By email

1 September 2020

Rules Committee
For: Sebastian Hartley (sebastian.hartley@justice.govt.nz)

Tēnā koutou

Submission on initial consultation with the legal profession on improving access to civil justice

1. I am a lecturer at Auckland Law School where I teach two papers, legal ethics and negotiation, mediation and dispute resolution. I am currently studying towards a LLM at Columbia University as a Fulbright Scholar and Ethel Benjamin Scholar, where I am focusing on access to justice. My background is in civil litigation, first as a solicitor at Gilbert/Walker and then Three Crowns LLP in Paris, and then as a junior barrister at Shortland Chambers. My comments are informed by my practical and academic experience in dispute resolution generally and alternative dispute resolution in particular.

2. Thank you for the comprehensive and informative discussion paper that the Committee has compiled. The paper contains an array of creative solutions aimed at tackling the intractable problem of a lack of access to civil justice in Aotearoa. In my submission, I focus on the second and fourth proposals.

Second proposal: introduction of inquisitorial processes

3. I broadly support the introduction of inquisitorial (and alternative) processes. I believe that the following issues need further thought.

4. Facilitation-to-determination or mediation-to-arbitration processes can be problematic in terms of parties' willingness to meaningfully and openly engage in dialogue in the consensual phase. One of the benefits of mediation/facilitation processes is the confidential and without prejudice nature of those discussions. Parties can speak more freely with a view to resolving their dispute by consent. If the mediator/facilitator adopts the role of adjudicator once a facilitated discussion fails, parties may be less willing to speak freely in the earlier phase of the resolution process. This could reduce the efficacy of consensual processes. I do acknowledge, however, that there may be a loss of efficiency in splitting the role between two people.

5. Nevertheless, I believe the best approach is to keep the mediation and determination roles separate so as to maintain the full benefits offered by the

consensual phase, unless the parties agree otherwise. This is a stricter position than that adopted by bodies such as the New Zealand Dispute Resolution Centre in their Rules,[1] but is appropriate given the constitutional role of the public court system.

6. As for the question of appeal, it is appropriate to curtail appeal rights but only where the procedure has been consented to and parties have been legally advised as to the consequences of that decision. It will rarely be appropriate to curtail appeal rights for a mandatory procedure.

7. Regarding the specific processes that ought to be adopted, more detailed design is required. This should be undertaken by a steering group of dispute resolution professionals who ought to consult with the wider community on different versions of any new processes.

8. Alongside the options discussed in the paper, further thought needs to be given to introducing culturally appropriate dispute resolution mechanisms. If introducing new processes based on Pākehā approaches to dispute resolution, there is no reason why tikanga-based options could not also be introduced. In fact, there are two very good reasons to do so: one is that it would enhance the judiciary's compliance with treaty obligations, the other is that it would significantly enhance access to justice for certain parts of society.

9. Finally, the introduction of new dispute resolution options will only be effective if there are procedural mechanisms that encourage their use in practice. Despite significant changes in philosophy around "good" and "effective" lawyering and advocacy, an aspect of which is maximising opportunities for the early resolution of disputes, my observation is that lawyers typically leave the resolution of a dispute to the last minute possible. One reason for this is that the existing procedural rules create inertia in attempting to resolve disputes early for fear of not having all of the information available from discovery and briefing. This inertia is amplified by the generally narrow definition by lawyers of their clients' 'best' interests, focusing on legal/measurable economic interests, at the cost of psychological/immeasurable economic interests.

10. The Rules Committee has the power to help shift this attitude by introducing a requirement that parties attempt to resolve disputes before issuing proceedings, like in the United Kingdom.[2]

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1 See, for example, [22.7]-[22.8] of the NZDRC Arb-Med Rules (2018): https://www.nzdrc.co.nz/wp-content/uploads/2019/04/NZDRC-Arb-Med-Rules-2018-Revision.pdf.

2 See the Pre-Action Conduct and Protocols Practice Direction in the United Kingdom: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct. I was

Fourth proposal: streamlining standard pre-trial and trial processes

11. I support efforts to streamline the briefing process. The reality is that, despite changes in 2012, written briefs remain a significant cost and – in my view – not necessarily the best process for ascertaining the required facts at trial. At the very least, the requirement to read briefs in court should be removed, and a presumption that briefs be taken as read introduced (with reading only to take place with the direction of the court or on application). I also support the use of witness outlines, described in Appendix 1 of the paper. Likewise, I support a reduction in the burden of discovery.

12. In particular, I wish to highlight the nexus between poor definition of issues at the outset of a proceeding and mushrooming discovery, evidence and trial length. I have observed in my time working in international arbitration that the requirement for pleadings to be in a submission format focuses the parties' minds on the central issues early on rather than allowing parties to keep all their options open until they are delivering closing submissions on the last day of trial.

13. The procedural rules currently enable a culture of 'keeping options open' and, in my view, it is that culture that significantly contributes to the cost of proceedings and also discourages counsel from suggesting early options for resolution (such as mediation). Although a presumptive summary judgment approach might be useful, its summary format still enables parties to change their position later in time. There is merit in further exploring, in a holistic sense, how the procedural rules could be amended to encourage parties to adopt firm positions early on, thus encouraging earlier resolution of disputes (and reducing legal costs that arise naturally from the passage of time, including from duplication as a result of the need to re-read into matters).

14. Finally, I support strengthened judicial control of hearings. This, alongside a strengthened practice of active case management at the outset of hearings, is part of what needs to happen in order to encourage more discipline in the profession. So long as lawyers are afforded space to keep their options open they will and, in fact, almost always must do so.

Conclusion

15. One aspect that is not discussed in the paper is the role of technology. In due course, it will be important to reflect on what we have learned from Covid-19 about how technology can assist with enhancing access to justice.

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involved in a trans-national matter where we were able to swiftly and cost-effectively resolve a dispute that engaged this Practice Direction.

16. Thank you for the opportunity to contribute to this discussion. Should you have any questions, or if I can assist further in any way, please do not hesitate to contact me. I look forward to continuing to contribute to this conversation.

Nāku, nā