive to settle provided by the threat of later discovery.

(b) the increased barrier to filing proceedings would discourage some litigants from commencing proceedings at all, which creates an access to justice issue.

[24] Submitters raised the concern that the twenty-five days currently allowed for defendants to file pleadings would not be enough time for defendants to file their statement of defence, review the documents disclosed by the plaintiff, do their own

document review, and carry out their own disclosure process. Some suggested solutions were:

(a) Disaggregating the deadlines for defendants to file their statements of defence and provide disclosure;

(b) Keeping the same deadline for both but extending the timeframe beyond 25 days;

(c) Suggesting an altogether alternative schedule for the disclosure timeline.

[25] Multiple submitters raised the practical difficulty for plaintiffs of disclosing 'adverse' documents before the defendant files pleadings: this requires somewhat of a stab in the dark, for example having to guess what affirmative defences will be raised.

[26] Some submitters raised the concern that the disclosure process will often have to be duplicated as issues come to light over the course of proceedings.

[27] Some submitters objected that the process of determining which documents are important enough to be disclosed requires an investment of time and expertise, so that the time savings from not having to undergo full disclosure are minimal. One submitter raised the point that this would shift the time burden onto the party with the larger volume of documents, which is arguably fairer than the current position.

[28] Many submitters raised concerns about the proposed duty of candour being insufficiently clear and enforceable. Many submitters, including some who supported the proposals in principle, observed that the obligations would need to be monitored and enforced, with penalties for non-compliance, to guard against both over-disclosure and under-disclosure.

[29] A few submitters raised the point that reduced discovery obligations would be appropriate for simpler cases of lower value, while more extensive discovery would remain necessary for more complex or high-value cases. Submitters who raised this point recommended that the issues conference be used to determine which discovery

‘track’ should be adopted. This was usually tied in with suggestions that streamlining procedures were appropriate for simpler and/or lower value cases.

Issues conferences (“IC”)

[30] Twenty-seven submitters addressed this proposal. Submissions on this proposal were strongly positive, with only three submitters expressing reservations. The three submitters who opposed the proposal did so on the basis that it would not work in practice; provisions for a similar process already exist in the rules, and judicial engagement would remain inadequate if this proposal was implemented because of a conservative legal culture and inadequate judicial resourcing.

[31] Common threads in the responses were:

(a) The importance of judicial resourcing to ensure that judges have enough time to prepare for the IC;

(b) A preference for interlocutory matters, the appointment of experts, and the extent of discovery to be addressed at the IC;

(c) A strong preference for having a single judge deal with the case from the IC to trial. One submitter, Duncan Cotterill, suggested instead that IC should be held on a ‘no prejudice’ basis to encourage candour, and the Judge who presides over the IC should not preside over the eventual hearing.

(d) A division among submitters over whether the judge at the IC should address the substantive merits of the case. Submitters who addressed this point all agreed that it was likely to inform parties’ views of the relative strength of their arguments in the eyes of the Judge, but were divided over whether this was a benefit or a drawback of the proposal;

(e) An understanding that, while the IC would frontload costs, it would have efficiency benefits overall.

Interlocutories presumptively being determined on the papers

[32] This proposal garnered strong a wide variety of responses. Nineteen submitters addressed this proposal, with five supporting it, five opposing it wholesale, and nine ambivalent or supporting the proposal only in limited circumstances.

[33] Common threads in the responses opposing the proposal were that

(a) Some interlocutory matters are not suitable for determination on the papers. Many submitters were emphatic that summary judgment and strike-out applications were not appropriate for resolution without a hearing;

(b) A worry that the proposal would flood the courts with interlocutory applications otherwise discouraged by the spectre of a trial;

(c) The loss of the significant benefits of a hearing to testing and narrowing the substance of an interlocutory dispute; and

(d) The loss of the opportunity for counsel to develop advocacy skills.

[34] Parties who supported the proposal in whole or in part raised caveats that:

(a) Counsel should be able to request an oral hearing;

(b) The default requirement for affidavits in support and opposition should be removed; and

(c) Litigants-in-person should be heard in person to allow judges to decipher the particulars of their claim.

[35] Some parties proposed instead replacing in-person hearings with VRM. Andrew Holgate also suggested that interlocutory applications for summary judgment should only be available where a matter is defended. Izard Weston Lawyers suggested

that more issues should be able to be conclusively determined by the exchange of memoranda, with a Judge directing applications to be filed only where necessary.

Documents in the common bundle to be admissible as to the truth of their content

[36] Ten submitters commented on this proposal. Opinion was evenly divided between them.

[37] Among submitters who objected to the proposal, common threads included:

(a) The increase in complexity and cost brought by the need to identify what in the common bundle needs to be challenged for each party to prove its case; and

(b) The impossibility of proving a negative against an asserted fact which is deemed to be truthful.

[38] Alternative proposals included:

(a) A mandatory requirement to file an agreed statement of facts, the contents of which would not need to be proved; and

(b) The documents referred to in affidavit evidence being presumed to be true, subject to challenge.

[39] Those submitters who supported the proposal generally did not comment on it in depth.

Witness evidence taken as read with oral evidence only for factually contested areas

[40] Twenty-one submitters addressed this proposal. Most supported it.

[41] Almost all submitters opposed the proposal for page limits on affidavits.

[42] There was widespread support for a presumption that evidence be taken as read, with the caveats that

(a) Judges would need to be allocated sufficient time to read the evidence before trial;

(b) Care be taken that memoranda provided in place of viva voca chronologies of facts not become another venue for advocacy; and

(c) Anxieties that witnesses who do not read their briefs of evidence or give their evidence in chief before being subject to cross-examination would be unprepared and unfamiliar with their evidence. The NZLS suggested the provision of 'reading days' so that lawyers can make up for the preparation time usually provided by examination-in-chief.

[43] Alan Galbraith QC in particular objected that the inefficiencies in current litigation were not due to the oral process, but to the introduction of briefs of evidence. He opposed removing viva voce evidence in chief, which gives the court an opportunity to assess the witness' own words before they face cross-examination.

Greater controls on expert evidence

[44] Seventeen submitters commented on this point. Most agreed with the proposal. One submitter opposed the proposal entirely, and two supported it only in part.

[45] Among submitters who supported the proposal, common threads were:

(a) Strong support for mandatory expert witness conferencing ("hot tubbing"); and

(b) Support for a limit of one expert per topic per party.

[46] The appointment of court-appointed single experts was unpopular with law firms. Objections included:

(a) The inevitability of duplicated cost, as parties would hire "shadow" expert witnesses to inform their cross-examination;

(b) The risk that the court will give the impression of delegating its decision-making;

(c) The risk of increased cost and delay with parties challenging the appointment process.

[47] NZLS raised the objection that placing the cost of court-appointed experts onto the parties would be a barrier to access to justice, as rich defendants facing meritorious claims could increase the cost for plaintiffs by applying for court-appointed experts on every sub-topic in the claim.

Commencement

[48] Only three submitters commented on the Committee's view on commencement, and all agreed that proceedings ought to continue to be commenced by the filing of statements of claim and defence in the usual way.

Proportionality as guiding principle

[49] Twelve submitters addressed this proposal directly. Most approved of it without further comment. It was opposed wholesale by only one submitter, who deemed it too "wooly". Two further submitters supported the proposal in theory but were sceptical about how it could be operationalised in practice.

Other matters

[50] A number of matters on which the Committee did not invite comment emerged in submissions relating to the High Court Rules. These were:

(a) The need for a comprehensive **electronic filing** system, electronic casebook and/or case management system;

(b) Frustrations with the **delays** in allocating prompt trial dates, with parties noting that they understood this to be a consequence of funding issues outside the RC's remit;

(c) the desirability of having **multiple tracks or modes of trial** with different degrees of procedural streamlining proportionate to the value and complexity of the case;

(d) the importance of changing the **culture** of the bar and bench, with more judges more proactively involved in case management and willing to enforce the existing and proposed HCR;

(e) the need to overhaul the governance of the use of **te reo Māori** in the courts, with the existing regime being too prohibitive;

(f) the desirability of permitting more procedures to begin by way of **originating application**;

(g) moving court **fees** to a sliding scale.

[51] Reforms to the **summary judgment** procedure were also suggested, including:

(a) permitting plaintiffs to apply for summary judgment without leave for a short time after the filing of the statement of defence, to align the HCR with the DCR; and

(b) permitting Judges to make directions for the disposal of a case after an application for summary judgment is dismissed which limits the trial to contested issues; and

GENERAL COMMENTS

[52] Comments which did not relate to the DT, DC or HC represented a wide range of views. Some felt that the legal system should be re-examined entirely, and others proposed more practical suggestions.

[53] At least two parties commented on the need for attempts at resolution/mediation, either pre-proceedings or during the proceedings to be part of the rules.

[54] Some parties commented on the Consultation paper's failure to consider how access to justice could be alleviated by exploring and developing technology.

[55] There were clashing views on the question of whether the law profession should do more pro bono work (Andrew Holgate) or whether the legal system should be robust enough to function independently with practitioners who are properly rewarded (Dentons Kensington Swan).

[56] A reasonable number of submitters called for an evidence-based changes so that the government, judiciary and profession can assess whether the interventions which are "hopeful" will actually bring about positive change.

[57] Overall, recommendations are disparate and contain some interesting ideas, especially those of Bridget Toy-Cronin and those who advocate for more use technology to improve access to justice.

[58] Author's note from Kate Davenport QC: New Zealand Auckland University Lecturer, Matt Bartlett has given a paper to the ADLS recently on a Dutch online family resolution court. This used algorithms and the intervention of judges reviewing the material digitally to try to resolve disputes at low level in the Family Court. This is something that in the medium to long term should be part of the planning for the Court.