



**waitematā**

community law centre

te korowai ture ō waitematā

**SUBMISSIONS ON**  
***IMPROVING ACCESS TO CIVIL JUSTICE –***  
***INITIAL CONSULTATION WITH THE***  
***NEW ZEALAND COMMUNITY***  
**11 September 2020**

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**Waitematā Community Law Centre**

**Te Korowai Ture ō Waitematā**

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## BACKGROUND

We appreciate The Rules Committee – To Komiti mō ngā Tikanga Kooti (*the Committee*) taking the time to consult with Community Law. We welcome the opportunity to make written submissions in respect of the Committee’s initial consultation on improving access to civil justice.

### **About Waitematā Community Law Centre**

The Waitematā Community Law Centre (*WCLC*) offers free legal help to people who are most in need in Waitākere, North Shore and Rodney. We are a walk-in service and also provide advice by phone and email. We regularly support people living in poverty; those in insecure housing; and those experiencing family violence.

In the period 1 July 2019 to 1 July 2020, WCLC handled on average 15 civil matters per week. Civil matters account for approximately 30% of our total matters. While not all of these civil matters will be disputes that end up before the Courts, these figures give an indication of the need for legal advice (and possibly representation) on civil matters among low-income communities and marginalised groups.

A large proportion of WCLC’s clients are Māori; however, in our experience, Māori clients are reluctant to access or participate in the civil justice system. We have included our views and submissions in this regard under the heading *Access to Civil Justice for Māori*, below.

### **Our submissions**

This document includes our written submissions in response to the specific questions raised in paragraphs 12-16 of the consultation document *Improving Access to Civil Justice – Initial Consultation with the New Zealand Community* (issued 11 September 2020) (*the short-form consultation document*).

We refer to the consultation document *Improving Access to Civil Justice – Initial Consultation with the Legal Profession* (issued 11 December 2019) (*the 2019 Consultation Document*) in connection with our submissions.

In formulating our submissions, we have also referred to the address of Hon Justice Stephen Kós, “Civil Justice: Haves, Have-Nots, and What to Do About Them.”<sup>1</sup>

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<sup>1</sup> Address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016.

## SUBMISSIONS

### Submissions on short-form consultation document

**12. *The Committee wants to get a better sense of whether New Zealanders would feel justice will still have been done if they have less control over presenting their case because judges are more involved. We want to know what is most important to people in feeling that ‘justice has been done’ when they come to court. What makes people feel respected and listened to, or disrespected and not heard?***

- (a) Self-represented litigants (SRLs) already feel a lack of control over presenting their case because they:
  - are uncertain about court processes;
  - struggle to be effective self-advocates when they are emotionally invested in a dispute;
  - are daunted by the formality of District Court/High Court proceedings in which the judge is required to remain remote and dispassionate.
- (b) Greater involvement/engagement by judges may in fact give these litigants a greater feeling of control because the judge is more actively supporting and guiding the process. Such litigants may perceive this as the judge being more invested in the matter and could in fact improve litigants’ sense that justice is being done.
- (c) SRLs struggle to separate the legal question before the court from the personal context in which a dispute has arisen. As a result, they may not understand which information is material to a dispute and which is irrelevant. Assistance to define the issues in dispute at an earlier stage in proceedings would be beneficial. In this regard, we support the proposed inquisitorial process outlined at paragraph 36 of the 2019 Consultation Document.
- (d) SRLs also regard court as a forum where they may tell their story, assert their rights and confront a party who has wronged them, rather than merely receiving a ruling on a discrete legal question. Such litigants sometimes return from court frustrated and confused that they have not “had their day in court” i.e. they have not been given the opportunity to speak at length about the context surrounding a dispute and the personal harm which they perceive has been done. They sometimes complain that the judge did not listen to their side of the story and that he/she must have predetermined the outcome.
- (e) This causes many litigants to feel that justice has not been done. In extreme cases, some may attempt to appeal the decision or seek judicial review because they perceive bias or unreasonableness in the decision-making process (even where this is unlikely to have been the case).
- (f) In this regard we submit that SRLs would benefit from the ability to access information and improve their understanding of what the civil court process entails at each step of



proceedings. Often people fear what they do not understand, and this can lead to SRLs feeling disrespected and not heard as the matter progresses if they do not understand what is happening.

**13. We would like to hear whether people would be interested in judges being encouraged to take a more active role in offering mediation and helping settle disputes.**

(a) Our view is that judges taking a more active role in offering mediation and/or helping settle disputes could work well, as follows:

- For many SRLs, the process and outcome of justice are intertwined. Mediation or an inquisitorial process may be received favourably by SRLs because it permits a dialogue between the parties and judges, allows for greater informality, and is less intimidating than a formal adversarial court process.
- There is likely to be less confusion among SRLs if the participants are allowed to ask questions or engage in dialogue as part of the process of reaching agreement.
- SRLs may also feel greater buy in/satisfaction with an outcome where they feel it has been reached via a more restorative, discussion-based process rather than imposed through an adversarial one. This also goes some way towards SRLs feeling respected and listened to.

(b) However, we submit that this would need to be balanced with the following factors:

- Mediation alone does not resolve problems with imbalance between the parties. In this regard we support the remarks at paragraph 35 of the address by the Hon Justice Kós.
- This imbalance can arise through an array of factors, whether it be an imbalance in power/status (e.g. SRL versus an insurance company); cultural dynamics and/or language barriers; cognitive challenges/lack of understanding; or vulnerable client SRLs who are under-resourced both in terms of finances and energy/motivation to continue proceedings.
- In our experience, vulnerable parties participating in mediation are quick to surrender their legal rights, often for one or more of the reasons outlined above. In this case we often see a mediation quickly devolve into a back-and-forth negotiation aimed at reaching a financial settlement, without much focus on the facts and applicable legal principles of the matter. This does not leave participants with the sense that justice has been done.

(c) We envisage that the involvement of judges in a mediation/settlement process would address these concerns to a certain extent, given the legal expertise and level of analysis which judges are likely to apply to a matter in front of them.

**14. What deters people from going to court to resolve their disputes? In particular, is lack of money/perceived cost the main obstacle, or are other factors equally or more important?**

- (a) Perceived cost is a deterrent because individuals are fearful that they may be burdened with large costs awards from the other party if they are unsuccessful. This is a particular deterrent where the opposing party is represented but the litigant is not.
- (b) Court processes are perceived to be time-consuming and to require ongoing expense and effort because of multiple appearances at conference/trial stages.
- (c) The preparation of documents at each stage is onerous for SRLs, as is orally presenting a case and cross-examining witnesses. We comment on this further at paragraph 15, below.
- (d) We acknowledge that civil legal aid is outside the scope of this consultation. However, we note that the lack of civil legal aid lawyers is a barrier to accessing justice. Due to the fee-driven nature of legal practise, there are not enough civil lawyers willing to take on time-consuming matters for marginalised or vulnerable clients. While we recognise that this is the reality of legal practise, the fact remains that the cost of representation (and consequent lack of access for many) is a significant obstacle to going to Court to resolve a dispute. In this regard we support the proposal for limited representation at paragraph 50 of the address by the Hon Justice Kós.
- (e) Many individuals are uncomfortable with the public nature of hearings and publication of decisions. This is particularly pronounced among some migrant communities in which there is stigma/shame to being a party to a court process, even in the context of a civil matter, and even if that individual is ultimately successful. Greater use of mediation/facilitation procedures in which settlement is confidential or is formalised in a Tomlin order, etc. could improve access to civil justice in these circumstances – although we note the need to balance this with the factors outlined at paragraph 13(b), above.
- (f) Language barriers can operate as a deterrent to going to Court. Although access to interpreters is available at the hearing stage, there are many steps to navigate before this point. This can be difficult for clients who do not have English as a first language.
- (g) Disabled clients find it very difficult to access and navigate the Court system. We respectfully submit that the Committee may wish to engage with disability service providers and Auckland Disability Law<sup>2</sup> to obtain their specific views in this regard.

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<sup>2</sup> <http://aucklanddisabilitylaw.org.nz>



**15. We would also like to hear from organisations like the Community Law Centres and Citizens Advice Bureaux who assist self-represented litigants in navigating the court process about the barriers and frustrations their clients face in going to court.**

*Court documents*

- (a) The Schedules to the Rules do not contain forms for all necessary documents and, although forms and precedents for initiating proceedings in the District Court are available to SRLs via the Ministry of Justice website, there is little guidance for SRLs at later stages in the proceedings.
- (b) The need to prepare Court documents in a specific format is a challenge for many SRLs who do not have the necessary resources or knowledge to do so.
- (c) We submit that accessible, easy-to-navigate template forms could be developed for all necessary Court documents.

*Pleadings*

- (d) Without appropriate training, most SRLs do not have the necessary skills or knowledge to draft relevant and concise pleadings. Many of our clients also experience challenges in regards to literacy and comprehension, which pose a further obstacle to access to justice.
- (e) In this regard we support the remarks at paragraph 49 of the address by the Hon Justice Kós, although we note that if initial pleadings were required to be certified by a lawyer, this would give rise to an additional barrier for many SRLs.
- (f) A more preferable approach may be to adopt the inquisitorial process outlined at paragraph 36 of the 2019 Consultation Document, in particular the proposal for an initial review of pleadings with assistance provided to remedy deficient pleadings where appropriate.
- (g) We support the proposal to offer this type of assistance at the Courts. We submit that an Applications Support Coordinator role, or similar, could be established to provide this resource, rather than imposing an additional burden on existing registry staff. We envisage this as an entry-level role which could be staffed by recent law graduates, who can assist SRLs in completing Court documents in a template form.
- (h) Alternatively, this support could be considered in combination with the proposal for limited representation at paragraph 50 of the address by the Hon Justice Kós. We envisage that this would then be a similar approach to the duty lawyer system operating in the Courts, but for civil matters.

### *Evidence*

- (i) In our experience, SRLs struggle to prepare briefs of evidence so the use of will-say statements is likely to be beneficial.
- (j) There is also a cost barrier for SRLs who need to obtain expert evidence or reports to support their application. This arises at the outset and before the matter even goes to a hearing. A common example of this is the need to obtain a builder's report. Parties who are able to pay for a report can often obtain a very favourable one, leading to unjust outcomes for those who cannot afford the same, as well as confirming their perception that the justice system is set up to serve the "haves".
- (k) To a certain extent this could be addressed by a Court assessor or judge identifying the evidence that is relevant and required for the proceedings; and where necessary, appointing the experts to provide the evidence. The costs could then be apportioned between the parties once a decision is made, if appropriate.

### *Service*

- (l) Finding and serving the other party is a barrier to going to court, particularly where there are deliberate attempts to evade service (which is an issue faced frequently by our clients).

### *Enforcement*

- (m) Successful litigants become frustrated when they must undertake a separate civil enforcement process to enforce the judgment, with additional expense and delay. We submit that consideration could be given to putting an enforcement plan in place as soon as an outcome is reached.

***16. From these groups, we would like to hear about these barriers and the type of disputes these clients need help in addressing. We would be interested in receiving any data you have and can share about the types of clients you are seeing who have civil legal issues but would also like to hear the stories of your clients and those involved for your organisations in dealing with them, and about any common themes you identify in the cases that you see.***

### *Types of clients*

Although not an exhaustive list, we see the following types of clients who have civil legal issues:

- (a) Low income clients – many of our clients access social security benefits, or work in low-paid jobs/industries, often for minimum wage. For these clients, cost is a significant consideration in pursuing civil legal claims.



- (b) Ethnically diverse – many are migrants to New Zealand from Asia and the Pacific Islands. For these clients, language barriers and cultural dynamics can pose a barrier to accessing civil justice.
- (c) Many of our clients are living with mental health problems or experience ongoing mental illness. It is very difficult for them to access or participate in civil justice. We often see situations where a client's case has merit, but they are not in a position to advocate for themselves; or their health condition makes it difficult for them to effectively attend Court or participate in proceedings when required. In this regard we submit that a Mental Health Coordinator support role could be established in the Courts, whereby an appropriately trained person could walk alongside clients who require additional support in navigating the civil justice system.
- (d) We also work with clients who experience challenges in regards to literacy and comprehension, and/or live with cognitive challenges, which creates a very real barrier to their ability to access civil justice. In this regard we propose the establishment of an Applications Support Coordinator role, or similar, as described at paragraph 15(g), above.
- (e) While this is not always the case, clients may experience an intersection of any or all of the above (or other difficulties) in addressing their matter.

#### *Common themes*

- (f) In summary, we have identified the following common themes in the cases we see (as detailed in these submissions):
  - Cost as a barrier;
  - Lack of understanding about the process;
  - Lack of support available once in process;
  - Difficulties in regards to preparing the necessary documentation; formulating pleadings; and compiling evidence;
  - Difficulties in accessing representation;
  - Imbalances between the parties;
  - Additional challenges experienced by disabled clients and clients living with mental illness.

#### *Case studies*

- (g) A company which held itself out as a home funding lender took large sums of money from low income people on the understanding that the funds would be invested on their behalf and the sum used for a deposit on a house. This was never the case. WCLC challenged this on behalf of several clients who had experienced the same issue, and filed a complaint with the Financial Dispute Resolution Service (FDRS). Once the complaint was filed, the company withdrew from the FDRS scheme. WCLC supported



the clients to apply to the Disputes Tribunal to pursue their claim. The clients were successful in obtaining judgment against the company in the Disputes Tribunal. The company did not honour the judgment and the clients had to file for enforcement in the District Court. By this stage the company had gone into liquidation. The clients have attempted to pursue the sole director personally but he has evaded all attempts to be located or served. It would have been almost impossible for the people targeted by this company to navigate the process without appropriate support; and at this stage it looks likely that in fact justice will not be done for them despite having obtained a judgment in their favour.

- (h) Clients who have been served with Notices of Proceeding in relation to debt matters may abandon attempts to defend proceedings, even where they may have a defence under the Credit Contracts and Consumer Finance Act 2003, because they see defending the claim as too challenging.
- (i) A client who had commenced proceedings under the Harassment Act 1997 struggled at the later stages of the proceeding to prepare briefs of evidence.
- (j) A SRL wished to have an expert give evidence (in this case, a builder in relation to a construction dispute) but the requirement that the expert give oral evidence meant that the SRL had to pay the expert a considerable amount for his/her time in court. Use of affidavit-only evidence and removing the requirement that briefs be read aloud at trial would be efficient/cost-saving.
- (k) The requirement that companies be represented in proceedings places a significant financial burden on small businesses as they are ineligible for legal aid but cannot necessarily afford representation (particularly post-Covid-19). In one case, a company director who had obtained default judgment in the Disputes Tribunal issued a statutory demand to enforce the judgment. The opposing party engaged counsel and opposed the demand on spurious grounds. As the hearing on the statutory demand took place in the High Court and the director did not have right of audience, the company ultimately withdraw the demand, has been unable to enforce the judgment, and is at risk of being pursued for costs.
- (l) Many of our clients also experience issues which could be treated as Police matters, for example harassment, theft, or obtaining by deception in a special relationship. If Police are reluctant or refuse to engage in addressing the matter, claiming it is a civil matter, clients then need to rely on the civil court process (including the associated costs and complexities) to bring an appropriate claim.

### Access to Civil Justice for Māori

Within WCLC we have a dedicated Kaupapa Māori Service. As indicated above, a large proportion of WCLC's clients are Māori; however, in our experience, Māori clients are reluctant to access or participate in the civil justice system. The Kaupapa Māori Service offers the following specific submissions in this regard:

- (a) Many of our Māori clients feel a lack of confidence in accessing the Courts for civil disputes, and do not feel empowered to hold other parties to account;
- (b) Part of this stems from the nature of the current Court system and the fact that there is little collaboration or contribution between the parties in reaching a decision, rather, a decision is made and the parties are told by the Judge what is going to happen;
- (c) The historical impacts of colonisation mean that for many Māori, their expectation is that they will not be listened to or respected in the justice system, "so why bother"; and they feel acutely aware of power imbalances in the justice system;
- (d) Humility is a core value in Te Ao Māori, and this does not translate well in an adversarial setting where a SRL needs to advocate for themselves and their situation;
- (e) The foundation of Te Ao Māori is connectivity and relationships, which means that in a Court setting, it is important to recognise the whole person and to whakamana (give respect and dignity to) the parties, not just for a person to be seen in terms of the issue in dispute;
- (f) In the context of the above concerns, we support the proposal for judges to take a more active role in offering mediation and helping settle disputes. We believe that Māori clients will welcome the opportunity to participate in mediation, as this facilitates the opportunity for kōrero kanohi ki te kanohi, enabling the parties to engage in dialogue and collaborate to resolve their dispute.
- (g) We note that consistency in process and protocols will be key, in order to build participants' trust and confidence in the civil justice system. We support the work of Chief District Court Judge Heemi Taumaunu in respect of delivery of equitable treatment for all people affected by the business of the Court.<sup>3</sup>

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<sup>3</sup> <https://www.teaomaori.news/judge-heemi-taumaunu-seeks-transformative-change-justice-system>