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RULES COMMITTEE'S CONSULTATION PAPER "IMPROVING ACCESS TO CIVIL JUSTICE"

1. I am writing to provide my comments on the Rules Committee's consultation paper "Improving Access to Civil Justice" dated 11 December 2019.

2. The focus of my submission is advocating "legal design" as an approach for tackling the "the justice gap". I appreciate that all of my comments are beyond the proposals set out in the consultative paper. I hope that the Rules Committee will, nonetheless, consider my comments set out below.

## Background

3. I am a barrister practising primarily in Auckland. I have worked within legal practices in New York. I practised at both the New South Wales and New Zealand independent bars from 2003 until 2014. During the period 1997 until 2003, the majority of my practice was in the area of employment law. At the end of 2003, I transitioned my practice into general litigation and dispute resolution. I operate a mixed charging model comprising predominantly time and attendance, with a small contingency component to promote access to justice. I have been an approved civil and criminal legal aid provider since 1998.

## The Justice Gap

4. In the employment jurisdiction, there are two key features which are not present in civil proceedings.

   (a) The first is that the Employment Relations Authority ("**ERA**") adopts an inquisitorial process that is significantly more "user" friendly. The ERA has very few procedural rules and generally provides a shortlist of directions at one case management conference, before conducting its investigative meeting. In my experience, self-litigants or those represented by advocates or lawyers with little experience can navigate their way through the ERA's processes without too much difficulty, cost, delay and importantly distress; and

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(b) The second feature is the involvement of employment advocates who charge their clients on a contingency "no-win-no-fee" basis. Such advocates fill part of what would otherwise be, a significant justice gap. Many deserving cases would otherwise be abandoned if employees were required to fund their claims upfront. While lawyers are permitted to act on a contingency no-win-no-fee basis, they are not permitted to charge a percentage of recovery unless that percentage is deemed to be "reasonable". Some lawyers, including myself, are reluctant to act on a percentage contingency basis due to the risk that our client, or more likely the other party, will without good grounds, challenge the reasonableness of any contingency fee charged.

5. While outside the scope of the Rule Committee's review, the prohibition on lawyers charging even a reasonable contingency fee in relationship property matters does not seem to have any logical justification and acts as an unreasonable barrier for access to justice.[1] In my experience, many parties, most often the lower or non-earner, to a relationship property claim, do not have immediate access to funding to advance their interests and rights. I would certainly be prepared to widen my contingency practice if I was permitted to take on clients with meritorious relationship property claims without access to funding in the Family Court.

## Legal Design

6. Access to justice is an extremely complicated, systemic, and difficult problem to solve. Lawyers and former lawyers are, with respect to both groups, not in the best place to tackle the problem on our own. Our own training and experience restrain us. Part of the answer lies in adopting a human-centred design in our system of dispute resolution.

7. The High and District Court Rules have centred on only one aspect of producing efficient outcomes, being accuracy, i.e. a well-reasoned and correct judgment. In my submission, accuracy should not trump but rather give way to the more important aspect of efficiency, which is timeliness. The adage "justice delayed is justice denied" is just as relevant today as ever. Most parties to litigation would prefer to get a 60 precent correct judgment delivered within six months, rather than a 90 percent correct judgment within three years. The complicated and delayed process that is civil litigation in New Zealand, causes more distress for some parties than they suffer from receiving a poorly written judgment. Often what parties want is a resolution, irrespective of whether it is in their favour or not. Unresolved or delayed resolutions can be more distressing than losing following a trial. A losing litigant can accept defeat and get on with their lives. The proof of that is that no all wrongly decided cases are appealed. A litigant with an unresolved dispute has to live with the uncertainty and ongoing costs, both financial and emotional. Often those costs create more of a strain than a poorly crafted judgment handed down many months if not years after the proceedings were commenced.

[1] s335 Lawyers and Conveyancers Act 2006

8. The Family Court is perhaps the most striking example of inefficient and inadequate "legal design". It is not only common but is the norm, for relationship property claims to have litigation lifecycles that exceed two years. In the meantime, the actual parties who the system is supposed to serve have their lives placed on hold. In my experience, a culture exists both within the profession and the bench, that case management directions and orders are merely soft aspirational targets which can be missed without any consequences. There is little, if any, accountability for the mismanagement of proceedings before the Family Court. The impact of delays on the parties does not feature in the family jurisdiction.

9. I have read the Law Society submission to the Rules Committee dated 25 August 2020. I do not have anything that I wish to add to the specific proposals set out in the consultation paper. Instead, I would encourage the Rules Committee to approach the problems that it seeks to resolve by adopting a "legal design" approach.

10. Central to designing a dispute resolution process is the involvement of the "user" of the process. One logical starting point would be to alter the composition of the Rules Committee. Specifically, to include a representative of the community. It is the members of the community who pay for the system, though their taxes and are also the system's end users. It is the community which is directly affected by, the efficiency or inefficiency of our systems of dispute resolution.

11. Lawyers and former lawyers do not have a monopoly or exclusively hold all wisdom or knowledge when it comes to providing solutions for those that seek a resolution to their disputes. I believe that it is arguable that our professional training and experience does, to a degree, restrict our ability to design systems that produce the most optimum efficiency in the circumstances and with the available resources.

12. I would encourage the Rules Committee to consider Dr Margaret Hagan's e-book "Law by Design"[2] or even Google "legal design". Dr Hagan is the head of the legal design lab at Stanford Law School[3]. Dr Hagan, in her book, states that she advocates "for a design-driven approach to legal innovation. Design is the way to generate promising ideas for how legal services could be improved, and then get them developed in quick and effective ways."

13. The Legal Design Summit in Finland each year produces a wealth of information and resources on the topic of legal design.[4] During last year's Legal Design Summit, Dr Hagan addressed the topic of "strategic blueprints for legal design and access to justice". Previous summits have also addressed topics such as "information design for courtroom."

14. The legal design process involves five steps being:

[2] http://www.margarethagan.com/ www.lawbydesign.co
[3] https://law.stanford.edu/organizations/pages/legal-design-lab/
[4] http://www.legaldesignsummit.com/home

(a) **Discover**. What is the landscape? Understanding the challenge and the stakeholders;

(b) **Synthesise**. What is your mission? Define and map the users and the problem statement you will be designing for;

(c) **Build**. What ideas may work? Generate possible solutions for the problem and prototype;

(d) **Test**. Are the ideas worthwhile? Test promising prototypes with your users and life situations; and

(e) **Evolve**. How to move forward? Process the feedback, edit your prototypes, and vet them.

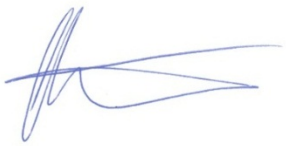
15. I also encouraged the Rules Committee to consider the Australian Productivity Commission's 2014 inquiry "access to justice arrangements".[5]

## Conclusion

16. I applaud the Rules Committee's attempt at trying to solve, in part, the challenging problem of improving access to justice. I strongly believe in the underlying objectives and goals. However, I would encourage a different approach to that adopted by the Rules Committee.

17. Each of the Rules Committee's proposals would benefit from being reviewed using the five-step legal design process outlined above. Importantly, the input from representatives of the broader community of those end-users of our Court based dispute resolution systems should be sought. Such consultation should be beyond just community law centre lawyers. Research resources exist that could provide valuable insight, such as the University of Otago's Legal Issues Centre's "Accessing Legal Services" project.[6]

Yours faithfully



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[5] https://www.pc.gov.au/inquiries/completed/access-justice/report
[6] https://www.otago.ac.nz/legal-issues/research/otago689626.html