To: The Clerk of the Rules Committee
From: Dr Bridgette Toy-Cronin, Faculty of Law, University of Otago
Re: Improving Access to Civil Justice: Further Consultation (issued 14 May 2021)

Thank you for the opportunity to comment on the proposals to improve access to civil justice. I make a general comment about evidence-informed rule reform before turning to the specific proposals.

Evidence-based reform

In the publicity for this consultation, there were references to this reform process being a "once in a generation" change. While this framing may encourage engagement (presumably its intent), it has a number of negative potential consequences: creating unrealistic expectations, putting pressure on the Committee to make a single effective change to ameliorate both longstanding and very complex problems, and limiting the ability to change direction or innovate if the evidence suggests that is necessary.

As the Committee may be aware from my previous engagements with it, I advocate for more measured and evidence-based change so that we can assess whether the interventions that are hoped will create positive change, do in fact do so. I understand that the Rules Committee does not necessarily have the power or resource to gather base-line information and set out a programme of evaluation. Nevertheless, I encourage the Committee to use any means it does have to ensure that the reforms that are undertaken are informed by evidence and that a process of evaluation is put in place so we can see if they are successful. That will allow the Committee to build from successes and change direction if an aspect of the reform is not working.

Disputes Tribunal

The proposal to expand the Disputes Tribunal's jurisdiction is primarily driven by the cost of currently accessing legal assistance to run litigation. Setting the jurisdiction at $100,000 would be to use the legal market as the means to set the jurisdictional limit (i.e. cases under $100,000 cannot be run with legal assistance and therefore the jurisdiction should be set at that level). Determining the amount and type of procedure available to a legal dispute should be done on principle—not on the market for legal advice.[1] This is difficult for the Rules Committee, however, who does not have control over the factors that mean legal fees are out of reach for most New Zealanders. Its only choices are to raise the jurisdiction to meet the market, or leave the problem unattended to in the hope that this will put pressure on those who do have more control over the accessibility of legal assistance.

Setting the jurisdiction at $50,000 is a compromise position: doing something to ameliorate the problem for those who cannot access legal services but not letting the market set the jurisdictional limit. Ideally, changing the Dispute Tribunal's limit would be done with more information about

[1] I make this argument in more detail in a paper that was recently published in the Policy Quarterly: https://ojs.victoria.ac.nz/pq/article/view/6820.

how effective the Disputes Tribunal is in its role and who it is serving (and not serving). This information is not currently available although there is a perception it is providing an effective service.

I therefore submit that the best path forward on the information we currently have available is to set the jurisdiction at $50,000 and gather more information about the operation of the Disputes Tribunal. It would be very helpful to know more about the Disputes Tribunals' strengths and whether, by expanding the jurisdiction, any of those strengths will be undermined. For example, would an expanded jurisdiction mean that the nature of the parties changes (e.g. more insurers were involved) and will this have any effect on factors such as balance of power between parties, its speed, the type of issues it is equipped to adjudicate? Who is using the Tribunal and who is not? With this information, the jurisdiction can then be revisited, as can the application of its procedure to the District Court or even the High Court.

On the specific changes to the Disputes Tribunal that submissions are invited on (para [51]), I make the following comments:

(a) Yes, I would support the Tribunal being renamed the Small Claims Court. The concept of a Tribunal is confusing to the general public given the broad way in which it is used in New Zealand (most visibly the Waitangi Tribunal). Footnote 29 of the consultation paper notes the reasons for using the name "Tribunal" and I agree that on the face of them, these reasons appear to have merit. However, my research in the Tenancy Tribunal suggested litigants did not distinguish between that body and a criminal court (to some lay people, "going to court" is just "going to court", regardless of the name or the legal distinctions between civil and criminal). Furthermore, the Tribunals are housed inside court buildings so I would suggest the idea that omitting the word "court" from the title has little impact.
(b) The terms referee and adjudicator are both somewhat confusing. It would be good to have some consistency across the system. If it was renamed a "court" then judge seems the most apt name. If it is a Tribunal then "adjudicator" would be consistent with the Tenancy Tribunal and the Motor Vehicle Disputes Tribunal.
(c) I make no submission on this point.
(d) Yes, the Tribunal should be open. It is an anomaly that it is closed (the Tenancy Tribunal is open) and greater transparency is needed about its operation to increase confidence (even if its jurisdiction is not lifted).
(e) The daily fee for referees should be lifted but not for the reason stated. The amount of the claim has no logical nexus to the complexity of the claim, so this does not seem to be a valid reason for increasing the fee. The daily fee should be lifted to attract quality adjudicators and ensure diversity. The low fees make it appealing only to a small number of practitioners (for example, those for whom the flexibility and part-time nature of the work is a draw card as they have caring responsibilities). Increasing the jurisdiction would mean larger numbers of adjudicators will be required and therefore the package needs to be more attractive.
(f) Yes, adjudicators should be allowed to waive filing fees as the fees are an impediment to accessing the Tribunal for some people.

(g) I would support a limited ability to award disbursements and perhaps a very limited costs jurisdiction e.g. a strict schedule with low amounts of reimbursement to recognise travel and time.
(h) Yes, the enforcement of Disputes Tribunal awards needs attention—even if the jurisdiction is not lifted, it is very problematic for successful parties.

In addition to the points raised in paragraph 51, I would also suggest that the term of appointment for Referees (Disputes Tribunal Act 1988, s 7(3)) be revisited. A term appointment—particularly one so short—gives rise to opportunities for political interference in the appointment of adjudicators. While there is no suggestion that such opportunities have or are being used, it would be preferrable to provide statutory protection against the possibility. This concern takes on more significance if the jurisdiction is raised significantly and the Disputes Tribunal consequently plays a larger role in adjudicating civil disputes in New Zealand.

District Court

The difficulties the District Court has encountered do seem to be institutional and cultural rather than a problem with the Rules. The Rules themselves are largely untested and were based, as the consultation paper notes, on international best practice. The suggestion that the institution itself is strengthened—rather than the rules changed—is therefore logical. I support the three steps for strengthening the District Court laid out in paragraph 58 of the consultation paper. The idea of appointing part-time civil judges also seems to be a useful means of strengthening the civil jurisdiction of the District Court. Adopting some of the features of the Dispute Tribunal process (as suggested in paragraph 63) may be helpful. From the perspective of trying to discover what processes work well in our courts, what is more important is monitoring and evaluating who is using the processes and whether the processes are achieving their aims. This can then inform future reform in the District Court and allow application of those lessons to other jurisdictions.

I also support implementing pre-action protocols for debt-recovery cases. I fully support the caution that "the functioning of such protocols in the debt context be assessed before wider reforms in this area are pursued" (paragraph [62]). This assessment should also be used to consider whether or not to continue the use of pre-action protocols for the debt context. How this assessment will be carried out needs to be determined before the change is implemented as there may need to be a pre-reform assessment so that change can be measured.

High Court

Overall, I consider that the suggested amendments to the High Court Rules are unlikely to create a significant shift in the accessibility of the High Court. They are not a fundamental change, although I also recognise that aspects of the change needed are outside the Rules Committee's power.

The emphasis on proportionality is welcome, as is the note that proportionality pays attention not only to the value of the claim but also to the complexity and importance of the dispute to the parties and wider community. This needs to be emphasised in the rules, as it is possible that some will interpret proportionality as a simple equation i.e. what can be reasonably spent needs to be

less than the amount at stake. While this simple equation works adequately for claims over smaller dollar amounts (do not spend $20,000 to recover $30,000) it is less obvious that $2m should be spent to recover $3m, even if the issues are no more complicated than the $30,000 dispute. The reasonable spend also needs to be determined by the complexity and importance of the issue and in full awareness that the litigation will cost both parties.

In regard to the specific reforms proposed in the High Court, I support the expanded use of issues conferences and the reforms to expert evidence suggested. Both should go some way to reducing cost to parties. The other observations I have about the proposed amendments to the High Court procedure relate to the role of litigants in person (LiPs) and I turn to these now.

Application of the High Court reforms to LiPs

The suggested reforms for the High Court do not respond well to the needs of LiPs. The needs of unrepresented parties are acknowledged in paragraph 68, recognising that formal pleadings present a significant barrier for LiPs. The suggested salve for this—information on the court's website—will not address this problem. Similarly, in-person information through the registry (who can give only information, not advice) will be inadequate to address this problem. It is not possible to teach someone the specific art of pleading via information. If formal pleadings are to be retained, the Rules Committee needs to make it clear that other parts of the system are going to need to support LiPs' needs. For example, the establishment of a service for advising on, checking, and editing pleadings by independent counsel before they are filed in court.

The changes suggested for trial (para [75]) do not mention LiPs at all. There seems to be an assumption of representation (e.g. "There would be an initial issues conference held with a Judge, counsel and party representatives for each party" (at [70]); "… that they do not include submission by counsel disguised as evidence" (at [75(c)]; "imposing costs sanctions for the filing of inappropriately argumentative affidavits - which sanctions counsel could be made personally liable for paying" (at [75](c)(iv)).

If LiPs are contemplated as falling within the proposed trial rules, then I would predict there will be considerable conflict over their fairness to LiPs. The idea of differentiating submission and evidence is particular to the legal field and is not part of lay discourse. Expecting lay people to understand and apply the distinction is likely to lead to frustration and disappointment for all involved. Similarly, what constitutes "inappropriate argumentative affidavits" is particular to legal culture, not lay culture, and therefore difficult to expect lay people to adhere to. Oral evidence is much more likely to avoid these difficulties than requiring written evidence.

I suggest that the proposed High Court reforms need to be revisited with a specific focus on the needs of LiPs. They are current High Court users and their numbers are likely to grow rather than shrink.

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