# Submission to rules committee on improving access to civil justice

1) I am a lawyer with 12 years working in litigation. My roles have included working for boutique litigation firms, as a case manager for a private dispute resolution provider, and as the principal of a specialist insurance and litigation firm. I am currently a member of the Canterbury Earthquake Insurance Tribunal (CEIT).
2) My experience involves work in the High Court, District Court, and in a number of Tribunals. I have worked on cases in bodies including the Human Rights Review Tribunal, the Tenancy Tribunal, Accident Compensation Appeals Authority, the Employment Relations Authority, Weathertight Homes Tribunal, and Medical Practitioners' Disciplinary Authority. I have advised clients appearing in the Disputes Tribunal.
3) I have been a volunteer lawyer with the Wellington and Hutt Valley Community Law Centre for the past seven years and I run a monthly legal drop in at a local community centre. I have been a civil Legal Aid provider since 2011.
4) Prior to re-training as a lawyer, I worked in the insurance industry in New Zealand and the UK. My responsibilities included handling litigious files, in this capacity I appeared in Disputes Tribunal matters for my employer on a number of occasions.
5) In practice I work with a variety of clients over a wide number of issues and areas of law. The clients range from at-risk consumers who have mental health or medical issues, those in low-income brackets, to SMEs and mid-size commercial organisations. Reform is needed. Litigation is currently beyond the reach of many New Zealanders, and it is a constitutional issue when people are barred from access to fair and cost-effective justice.

## CEIT Experiences

6) In the CEIT the members have faced a number of the issues which are discussed in the White Paper. The CEIT's jurisdiction requires the applicant to be a policy holder and one or more respondent must be an insurer. The jurisdiction is limited to earthquake damage to residential property. The jurisdictional requirements mean that practically all cases involve a significant disparity in

resources and technical competence. This disparity extends to all aspects of the applications and underlying claims, from the understanding of legal issues, availability of counsel, resources to fund counsel and expert witnesses, and generally the competency to handle technically difficult, and often legally complex matters. Because of these issues the Tribunal is becoming experienced in the use of inquisitorial processes, the appointment of independent experts for the tribunal, and handling applications brought by self-represented lay litigants

## Proposals

My observations on the proposals set out in the White Paper are

**Disputes Tribunal**

7) I have misgivings regarding the increase in the jurisdiction of the Disputes Tribunal. This largely relates to the inability of parties to use counsel and the limited right of appeal. In my experience the Disputes Tribunal works well for simple matters which are free from factual or legal complexities. Where the issue is straightforward, for instance; motor vehicle accidents, damage caused by stray stock, or single incidents of negligent property damage, the Disputes Tribunal processes work well. Where the issues are more complex, either the expert advocacy provided by counsel, or increased resources for Referees are necessary. Examples of more complex issues could include; the interpretation of agreements and contracts where parties have failed to keep good records, where there are multiple tortfeasors, or where contribution allocations are necessary in calculating damages. In these more complex matters the Disputes Tribunal process does not, in my opinion, deliver reliably just outcomes.
8) I believe the limits of the Disputes Tribunal process is due to resourcing and the rule against counsel. Disputes Tribunal Referees are paid by the case rather than sitting fees, and this limits the time they are able to dedicate to coming to grips with complex matters. In the absence of counsel, the Referee needs to put time and analysis into getting to the heart of the issues. This highlights an issue which I feel requires more discussion than is currently in the White Paper; inquisitorial processes only work well when the decision-maker has the time and resource to make more detailed enquiries.

9) In my experience self-represented litigants are less likely to accurately and concisely identify issues, to understand the evidence required to prove their claims, or to understand the legal framework in which their claims sit. It is misguided to say that these issues can be simplified; the complexity in the law reflects the complexity of our society. Simplifying the law merely broadens the possibility that the flexibility of the law will be lost, causing injustice to those sectors of society which sit at the margins. The answer to this is a well-resourced, independent judiciary, without the constraints of excessive workloads.

10) If the Dispute Tribunal's monetary jurisdiction is raised to $50,000, the current Disputes Tribunal procedures, which have a limited ability to appeal, represent a risk to many litigants. $50,000 is a considerable sum of money for many New Zealanders. Any extension of the Disputes Tribunal's monetary jurisdiction should also come with broader appeal rights. Moreover, there should be the ability in the Tribunal for parties to be represented, and for Referees to be paid more for complex matters.

**Fees**

11) With regard to the proposal to waive filing fees, in my view filing fees serve little or no purpose and act solely as a barrier to justice for many litigants. This also extends to setting down fees and hearing fees in the District and High Court. For clients who can afford the fees the issues are not significant. For those on lower incomes, if they can meet the thresholds for Legal Aid, the fees are waived as of right. Those who are most affected are those on low or moderate incomes who do not meet the criteria for legal aid and who do not meet the requirements for waiver of fees.

12) A number of my clients over the years have been in dispute with large multinationals. Often the clients earn reasonable wages, and hold significant assets and, therefore, do not meet the criterion for either fee waiver or legal aid. However, due to the nature and subject matter of the disputes they are facing financial and personal distress. Filing, scheduling, and hearing fees merely add another affordability issue on top of the already significant costs. In my view fees should be abolished, they serve no real purpose of funding the courts.

**District Court reforms**

13) With regards to the District Court reforms, a substantial issue as a practitioner is not just regaining the Court's credibility in civil matters, affected by the 2009 reforms, but also the funding and resourcing of the civil bench. There are simply not enough civil District Court Judges, and scheduling of cases often means months, or a year, may pass before a substantive hearing takes place. Due to this, I wholeheartedly support the proposal to introduce non-judicial Recorders as used in the UK, along with the appointment of more Judges to deal with these issues.

14) Case management also requires reform. In my experiences of various Tribunals, close case management involving the use of a docket system, delivers effective issue identification, and increases the likelihood of early settlement. The current District Court case management system is haphazard, and it is too easy for parties to engineer delay for tactical reasons.

15) An issue in te Whanganui a Tara, is that the District Court registry has been deprived of competent staff through retirements and restructuring. The replacement staff appear to lack the time, training, resources, and competence to do the job. Discussing this issue with colleagues operating in other District Court rohe, it appears these issues are widespread.

16) I also believe that reform should include the establishment of specialist civil benches in the District Court. I understand the misgivings regarding specialist Judges, issue capture being the most often mentioned. However, these views overlook the efficiencies that a specialist bench provides. A specialist Judge understands the issues that are coming before them and needs no time to get up to speed.

17) Inquisitorial processes deal with the challenges posed by self-represented litigants and are an important tool. However, these processes require much more preparation and understanding of the issues on the part of the decision maker. If the courts are to use inquisitorial processes, specialist Judges, who understand of the complexities of the issues before them, are ideally placed to act in an inquisitorial manner. A generalist Judge starts on the back foot.

18) In my own specialist area, I have noticed that basic misunderstandings of key issues which underpin the law often mean that generalist Judges miss the subtleties of more complex issues. There is a need to educate the Judge so that they can meaningfully rule on the issues in dispute. This need to educate is inherently inefficient, requiring longer submissions and extensive citation.
19) The use of specialist non-judicial Recorders would also enable case law to develop at a pace which keeps up with commercial practices and societal changes. In my specialist area, insurance there are a number of precedents that were laid down the 1970s and 1980s (or earlier) which do not reflect current commercial practice or societal attitudes. In an ideal world Parliament would conduct law-reform, however, it has not.
20) The appointment of a Chief Civil Judge would assist with re-invigorating the civil bench.

**High Court**

21) In the High Court the issue is simply that a one size fits all approach drives costs. There is also judicial inertia about the uses of; technology, flexible procedures (such as hot-tubbing), and Judicial Settlement Conferences, as means to resolve issues and increase accessibility. It is inevitable that High Court actions will be higher cost, largely driven by the cost of legal services and expert witnesses, however, a docket system, close case management and more flexible procedures should help lower these costs.
22) With regard to the reform of expert evidence procedures, I would add that the issues with expert evidence in the CEIT context have led to the use of Tribunal appointed experts, and hot-tubbing (simultaneous disposition) as the normal way for experts to be empanelled. While in its early stages this does appear to be driving more effective and impartial expert witness processes.

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