



Sebastian Hartley
Auckland High Court
PO Box 60
Auckland 1010

Porirua Kapiti Community Law Centre (PKCLC) Submission to Improving Access to Civil Justice - or Death by a Thousand Cuts

Dear Mr Hartley,

We would like to thank the Rules Committee for the opportunity to consult on the barriers to accessing civil justice.

In providing legal assistance to individuals who cannot afford a lawyer, PKCLC has seen firsthand how the legal system is stacked against our most vulnerable communities. Our submission will document how the civil justice system is inaccessible for those with the least financial, technological and educational resources. Firstly, we will outline how the highly academic and technical nature of legal information is a barrier to justice. In particular, the shift to online legal information has excluded those who cannot afford to access technology. Secondly, psychosocial barriers to justice will be canvassed including feelings of feelings of whakamā (shame or a lack of understanding) and public perceptions of justice. Finally, we will outline how even where claimants are successful, they often face further injustices when seeking to recover the debt they are owed.

The Inaccessibility of Legal Information

A significant barrier to justice is the inaccessibility of legal information. Many of the individuals we see are Māori, Pasifika, migrant, refugee, and those with less education. Due to the compounding effects of racism and classism, these communities are most likely to have the least financial resources and frequently cannot afford computers, mobile phones, the internet and/or mobile data. Without this technology, people may be unable to communicate with, and obtain information from, lawyers, the police government departments, and the courts. In many cases, people are being forced to deal with government departments online or via call centers. For example, a phone with credit is often needed to make appointments or submit forms. Similarly, email is one of the only ways people can receive information such as: specific forms; the correct legal documentation to file; relevant fees or fines; and the dates of court appearance(s). Even where individuals have access to this technology, there are instances where the police seize mobile phones and computers as evidence. This cuts off a person's access to vital legal information.



Another form of communication is via the post. However, mail is far slower than email and is often unsuitable for those in precarious living situations. Individuals who frequently move homes are less likely to update their residential address. This can cause legal documentation to be sent to a previous place of residence. When coupled with the unaffordability of technology, these barriers can cause people to be unaware of important information such as the existence of court proceedings or the dates of court hearings. In many instances individuals only get a text message telling them to turn up to court on a certain date. For example, in Porirua every week we are getting clients who are discovering that there have been Judgements made against them in the Court or a Tribunal and they only find out when a bailiff turns up to seize goods, or their wages are garnished.

Fear of Technical Mistakes

Further, the highly technical and academic nature of legal information is often a barrier to justice. This creates confusion, and can cause individuals to worry that technical mistakes will invalidate their claims. Consequently, people are largely reliant on lawyers when seeking to understand legal documentation and procedures. Where cost prohibits access to legal assistance, these individuals are effectively barred from pursuing their claim. Individuals are increasingly relying on court staff, or low skilled community groups to get assistance in engaging with the court process, and unfortunately not all the information given is accurate or given in a timely manner.

When people do bring claims to court, they may fear that they are doing so on the incorrect ground(s). This issue was recently highlighted by two men who relied on habeas corpus when seeking to challenge the legal basis of ANZs lockdown. The court of appeal held that habeas corpus was the incorrect ground for bringing a claim. However, they recognised the potential for judicial review to be successful.

While this case was initially viewed as comical by many in the media, it illuminates a key perception with our legal system: individuals with strong cases are denied justice because they chose the wrong legal avenues. This exacerbates claimants' feelings of uncertainty and distrust when engaging with the courts.

To decrease such fears and improve public satisfaction with the civil justice system, PKCLC supports changes that would enable judges to play a more active role in determining the correct legal application(s) prior to proceedings. Such changes would save both courts and claimants a substantial amount of time and money. This aligns with the legal systems values of accessible, high quality, and efficient justice.



Whakamā

Whakamā is a Māori concept which encompasses feelings of shame, a lack of knowledge, inferiority, inadequacy, shyness, embarrassment, and self-doubt. Feelings of whakamā are often mirrored in Pasifika and migrant communities.

Many individuals who approach PKCLA may feel whakamā when engaging with ANZs legal system, a system imported by England and highly professional in nature. The eurocentrism and bureaucracy which dominates the legal sphere does not reflect ANZs population. Accessing justice can therefore be an alienating experience for those whose culture(s) do not reflect the dominant values of ANZs legal system.

In particular, Māori and Pasifika may fear speaking or acting incorrectly in a system which has marginalised and targeted their communities. The emphasis these cultures place on community and respect for others can also contribute to feelings of whakamā. Individuals may be discouraged from seeking justice due to fear that their involvement with the courts will bring shame on their whānau.

Likewise, people may feel whakamā due to the articulate speaking and writing skills that are necessary when engaging with the civil justice system. When coupled with difficulties navigating legal information, these barriers are likely to disadvantage individuals with less education.

Migrants, immigrants, refugees and those for whom English is their second language may also be disadvantaged. These groups are less likely to have previous experience with ANZ's legal system. They may face greater challenges when: navigating legal aid and the court system; comprehending their rights and responsibilities; and understanding the outcome of court decisions.

More broadly, feelings of whakamā are compounded when people bring claims against those with greater resources. For example, 90 per cent of judgements in the Tenancy Tribunal are awarded to landlords. Landlords and property managers often possess greater financial resources than tenants. Those who own numerous properties may come before the Tenancy Tribunal multiple times. The legal knowledge landlords' gain through this process enables them to become highly skilled in winning cases.

Ironically the more lawyers or skilled advocates are removed from the various Tribunal processes the more this section of society needs them to navigate the system and equalise the imbalance in knowledge and power in the Justice system. The current lack of legal advice in Tribunals can therefore lead to feelings of injustice by those bringing claims against more



powerful individuals or organisations. This power imbalance is also seen in the Disputes Tribunal and the District Court debt collecting processes.

What seems to have been forgotten in the rush to remove lawyers from the justice system is that one part of a lawyers job is to act a shield and as a navigator to litigants therefore reducing or lessening the whakamā that an individual might experience. Obviously making lawyers available to this segment of society is still a challenge.

Moral and Cultural Perceptions of Justice

Public perceptions that justice should be based on morality and equality frequently creates dissatisfaction with the civil court system. While the public go to court for justice, often all they receive is the interpretation of legal rules. This often clashes with public expectations that fairness and equality will be upheld.

Outside of academic and professional communities, the most common way that people engage with the legal system is through the media. American movies and television series have contributed to the ideology that courts will always remedy injustice and stand up for the underdog. Correspondingly, a moral perception of justice is most commonly held by individuals who do not possess the resources and education necessary to understand the complexities of the court system. Reflecting structural inequalities, these individuals are more likely to be a part of marginalised groups including Māori, Pasifika, immigrants, migrants, and lower socioeconomic communities. Due to the emphasis these groups place on morality, they are most likely to feel disenfranchised when technicalities and a rules based application of the law prevents liability.

This disconnect between legal and public perceptions of justice are compounded for individuals whose culture(s) place great emphasis on community networks, collective responsibility, and/or restorative justice. The adversarial nature of ANZs courts starkly contrasts Māori and Pasifika cultures, which place great value on the restoration of relationships. Consequently, Māori and Pasifika may feel that their cultures are excluded and overlooked by the civil justice system. Even where their claims are successful, the emphasis courts place on competing legal arguments can be considered frightening and harmful.

PKCLC therefore supports investigating changes that would empower judges to help parties reach an agreement to resolve their dispute. A move towards a more inquisitorial process would provide parties with greater support while still ensuring the vindication of the victim. More broadly, PKCLC recognises that a more inquisitorial process would help judges to get to the heart of the legal issue. This would decrease the time and cost of court cases, without compromising the quality of decisions.



Debt recovery and enforcement

Even where people take claims to court and are successful, further barriers to justice can arise surrounding the recovery and enforcement of civil debt.

Regarding obtaining debt from companies, successful claimants (creditors) may face challenges due to the variety of loopholes companies can draw upon to avoid paying debt. For example, registered liability companies can be closed and liquidated before a new company, often referred to as a phoenix company, is opened under a different name. Phoenix companies do not inherit liabilities from the old company. As a result, phoenix companies have been used by company owners seeking to avoid paying debt.

We recognise that the Insolvency Practitioners Regulation (Amendments) Act 2019 has increased the regulation of phoenix companies in ANZ. Likewise, we recognise that in certain instances, courts can rule that owners and shareholders are just as liable as the company itself. The ability for individuals to be found personally liable where a business has closed down or is liquidated was strengthened by the Employment Relations Act 2016.

These legislative changes are excellent steps in ensuring that creditors' debts are recovered. However, the law regarding insolvency is complex. It requires a level of legal expertise to navigate. Consequently, many individuals seeking to recover civil debt against a liquidated company are unaware of their rights as well as the legal processes available to them. In reality these process are beyond the ability of most of our clients to access.

For example, individuals who are successful in bringing a claim against a company may be forced to take a second claim to court so that owners or shareholders can be held to be personally liable, and therefore required to pay debt. They are essentially required to expend double the resources in terms of legal assistance, court costs and time, which on a practical level operates as a significant barrier to accessing justice.

Further, company owners can avoid debt by placing assets and intellectual property in one company (Company A), and create another company (Company B) which deals with daily operational matters. Company B will contract with other businesses and/or individuals. Where a contracting party successfully sues Company B, they will face barriers in obtaining debt because there are no assets in Company B. All assets are tied up in Company A. In such situations, those seeking to recover debt face significant legal and financial barriers.

Creditors can also face obstacles when trying to recover debt from individual debtors. When an individual cannot or will not pay debt, creditors are usually required to apply to the court to



initiate the civil enforcement process. This process is timely, costly and complex. A level of legal expertise is required to determine which enforcement action(s) are the most appropriate.

Further, these actions must be served on debtors. This is a difficult and time consuming process when the identity and/or address of the debtor cannot be determined. In many case it is simply not cost effective to pursue, especially if the debtor is determined not to pay.

Creditors may also have to pay fees for each enforcement application. For individuals with few financial resources, these fees may prevent them from enforcing debt altogether. This completely undermines the ability for courts to deliver equitable and just results. Civil enforcement fees can often be repaid by adding them to the debt owed. However, it can take years for debtors with few financial assets to pay off debt. Thus barriers to justice extend far beyond the court room. In the eyes of claimants, it can take years or even decades before justice is truly done.

To conclude, our clients have difficulty in accessing or navigating the justice system on their own, and in many cases they either can't afford representation or are not allowed representation. Even if they do manage to get a win, obtaining payment is often unlikely or beyond their resources. So the question really becomes 'why bother'. Unfortunately that attitude then begins to permeate the individuals engagement with society in general.

For the segment of the population we serve the justice system appears to be set up to inflict a thousand cuts on anyone who attempts to use it.

Yours sincerely,

Mike Sceats
Managing Director
Porirua Kapiti Community Law Centre

Lara Cable
Intern
Porirua Kapiti Community Law Centre