

2 July 2021

The Clerk to the Rules Committee
By email: rulescommittee@justice.govt.nz

al.nz

Improving access to civil justice - proposed civil law reforms

- 1 Anderson Lloyd welcomes the opportunity to provide its submission on the Rules Committee paper *"Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community"*, and is grateful to the Rules Committee for the work that has gone into this paper and considering previous submissions.
- 2 Anderson Lloyd represents large commercial clients on complex claims, as well as individuals on claims of small value. As such, we are fortunate to be in the position of considering the issue of accessing civil justice from the perspective of a range of clients.
- 3 The below submission organises feedback into the following categories: Disputes Tribunal, District Court and High Court. Although Anderson Lloyd has not provided feedback on every proposal within the paper, we have commented on the proposals that we either strongly support, or strongly oppose. We note that while there has been some recognition of the social and cultural barriers that exist in the access of justice, further consideration is required to actually address these barriers. It is Anderson Lloyd's submission that culturally appropriate dispute resolution options, such as a tikanga based model, requires consideration and implementation into all levels of our justice system.
- 4 While the majority of the proposed civil law reforms should contribute to the improvement of access to civil justice, as a whole the profession must commit to continuous work to enhance and progress access to our civil justice system.

Disputes Tribunal

- 5 Anderson Lloyd supports the proposal to increase the jurisdiction of the Disputes Tribunal and suggests that the appropriate figure to set the jurisdiction at would be \$100,000. It is currently uneconomic for a represented litigant to bring a case to the District Court for anything less than \$100,000. The increase of the Disputes Tribunal's jurisdiction would allow litigants to bring their own cases before a decision making body in a more economic and efficient way.
- 6 However, as the Rules Committee has been identified, alongside an increase of jurisdiction additional changes would also be required. These would include:
 - (a) Amending the right of appeal of a Disputes Tribunal decision to that of an automatic right of appeal to the District Court for claims over \$30,000. For claims \$30,000 and under, the current right of appeal (allowing an appeal in circumstances where proceedings were conducted, or an inquiry was carried out, unfairly, resulting in prejudice) should remain. This would ensure that defendants of low value claims are not unreasonably dragged into District Court proceedings where the Disputes Tribunal has already fairly and reasonably issued a determination.

- (b) Amending section 18(6) of the Disputes Tribunal Act 1988 to require the Disputes Tribunal to give effect to strict legal rights or obligations, or to legal forms or technicalities.
 - (c) Requiring referees to be legally qualified and experienced, with specific training and qualifications that must be obtained to sit as a referee in the Disputes Tribunal. Training should be ongoing, with continued training obligations such as the continuing professional development (CPD) requirements that lawyers must undertake, on an annual basis.
 - (d) If the Tribunal's jurisdiction is increased, and referee's training and qualification obligations are strengthened, the referee's daily fees should also be increased to reflect those changes.
- 7 Further clarification is required as to what claims could be taken to the Disputes Tribunal (or Community Court or Small Claims Court). For example, currently there must be a 'dispute' for a claim to be brought to the Disputes Tribunal. For debt recovery matters, where for example a letter of demand or statutory demand has been served to a debtor and no payment has been made, nor has any response from the debtor been received, it is unclear whether there is any 'dispute' in that scenario. It is Anderson Lloyd's submission that, on the basis that the reforms noted at paragraph 6 above are implemented, the Disputes Tribunal should have jurisdiction over debt recovery matters (at a claimant's election) up to its current jurisdiction (\$30,000) where the debt is not disputed. For debt claims over \$30,000, we submit that those debt claims should remain in the District Court, where a judgment can be sought by default.
- 8 Clarification is sought as to whether there is concurrent jurisdiction between the Disputes Tribunal and the District Court. A claimant should have the ability to bring a claim in the District Court for claims up to the value of \$100,000 (i.e. it is not mandatory to bring a claim in the Disputes Tribunal in the first instance). This enables claimants the opportunity to engage legal representation.
- 9 Without making further substantive comment, Anderson Lloyd also supports the following proposals:
- (a) Renaming the Disputes Tribunal to the Community Court or the Small Claims Court. It is suggested however that should the jurisdiction of the Disputes Tribunal be extended to \$100,000, the title of Community Court may be more appropriate.
 - (b) Changing the title of 'referee' to 'adjudicator'.
 - (c) Conducting public hearings and publicising decisions of the Disputes Tribunal, with the ability to seek leave as appropriate for a private hearing and/or decision.
 - (d) Increasing resource to enable the Disputes Tribunal to make greater use of its powers to appoint investigators and experts.
 - (e) Providing the Disputes Tribunal with the ability waive filing fees.
 - (f) Granting the Disputes Tribunal a limited costs jurisdiction to award disbursements, however with a guiding principles of reasonableness and proportionality of those costs. Associated rules would need to be developed to guide the power to award disbursements, such as that which exists in the higher courts.

District Court

- 10 Anderson Lloyd strongly supports the proposal to appoint a Principal Civil Judge for the District Court, and to appoint part-time Deputy Judges/Recorders from within the senior ranks of the

profession. This would strongly increase the efficiency and accuracy of decisions coming from the District Court, as well as providing for relevant and current civil expertise within the Court.

- 11 Anderson Lloyd also supports, in principle, the proposal to adopt pre-action protocols for debt recovery within the District Court, such as the Pre-action Protocols for Debt Claims that currently exists in the UK. However, it is suggested the further consultation on the protocols is required, with specific protocols put forward for feedback and comment. Another way in which information could more clearly be communicated to defendants could also be improving the quality of the information contained in the current notice of proceeding, and tailoring a notice of proceeding specifically for debt claims.

High Court

- 12 Anderson Lloyd does not support the proposal to replace discovery with new disclosure rules. If a party is required to provide every document relevant to its case at the outset of the claim, depending on the size and complexity of the claim, this could significantly increase the costs of bringing a claim to the High Court and would likely be disproportionately expensive. It is only once a defence is filed, and the parties have clearly identified the issues in the claim (such as for a case management conference), that a decision as to the relevance of documents can most accurately be made. We suggest that an alternative proposal, such as a presumption of tailored discovery, would be more suitable.
- 13 Presently there is significant leniency in High Court civil proceedings to 'avoid' an initial case management conference by filing a joint memorandum of counsel, which negates the need for judicial involvement early in proceedings. Anderson Lloyd strongly supports the proposal to increase early engagement with Judges by way of an issues conference. We suggest that the presumption for civil cases in the High Court should be for issues conferences to be mandatory, however this should also be guided by the principle of proportionality – there should not be an expectation on counsel to put forward full legal arguments with supporting case law (essentially submissions) at an issues conference, but rather a pragmatic conference that identifies the key issues in the proceeding, supporting evidence, and the core legal principles required for each party to prove their case. It would be beneficial at this stage, if the Judge felt it appropriate, for the Judge to give their initial view on the claim and what would be required for that party to success in their claim, which may assist the parties to consider alternative dispute resolution.
- 14 In principle Anderson Lloyd supports the proposal that interlocutory applications would be presumed to be dealt with on the papers, as this can significantly reduce the costs for parties in litigation. However, there would need to be clear identification of how a party could seek leave for an interlocutory application to be heard in person, and what would be required to satisfy such an application.
- 15 Anderson Lloyd also support the following proposals, without substantive comment:
 - (a) Documents in the common bundle to be admissible as to the truth of their content, subject to a challenge being advanced.
 - (b) In respect of evidence:
 - (i) evidence to be given by way of affidavit, and taken as read for each trial, requiring oral evidence only for matters for factual contest; and
 - (ii) disincentives, such as costs sanctions, for representatives that use witness statements, or overly argumentative affidavits, as advocacy.

- (c) Greater use of Court appointed experts, and limiting to one expert witness per topic, per party.

Concluding comments

- 16 Anderson Lloyd is grateful to the Rules Committee for the opportunity to submit feedback on the proposed civil law reforms, and we look forward to the promising change that the proposals may implement. We welcome any questions that arise from our submission, and are happy to provide any further information as required.

Anderson Lloyd