Improving Access to Civil Justice

Submission of Blair Mumm to the Rules Committee

26 June 2021

Summary

[1] This submission details support and opposition to specific proposals set out in the Rules Committee's further consultation paper of 14 May 2021 on improving access to civil justice.[1]

[2] I offer no support, opposition, or comment on proposals not mentioned here.

[3] I commend the Committee for its mahi in this area.

Disputes Tribunal

Jurisdiction

[4] The Committee has proposed to expand the jurisdiction of the Disputes Tribunal to include proceedings for amounts sought up to $50,000.[2]

[5] I support a further expansion of the Tribunal's jurisdiction for amounts up to $100,000,[3] primarily because of "the views of submitters and commentators that bringing claims in the District Court is uneconomic in cases for less than $100,000".[4]

[6] With any expansion of the Tribunal's jurisdiction, I would support an increase in appeal rights for parties to disputes.[5] I believe this would be commensurate with the increase in monetary threshold and with the wider variety of factual scenarios that would likely come before the Tribunal as a result.

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1 Rules Committee "Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community" (14 May 2021) Courts of New Zealand <courtsofnz.govt.nz>.

2 At [50].

3 As proposed at [50(c)].

4 At [45].

5 As proposed at [50(c)(i)].

[7] I would also support identical appeal rights in all cases.[6] I believe this would be the simplest and fairest approach. It would also go some way to ensuring that it would not be "more trouble than it is worth" for parties to disputes of lower monetary value to challenge Tribunal decisions, especially for challenges that would have merit.

Renaming

[8] The Committee has considered renaming the Tribunal to better suit the role and position it has, and may soon have, in the civil justice system.[7]

[9] I do not support renaming the Tribunal. The current name is, after more than 30 years since its introduction,[8] likely well-recognised. The Tribunal also appears to have a good reputation.[9] These factors should be leveraged to ensure that suitable parties continue to consider the Tribunal as an option for resolving disputes, especially if the jurisdiction of the Tribunal were to be expanded.

[10] Use of the word "Tribunal" indicates fundamental differences of procedure to a "Court". While those differences may be a result of public perception,[10] the good reputation of the Tribunal appears to be due to the aspects of the Tribunal that distinguish it from the civil jurisdictions of New Zealand courts.[11] Those differences should be promoted, not least by name.

[11] While the Committee suggests that a different name could better represent the standing of the Tribunal,[12] it is not clear that this is a sufficiently significant or resolvable deficiency to justify a name change. Even if public perception of the standing of the Tribunal is a deficiency that a name change could address, its

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6 As proposed at [50(c)(ii)].

7 At [51(a)].

8 Disputes Tribunals Act 1988, s 4(2) (as enacted).

9 Rules Committee, above n 1, at [43].

10 See [51(a)], n 29.

11 See [41].

12 At [51(a)].

standing or position is surely of less importance to the general public than its functions, powers, and suitability as an avenue to take their disputes through.

[12] Moreover, the names that have been suggested as the potential successor would introduce greater deficiencies than any which they would purport to address:

(a) The name "Small Claims Court" would not gel with an expansion in the Tribunal's jurisdiction to include amounts that many people would not consider "small". As a formerly-used name,[13] it would also demonstrate a conspicuous lack of originality which could cast a shadow over, and even distract from, other proposals in this set of reforms and the wider efforts of the Committee.

(b) The name "Community Court" may tacitly carve out the role that other courts and tribunals play as being places in the community where justice can be accessed. Public perception of the wider District Court in particular may be negatively affected if only part of it were to be labelled the "Community Court". It would imply that other divisions of the District Court are, by omission, not places for the community, at least to the same extent. This would be incompatible with the direction of the District Court as a whole, as expressed in the Te Ao Mārama model.[14]

[13] The logistical challenges and financial costs of renaming the Tribunal also weigh against such a proposal.

Other proposals

[14] The Committee has proposed a suite of other changes to the Disputes Tribunal. I support:

(a) changing the title of "Referee" to "Adjudicator";[15]

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13 Small Claims Tribunals Act 1976, s 4(2).

14 Heemi Taumaunu, Chief Judge of the District Court of New Zealand "Mai te pō ki te ao mārama: Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato Faculty of Law, Hamilton, 11 November 2020) at 25.

15 Rules Committee, above n 1, at [51(b)].

(b) amending s 39 of the Disputes Tribunal Act to require that, by default, hearings proceed in public;[16]

(c) increasing the daily fees for adjudicators,[17] especially to counterbalance the greater magnitude, value, and variety of disputes covered by the Tribunal if its jurisdiction were to expand;

(d) allowing the Tribunal to decide to waive filing fees;[18] and

(e) streamlining enforcement provisions for Tribunal orders,[19] perhaps by providing adjudicators with limited civil enforcement powers of District Court judges. This would sit well with remunerating adjudicators to deal with a wider variety of cases.[20] It would also make better use of the Tribunal's standing as a division of the District Court.[21]

District Court – part-time Deputy Judges/Recorders

[15] The Committee has proposed that Deputy Judges or Recorders be appointed to hear and decide cases in the Court's civil jurisdiction on a part-time basis.[22]

[16] I support this proposal, both generally and in the various ways the Committee has suggested this could be implemented.

[17] I note that if this proposal were to be implemented, the opportunity to be appointed a Deputy Judge/Recorder should be promoted not just among senior practitioners as a consideration in the near term, but also at more junior levels of the profession and in tertiary education as an aspirational, and perhaps

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16 At [51(d)].

17 At [51(e)].

18 At [51(f)].

19 At [51(h)].

20 At [51(e)].

21 Disputes Tribunal Act, s 4(1).

22 Rules Committee, above n 1, at [59].

inspirational, consideration. This would complement efforts currently underway to promote time on the bench as a viable and desirable career goal.[23]

High Court – evidence at civil trials

[18] The Committee has proposed to rebalance the proportions of documentary and oral evidence given at trial.[24]

[19] I support this area of change with one proviso and one exception.

[20] The proviso is that a sufficiently balanced basis for a judge's consideration of the issues in a case, whether factual or legal, remains of paramount importance. I am particularly wary of the risk of "the Court losing sight of important evidence because written evidence which is read outside of court sitting hours tends to make less impact than that which is explored as part of the hearing process".[25] This risk must be mitigated or eliminated if evidential rules are to change in the ways proposed.

[21] The exception is page limits or other restrictions to lengths of affidavits, including limits that scale to the type or size of the case.[26] Further to the practicability point the Committee has noted, I would expect that if issues were to be pruned more carefully pre-trial,[27] the scope and size of affidavits should shrink accordingly. Careful management of issues should achieve the same end as page limits would, rendering these additional limits unnecessary.

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23 See for example Christina Inglis, Chief Judge of the Employment Court of New Zealand "The lens through which we look: Employment Law and Practice, Part 2: Judicial Diversity" (paper presented to Victoria University of Wellington and University of Otago Employment Law Classes, Wellington and Dunedin, 11 May 2021/27 May 2021) at 10.

24 Rules Committee, above n 1, at [75(c)].

25 Andrew Popplewell, Lord Justice of Appeal, and others *Factual witness evidence in trials before the Business & Property Courts* (Courts and Tribunals Judiciary, 6 December 2019) at [15] as cited in Rules Committee, above n 1, at [75(c)(i)], n 50. This passage is presumably equally relevant in a New Zealand context.

26 Rules Committee, above n 1, at [75(c)(v)].

27 At [70].