The Rules Committee

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Access to Justice 01/19

Circular 8 of 2019

Dear Committee Members,

Please find attached, for your consideration, a submission from Dr Bridgette Toy-Cronin, Director of the University of Otago Legal Issues Centre and Senior Lecturer in the Faculty of Law at Otago University, and her colleague Dr Bridget Irvine (**C 8 of 2019**).

The paper explains Dr Toy-Cronin's comments that evidence suggests access to justice in the civil jurisdiction of the District Court is weaker than in the Disputes Tribunal or High Court.

Sebastian Hartley
Clerk to the Rules Committee

Access to Justice in the District Court of New Zealand

Dr Bridgette Toy-Cronin & Dr Bridget Irvine
University of Otago Legal Issues Centre

Paper prepared for the Rules Committee to explain Dr Toy-Cronin's comments that evidence suggests access to justice in the civil jurisdiction of the District Court was weaker than in the Disputes Tribunal or High Court.

15 February 2019

1. Introduction

The Rules Committee is conducting some work on the civil jurisdiction of the District Court. The Committee has asked for any research we have about: 1) filing numbers in the civil jurisdiction of the District Court, and 2) access to justice in the District Court. We have conducted a large research project on the pace of litigation in the High Court published as *The Wheels of Justice: Understanding the Pace of Civil High Court Cases*,[1] which also yeilded data about civil District Court proceedings. In addition, we have had access to Ministry of Justice data for the District Court and conducted other projects that have given us insight into the civil jurisdiction of the District Court. In this paper, we outline what our research has told us about access to civil justice in the District Court with the hope that this will be of assistance to the Rules Committee in its research.

2. The Numbers

We have been asked for data that substantiates what Dr Toy-Cronin has said in a District Court meeting about filings in the District Court being lower than other jurisdictions. In this section we explain our comparison of civil filings in the District Court against its two adjacent jurisdictions – the Disputes Tribunal and the High Court.

The most recently available data[2] for all three jurisdictions – the Disputes Tribunal, District Court and High Court - comes from the annual workload statistics for the year ending 31 December 2016 (see Figure 1).[3] Each jurisdiction reports on the workload statistics in three ways: (1) the number of new civil cases filed during the reporting period; (2) the number of cases disposed during the reporting period; and (3) the number of active cases at the end of the reporting period (see Figure 1). The Disputes Tribunal has the largest volume of cases, but also high turnover given the number of active cases at the end of the year is relatively low. The District Court has the smallest volume of cases – across all three measures of workload – by a significant margin.

[1] Bridgette Toy-Cronin, Bridget Irvine, Kayla Stewart, and Mark Henaghan *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, 2017), available at: https://ourarchive.otago.ac.nz/handle/10523/7762

[2] The authors have been unable to locate any public reporting on Disputes Tribunal workload statistics since the annual reports moved from Courts of New Zealand website to the Ministry of Justice website www.disputestribunal.govt.nz in 2017.

[3] Disputes Tribunal Claim Workload Statistics – for the 12 months ending 31 December 2016; Annual Statistics for the District Courts December 2016; Annual Statistics for the High Court 31 December 2016; all retrieved from the Courts of New Zealand website www.courtsofnz.govt.nz

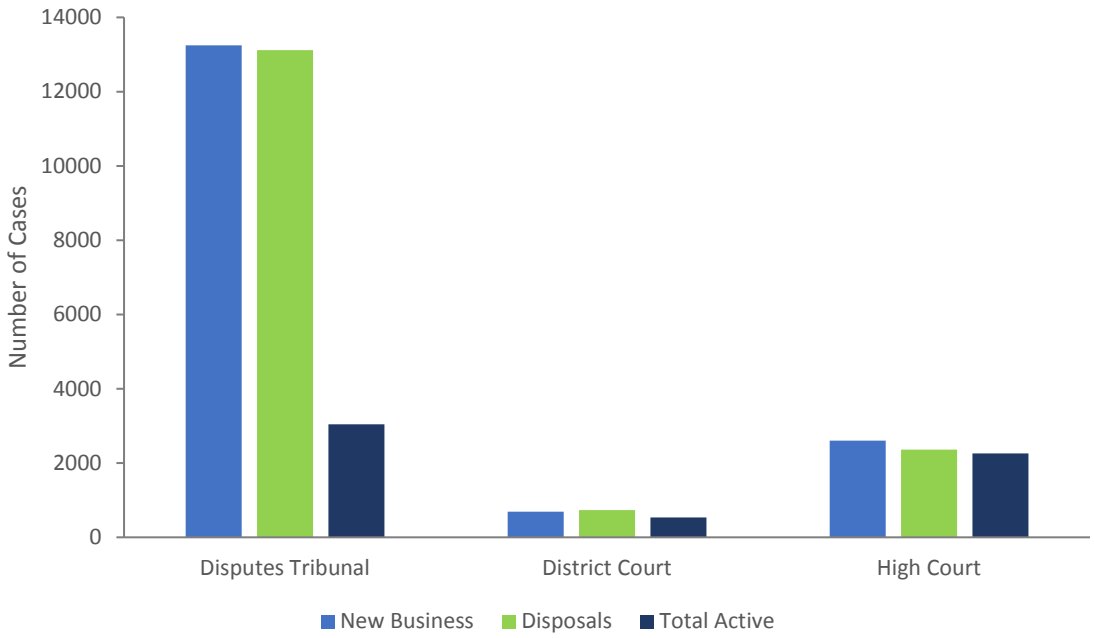

Figure 1. Comparison of civil filings across the Disputes Tribunal, District Court, and High Court for year ending 31 December 2016.

Figure 1 clearly shows that the civil workload in the District Court is disproportionally smaller than both the Disputes Tribunal and High Court. Our previous research in the High Court,[4] however, has taught us to interpret public reports with an abundance of caution.

A. The Reliability Issue: Are we analysing quality data?

The workload statistics that are publicly reported are drawn directly from the Case Management System (CMS), which is managed by the Ministry of Justice. In our previous research in the High Court, we had a unique perspective on the quality of CMS data, as we had access to: (1) public reports, (2) raw data from which these public reports were presumably generated, (3) a sample of physical files, and (4) the users of the system. These sources allowed us to tease out evidence of distortion in the High Court civil disposal statistics that we concluded occurred due to issues with the data that was being extracted from CMS. For example, we found evidence of human and computer error in CMS data. The Ministry initially provided a spreadsheet with 5809 civil High Court cases disposed between 1 July 2014 and 30 June 2015; after we applied the necessary corrections the final sample only comprised 5,666 cases – that is a 2.5% error rate in sample size alone.

[4] Toy-Cronin and others, above n 1.

We also discovered that there were various internal reporting practices that impacted on the way cases were recorded in CMS. This included: 1) excluding entire categories of cases from the database (e.g. historical abuse cases); 2) revising case status in the database (e.g. coded as 'active' or 'inactive' at various points in the lifecycle of the case); or 3) excluding certain court proceedings from the database (e.g. costs memorandum previously did not reactive a case in CMS, so did not appear on the list of active cases). We therefore concluded that any analyses of High Court civil data that is drawn from CMS needs to be interpreted carefully.

It is possible that similar issues might emerge in the data extracted from CMS for the District Court Annual Report. Without a comprehensive analysis we cannot say to what extent any of these factors might affect the reliability of the District Court's – or Disputes Tribunal's – civil data. Any comparisons across the three jurisdictions must proceed with that caveat in mind; the starting point might already be skewed in an unknown direction due to inaccurate data.

B. The Definition Issue: Are we comparing apples with apples, or with oranges?

CMS records a large amount of data, therefore what is extracted for a specific analysis depends in large part on the how the parameters of the sample are defined. When comparing across jurisdiction, or year, it is not always clear whether we are comparing apples with apples, or apples with oranges. For example, each jurisdiction reports on the total number of active cases at the end of each time period—that is, the number of cases that are currently being dealt with by the court or tribunal. But what constitutes an "active" case? There are different definitions used across the three jurisdictions:

1. Disputes Tribunal – Total Active Cases:[5]

   Active Disputes Tribunal claims are those which are awaiting a hearing or are awaiting final judgment.

2. District Court – Defended Total Active:[6]

   Active civil cases are those which are awaiting substantive hearing or are awaiting final judgment.

3. High Court – Total Active:[7]

[5] Disputes Tribunal Claim Workload Statistics – for the 12 months ending 31 December 2016 retrieved from the Courts of New Zealand website www.courtsofnz.govt.nz
[6] Annual Statistics for the District Courts December 2016 retrieved from the Courts of New Zealand website www.courtsofnz.govt.nz
[7] Annual Statistics for the High Court 31 December 2016 retrieved from the Courts of New Zealand website www.courtsofnz.govt.nz

> Active cases are those which have been deemed ready for a defended hearing with a High Court Judge, are awaiting defended hearing or are awaiting final judgment. It is limited to general proceedings, originating applications, judicial review proceedings, and defended interlocutory applications.

The District Court and High Court specifically state that the sample being reported on is limited to defended cases, with the High Court requiring the case to have been deemed ready for a defended hearing. The Dispute Tribunal workload statistics, however, includes *all* cases that are filed with the Tribunal, because the applicant will not know whether the claim will be defended until the hearing. The High Court also excludes three categories of cases from the workload statistics: bankruptcy, company liquidation, and appeals.

In the District Court, we also have access to internal Ministry of Justice CMS data for a later time period,[8] which allowed us to further explore the number of 'active' cases. The Ministry uses the data in CMS for a very different purpose; namely, to manage all cases in the court system. Therefore, the Ministry's sample should – in theory – include all cases moving through the court at a particular point in time e.g. cases being heard, cases awaiting judgment, cases filed with no statement of defence. In the dataset we received, the Ministry had collated the total number of active cases at the end of each month, between Jan and Oct of 2017 (see Figure 2).[9] The District Court also reported on the number of active cases for the 12 months ending 30 June 2017 (see Figure 2).[10] We were therefore able to directly compare the number of 'active cases' as recorded in the same time period: Ministry of Justice reported that there were 9018 active civil cases as of 30 June 2017; the District Court reported that there were 520 active civil cases as of 30 June 2017.

[8] This data was provided to Mr Geoff Adlam, New Zealand Law Society for an unrelated purpose of calculating representation status of cases filed in the District Court. This data was passed on to the authors for comment when Mr Adlam was writing an article for LawTalk.

[9] Note that the change of the District Court's jurisdiction to $350,000 on 1 March 2017 does appear to have caused some uplift of active cases from May onwards (see Figure 2), but without the raw data we cannot determine whether this is a statistically significant difference.

[10] Annual Report 2017 District Court of New Zealand, retrieved from http://www.districtcourts.govt.nz/reports-and-publications/annual-reports/ at p 29.

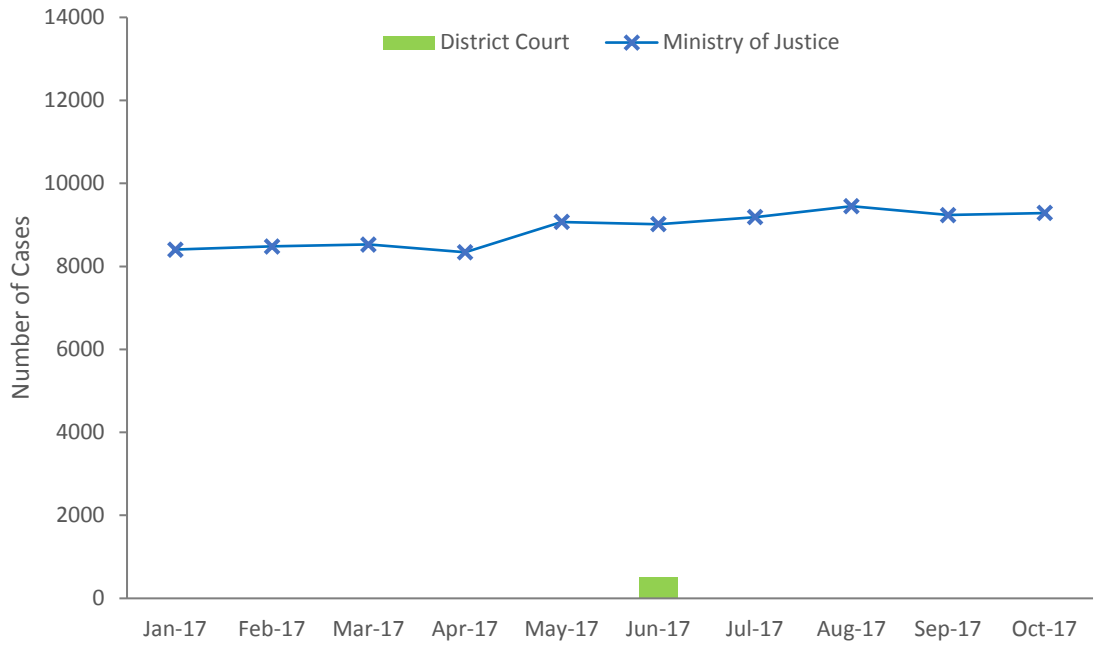

Figure 2. Ministry of Justice and District Court of New Zealand data for the number of active civil cases at the end of month.

Figure 2 shows that there is a significant difference in the total number of active cases in the District Court, and number of defended active cases. By having both datasets – if our interpretations are correct – we can usefully calculate the proportion of active cases that are defended in the District Court:

= 520/9018

= 5.77% of active cases are being defended in the District Court at 30 June 2017.

This illustration raises important questions about whether there is a high volume of undefended proceedings coming before the District Court and if so, what are the implications for access to justice for a case profile of this nature.

3. High Volumes of Undefended Proceedings

A high volume of undefended cases is generally considered problematic from an access to justice perspective as courts can effectively become state sponsored debt collection agencies rather than

determiners of legal rights.[11] High volumes of undefended claims are suggestive of structural problems preventing access by defendants. Some of the factors preventing access by defendants are neatly captured in *Diners Club (NZ) Ltd v District Court at Auckland* [2017] NZHC 2616 (Katz J). In that case, Diners Club (NZ) Ltd submitted that when faced with an undefended claim for payment of a liquidated demand, "the [District Court] Judge was required to enter default judgment in its favour, regardless of any concerns he may have".[12] The Commerce Commission intervened and gave evidence of a general nature about factors that might prevent a borrower from challenging a potentially oppressive credit contract, including:[13]

> (a) limited financial means;
>
> (b) lack of knowledge about their rights and the rights of the lender;
>
> (c) lack of knowledge about how much they actually owe (when taking into account interest, fees etc);
>
> (d) difficulty for borrowers recognising that fees are unreasonable or that a fee has been charged for a service which has not been carried out;
>
> (e) borrowers being unwilling to alienate a lender on whom they rely by initiating an investigation;
>
> (f) lack of knowledge about how to challenge a lender's claim for enforcement through the court system;
>
> (g) lack of knowledge about how to make a complaint to the Commission (or even that they are able to do so);
>
> (h) lack of knowledge of specific provisions such as s 94 of the CCCFA which gives borrowers the power to have unreasonable fees refunded; and
>
> (i) being unaware of proceedings being filed against them.

We have insufficient data about the profile of District Court litigants to establish whether its filings are dominated by corporate or government bodies collecting debts and therefore cannot comment on the extent to which these factors might be at play in the District Court. From an access to justice perspective, however, understanding these dynamics are very important, rather than simply looking at the number of filings.

To return to the comparison between the three jurisdictions in Figure 1, the possibility of data error and the fact that High Court and District Court figures include only defended proceedings, but the Disputes Tribunal includes all proceedings file, may account for some of the differences

[11] Jessica Steinberg "A Theory of Civil Problem-Solving Courts" (2018) 93 New York University Law Review 1579; Hannah Lieberman "Uncivil Procedure: How State Court Proceedings Perpetuate Inequality" (2016) 35(1) Yale Law and Policy Review 257
[12] At [3].
[13] At [50].

in filing numbers. However, these data problems are unlikely to fully explain the stark difference in workload statistics between the District Court and High Court. The District Court remains the court that litigants are least likely to choose to access. We now turn to qualitative data we have collected that might explain why the District Court is not a preferred civil forum.

4. Beliefs about the District Court Civil Jurisdiction

Through our work we have collected qualitative data that suggests that lawyers are reluctant to file in the District Court for a number of reasons. This data comes mainly from the *Wheels of Justice* project, where in the context of discussing the High Court, the District Court civil jurisdiction was also discussed.[14] This included questions we asked about the jurisdictional limits of the different courts and the different modes of trial available under Part 10 of the District Court Rules 2014. We have gone back to this data and analysed it for the purposes of reporting to the Rules Committee. We have identified a number of beliefs about the District Court civil jurisdiction that may influence where civil cases are filed.

1. Simple matters only

There is a belief that the District Court civil jurisdiction should only be used for simple matters, even if the monetary claim is less than $350,000: "The profession does not use the District Court civil process for anything that's got complications in it. It just doesn't". A Judge referred to having conducted an analysis that found that over 60 percent of cases filed in the High Court could have been filed in the District Court. Another Judge commented that before the lift in jurisdiction from $200,000 to $350,000, the High Court received filings for claims under $200,000 so the lift to $350,000 would not make a difference – "we query why it's there and sometimes we do refer cases back". The jurisdictional limits were considered unimportant however compared to whether the matter was complex or not.

2. Lack of Civil Resource

The District Court is seen as heavily dominated by criminal and family proceedings, with very limited civil resource. Judicial resource is limited as there are few judges with civil warrants and even fewer who have a workload that is civil dominated. This is particularly acute outside the main cities: "I never used the District Court because it was absolutely no good. And the reason is, it's no disrespect for them, it's only the main cities that they've got any civil judges". This lack of

[14] These interviews were conducted from late 2016 to early 2017.

resource was also seen as extending to the registry who were regarded as inexperienced in managing a civil case. The District Court registry is also centralised which lawyers did not like as they were not able to talk to a case manager who understood the case. The combined effect was that lawyers perceived the District Court as slower than the High Court for resolving civil matters:

> "District Court is the one with more delays so you pick the High Court" (Lawyer)
>
> "I'd choose the High Court every time because it's going to progress more promptly and be better judicially managed" (Lawyer)

This lack of resource may be distorting the civil case load of the District Court in other ways as well. On one research visit to a District Court registry, a court staff member explained to us that the absence of litigant in person files in the registry was because the registry advised litigants in person that the District Court was not the right place for them and that they should file in the Disputes Tribunal (even though a claim might lie within the District Court's jurisdiction). We do not know whether this is a widespread practice but we note that there may be factors such as this at play. If the District Court staff feel under resourced they may take action to divert the caseload to avoid the additional burden.[15]

3. Too settlement driven

There was also a view from lawyers that the District Court had become too settlement driven. They considered the current practice of an almost mandatory settlement conference as undesirable in a court where the reason for filing was to access adjudication. Lawyers referred to their clients being pressured to settle matters, even on the day of the trial, when what was being sought was the Judge's determination of the legal rights at stake. Lawyers who had been practicing for more than 20 years referred to the District Court as previously being a very oral driven court where a determination would be given in the court, but believed that it is now paper heavy and "more resolution driven" and concerned with "trial avoidance".

4. Major cost is legal fees

Lawyers considered that the main cost of running a court case was legal fees so there was no benefit in filing in the District Court (where it was slower, harder to access expert judges, harder to get to adjudication) over the High Court. The main cost of coming to court was the legal fees

[15] High Court registry staff commented on the problems faced by their District Court colleagues: "I mean the District Court people are out of control really because they've got far too much and haven't got enough manpower".

which were the same regardless of the court that the case was filed in. We asked about whether the different modes of trial in Part 10 of the District Court Rules could solve this problem as it reduced the scope of the fees. The answers suggested that these forms of rationing the amount of procedure available does not seem to be a well understood or accepted as a form of cost control for proceedings: "You can see it's not actually getting used, it's not being a drawcard for that court [the District Court] if you see what I mean". Where lawyers have limited understanding or acceptance of this type of procedure, legal costs will continue to be the major component of the litigation and therefore they will continue to file in the High Court to garner the other perceived benefits.

5. Directions for the Rules

The Rules are an important mechanism in access to justice and, as the Committee is no doubt aware, there are a number of rules that can potentially be altered to increase access to justice – rules about pleadings, evidence, trial forms, costs to name a few – but we do not intend to traverse our views here given we have only been asked for data. We would however note that there are other less obvious changes that could be made to try and increase accessibility. For example, we have previously raised with the Committee the possibility of altering rules around the solicitor on the record to allow for unbundled legal assistance. We are currently discussing this idea with the NZLS with a view to bringing this issue back to the Committee this year.

To return to the issue of data however, we would like to take this opportunity to recommend some approaches to data collection that are important where the goal is access to justice.

First, we consider the Committee needs more data about who the court users are. This data is not readily or reliably available in CMS. However it is possible to answer this question using the method we used in the *Wheels of Justice*.[16] Understanding the current profile of users of any court is key data in planning any rule changes to attempt to increase access to justice. It identifies who the current court users are and therefore which mechanisms might be most effective. It also identifies if there are groups who are not using the court so that rule changes can be made with a view to lifting their participation.

[16] Toy-Cronin and others, above n 1 at p 44. See also Suzie Forell and Catriona Mirrlees-Black *Data Insights in Civil Justice: NSW Local Court* (Law and Justice Foundation of NSW, 2016).

Second, we recommend that if the Committee is considering any rule changes to improve access to justice, a robust study into the effect of that change is undertaken. We note that Asher J has in the past recommended the Committee receive reports about the effect of rule changes.[17] We agree and further suggest that rather than only compiling Ministry statistics, the Committee organises a study to measure the effect. This could take the form of either:

a) An evaluative study – this involves a preliminary baseline study (with access to Ministry of Justice data plus any supplementary study) and then a follow-up study after the rule change has bedded in to measure change. Such a study needs to be carefully planned and initiated well before the rule change takes effect; or

b) A randomised control trial – this is the gold standard for evidence in medicine and is also starting to be used in law (in the United States at least).[18] If two procedures are in the rules side by side (e.g. the full trial and the short trial) cases can be randomised into one or other of the procedures. Data can then be collected about the outcomes the procedure is designed to improve e.g. lowering the legal costs, improving the time to final determination, improving litigant satisfaction, or all of the above. This then provides the best evidence for determining which of two procedural pathways is preferable.

We hope this is of assistance and we are happy to explain further if any aspects are not clear.

[17] Rules Committee minutes, 1 December 2014, p 2 (we thank Jason McHerron who alerted us to this discussion).
[18] James Greiner and Cassandra Wolos Pattanayak "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make" (2012) 121 Yale Law Journal 2118.