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| Description: Ministry of Justice Crest Image | **Martha Roche** Member Immigration and Protection Tribunal  |

20 August 2020

Sebastian Hartley

Clerk to the Rules Committee

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Dear Sebastian

Updating Procedure to Improve Access to Civil Justice

I have read the memorandum discussing alternative models of civil justice with great interest.

I am a former member of the Refugee Status Appeals Authority, the Deportation Review Tribunal, the Weathertight Homes Tribunal, a former Chairperson of the Human Rights Review Tribunal, and a current senior member of the Immigration and Protection Tribunal.

It is my observation that some of the reforms discussed in the memorandum have already been put into practice in New Zealand tribunals. I suggest that the Rules Committee may be assisted in its examination of the issues raised in the memorandum by reference to the practice and procedure of tribunals, particularly the Weathertight Homes Tribunal and the Human Rights Review Tribunal, the first of which exercises concurrent jurisdiction with the High Court in respect of civil claims and both of which have practices and procedures designed to accommodate self-representation. Both can be described as providing a hybridised inquisitorial-adversarial system of justice. In terms of memorandum at [31], these tribunals could be described as the “Toyota Corollas” of civil justice, as opposed to the procedural bicycle that is the Disputes Tribunal and the Rolls Royce that is the courts of general jurisdiction.

Tribunals accommodate self-representation and ensure access to justice in a number of ways. Filing fees and hearing fees are minimal or non-existent. Procedural rules (in the form of Chair’s directions and practice notes) are simple. The rules of evidence are relaxed and there is an emphasis on relevance.

The Weathertight Homes Tribunal (WHT) is a good example of civil justice. It deals with few claims now due to a statutory time limit for eligibility but in its heyday dealt with hundreds of claims. It was established to provide the owners of leaky buildings with access to speedy, flexible and cost-effective procedures for the assessment and resolution of their claims which are brought in contract, tort and under a range of statutes such as the Fair Trading Act. Claims range from under $20,000 to millions. Parties, both applicants and respondents, are frequently self-represented. Section 57 requires the Tribunal to manage adjudication proceedings in a manner that achieves the purpose of the Weathertight Homes Resolution Services Act (the WHRS Act), provided the requirements of natural justice are met.

The Tribunal has wide ranging inquisitorial powers pursuant to Section 73 of the WHRS Act. There is a case management process prior to mediation and hearings. Files “belong” to a tribunal member who is responsible for convening an initial procedural conference, dealing with all interlocutory applications and issues (most often the joinder or removal of additional respondents), convening a pre-hearing conference, and conducting the hearing. Members know the case and the parties well by the time it progresses to a hearing.

The WHT website contains diagrams showing how claims progress in the Tribunal and provides advice for parties who wish to represent themselves. In previous years, seminars were regularly conducted in main centres several times a year by the founding WHT Chairperson Patricia McConnell (now the Chair of the Private Security Personnel Licensing Authority) to which everyone who had registered a leaky home with MBIE was invited. These seminars were used to explain Tribunal procedure, basic legal concepts such as “what is a tort”, “what is a duty of care”, and to put a face to the Tribunal for those considering self-representation.

At the hearing, briefs are taken as read which saves a lot of time (at the HRRT they are read out but tend to be shorter). Witnesses are then questioned about their content. In some tribunals, the tribunal members question first. This can greatly reduce the time spent on cross examination as the tribunal members tend to have identified the issues and have “cut to the chase”.

The Human Rights Review Tribunal accommodates self-representation through case management, an inquisitorial function, and by keeping pre-hearing and hearing procedures as simple as possible. For example, after a preliminary teleconference where the concept of discovery is explained (amongst other things), discovery is carried out on an informal basis between the parties with reference to the Tribunal only in the event of a dispute (rare). No affidavits are required, simply an exchange of relevant documents between the parties. The HRRT website explains the Tribunal procedure and advises parties that they may represent themselves.

Both tribunal members and secretariat staff are required to be adept at dealing with self-represented litigants who often need concepts and procedures explained to them more than once. Ministry of Justice case officers with the interpersonal skills to deal with this (patience, expertise, and kindness) are essential to the success of the self-represented case load. Usually, individual case officers are assigned to a file and will manage all contact from parties on that file including, at times, frequent telephone contact from self-represented parties.

There are a number of decisions from the WHT where self-represented parties have succeeded against legally represented parties and a larger number in the HRRT. For recent example from the HRRT see *Vivash v Accident Compensation Corporation* [2020] NZHRRT 16.

I am making this submission only to bring your attention to an often overlooked part of the civil justice landscape and suggest that some of the answers you are seeking may be found in the Tribunal world.

Yours sincerely

Martha Roche