Te Tari Ture o te Karauna
Crown Law

1 July 2021

Chair of the Rules Committee
c/ Auckland High Court
Cnr Waterloo Quadrant and Parliament St
Auckland, 1010

Attention: Chair of the Rules Committee

By email: Rulescommittee@justice.govt.nz

Tēnā koe e Rangatira

Rules Committee Consultation: Access to Civil Justice Proposals
Our Ref: SOL115/1180

1. Thank you for the opportunity to comment on this consultation paper. In reviewing the paper we have had regard to the public interest in access to justice and in the expeditious conduct of proceedings.

2. This submission represents the views of the Crown Law Office as well as suggestions from individual counsel. Lawyers from the following agencies have had the opportunity to review the submission in draft and are generally supportive: Department of Corrections, Ministry for Primary Industries, the Ministry of Housing and Urban Development, Inland Revenue, the Ministry of Foreign Affairs and Trade, Te Arawhiti and the Ministry for the Environment.

3. The views of Crown Law and counsel suggestions should not be taken as government policy. We are also conscious that certain suggestions, if to be taken further, would need to be subject to a policy process by the Ministry of Justice. We also expect that Ministry of Justice resourcing would be impacted both by the proposals set out in the consultation paper, and our further suggestions (were they to be taken up). The views of the Ministry of Justice would therefore need to be sought.

4. We note further that access to justice can be examined through a Tiriti o Waitangi/Treaty of Waitangi lens, and certainly that is the approach the Waitangi Tribunal takes. We suggest it may be useful for the Committee to engage with representatives of Māori lawyers, such as Te Hunga Rōia Māori o Aotearoa, to inform its consideration of material in the consultation paper.

5. We set out the remainder of our comments following the order of the consultation paper.

Disputes Tribunal

6. The Crown Law Office does not appear in the Disputes Tribunal and so has limited comments to make in relation to these proposals as an organisation. However, our counsel engaged strongly with the Disputes Tribunal proposals including on the basis of experience as (private) participants in that forum or at some point having assisted private clients in that forum. Overall, there was a strong view that there is merit in the current model of the Disputes Tribunal as an easily accessible body with few rules or protocols, which is speedy, cost effective and at which final resolution is available. Counsel were concerned that changes should not undermine that model.

7. Other views gathered included that:

   7.1 An increase in the monetary jurisdiction was generally supported, although it was also noted that this could have unintended consequences:

      7.1.1 it may result in claims at the bottom of the monetary range being squeezed out, with priority instead being given to claims of greater value;

      7.1.2 with higher amounts, as more is at stake, representatives may need to be permitted. It may also be more important for the Tribunal to be required to give effect to the law. However, this may result in the Tribunal becoming too legalistic and therefore less accessible.

   7.2 If an increase of the monetary jurisdiction to over $50,000 were to occur, we agree there would need to be a right of appeal. A graduated system of appeal, as outlined in the paper would appear most appropriate.

   7.3 It was noted that any increase in the jurisdiction would need to take account of existing provisions relating to the transfer of proceedings to the High Court (see s 86 of the District Court Act 2016).

   7.4 Counsel considered that it may be appropriate for the referee to be a lawyer in disputes over a certain amount (e.g $30,000) and where an appeal on a point of law to the District Court is permitted. Further questions such as enforcement at that level would also require consideration.

   7.5 Views were divided on whether an increase to $100,000 would be appropriate. Some felt an increase from $50,000 to $100,000 with the consent of the parties would be acceptable. Others were concerned that increasing the monetary limit should not be at the expense of reducing access to the District and High Courts for resolution of higher monetary claims.

   7.6 Advantages and disadvantages of public hearings were identified. Overall counsel considered that a presumption of public hearings for higher monetary amounts would be beneficial.

District Court

8. The Crown Law Office strongly supports the objective of enhancing the District Court's civil jurisdiction as a major part of the access to justice commitment.

Counsels' experience was that the expertise of current District Court judges is not at issue, but rather the judges' ability to prioritise civil cases due to the Court's family and criminal workload. This results in incredibly long delays (currently obtaining a fixture for a half day hearing in Wellington can take nearly a year). Therefore, counsel welcome any proposal that would reduce delay.

9. Having a role of Principal Civil Judge appears to align with the goal of enhancing the capacity of the Court's civil jurisdiction and is strongly supported by the Crown Law Office.

10. The proposal for Deputy Judges/Recorders was supported and seen as a way to potentially enliven the District Court's civil jurisdiction and increase diversity on the bench. We propose that Deputy Judges/Recorders be empowered to hear certain matters in places other than a court building, for instance in lawyers' chambers or online. This may require legislative change.

11. Other suggestions from counsel included:

    11.1 Measures to incentivise the use of the District Court's civil jurisdiction (over the High Court) such as a presumption of transfer back to the District Court where the monetary value comes within the District Court's jurisdiction, and a presumption of costs at the District Court scale where a claim within that jurisdiction proceeds in the High Court.

    11.2 Having a target to bring civil cases to a final determination within a fixed (and short) period.

    11.3 Changing the rules, including empowering judges to get quickly to the heart of issues, move to resolution or hearing.

Proposals related to High Court

12. The Crown Law Office is supportive of all the proposals made regarding the High Court. The proposed changes should together result in reduced time and costs, thus enabling the more efficient conduct of litigation. In our view, key to this is introducing "proportionality" into the purpose provisions of the Rules. The Crown Law Office is strongly of the view that for proportionality to have meaningful effect as a guiding principle, judges will need to be closely involved. We consider that this should include individualised case management by judges.

13. Despite being in favour of the proposed changes, we are however uncertain that on their own they will result in improved access to justice. As identified in the consultation paper, there are significant barriers in bringing proceedings, due to the cost of legal representation and the difficulties faced by those seeking to represent themselves. The Rules Committee may wish to consider whether recommendations in relation to civil legal aid or a requirement for lawyers to undertake pro bono work would usefully accompany the other recommendations for reform. Likewise, recommendations in relation to how the Rules of Conduct and Client Care and associated guidance from the Law Society could be amended to clarify a lawyer's role in contributing to the proper and efficient functioning of the courts may also be valuable.

14. We comment more specifically below on some of the proposals.

Disclosure

15. The Crown Law Office agrees with the proposal for proportionate up-front disclosure in place of discovery and considers that more focused disclosure is likely to encourage access to justice. Counsel noted the following likely flow on implications of this approach:

    15.1 If discovery is to be replaced with disclosure, compliance with disclosure obligations will need to be monitored more closely.

    15.2 Many defendants will find it difficult to complete disclosure within the current timeframe for filing a statement of defence. There was strong support for the consideration of options such as separating these requirements (disclosure coming after the filing of the statement of defence), or allowing more time for both.

    15.3 In the Crown's experience, the entitlement to information under the Official Information Act 1982 or Local Government Official Information and Meetings Act 1987 is often used in tandem with discovery requirements in litigation involving the Crown. Consideration could be given to whether these processes should be sequenced to reduce delay and the need to reconfigure the issues as a result of official information disclosures.

    15.4 Early settling of the issues is likely to give the parties a better indication of what would be "proportionate" disclosure. We recommend consideration is given as to how the core issues should be confirmed at an early stage of the proceeding so as to inform the scope of disclosure. Disclosure of anything outside the ambit of those core issues would need to be sought and justified at the Issues Conference.

    15.5 Consideration should be given as part of any amendment to clarifying what the obligation is on counsel/parties to search for and identify relevant documents, particularly in relation to identifying adverse documents.

Issues Conference

16. The Crown Law Office supports the introduction of issues conferences as, in our view, proactive judicial involvement in the management of civil litigation is likely to lead to greater efficiency and better information for the parties on which to base their decisions as to how to proceed. Counsel considered that it would be beneficial to specifically allow for the possibility of Judicial Settlement Conferences, as is the case in the District Court, as such conferences are helpful in the early disposition of cases. Regarding these conferences, counsel noted more specifically that:

    16.1 The Rules may need to allow for more than one issues or Judicial Settlement conference to occur.

    16.2 At the Christchurch Earthquake issues conferences, there was a requirement for a client representative and a senior lawyer to attend. Sufficient representation of the parties at issues conferences may be a useful requirement.

    16.3 Having the same judicial officer assigned to both the issues conference and subsequent stages would be important. This early and consistent judicial engagement will be more likely to assist the parties with efficient disposition.

16.4 There is benefit in a judge giving a realistic assessment at an early stage and being more hands on – it is up to the party as to whether to take that advice.

16.5 In cases where an expert is required, for it to be mandatory to consider at the issues conference the appointment of a single expert.

Interlocutories and Trial

17. All the proposals outlined are supported. Counsel noted that:

17.1 The distinction between non contentious and contentious evidence may be hard to operationalise, at least at the outset.

17.2 It would be helpful if the Rules were clear on how any challenge to common bundle documents were to be pursued (a note on the index was recommended as being less resource intensive than a formal application).

17.3 It would be helpful if the Rules were explicit that documents did not need to be annexed to affidavits, as the document management can form a large part of affidavit preparation. Rather, affidavits filed instead of briefs of evidence could refer to the relevant document by the document ID number from discovery/disclosure.

Nāku noa, nā
Crown Law

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