SUBMISSION BY THE GAMA FOUNDATION ON THE RULES COMMITTEE PROPOSALS FOR IMPROVING ACCESS TO CIVIL JUSTICE.

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INTRODUCTION

Our 2020 submission started by stating the following:

> **"This submission is made from the somewhat unique perspective of a citizen who has over the past twenty years kept a record of experiences with dispute resolution processes and has had the opportunity to talk to academics, judges, lawyers and clients of the litigation industry.**
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> **We support all the proposed changes but consider that they are just a first step and that more extensive changes are required. In this submission we have included quotes from a lecture by a former judge and some details of our own experiences to illustrate what does currently happen and to support the case for major reforms to be made. If the proposed changes are fully implemented, this will only make a small difference because there is a huge uncontrolled litigation industry which exists outside the court system. This has many negative consequences for the rule of law and for the small proportion of citizens who can afford to spend large amounts of money and many years in what is usually a vain attempt to get justice.**
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> **We note from an interview in a legal publication that the Rules Committee will dismiss any commentary which they do not regard as 'intelligent' and that they are unlikely to do anything which is not supported by lawyers. This indicates that an independent inquiry is needed and that making a submission could be a waste of time. However, we have decided to make a submission because we think that you need to consider a viewpoint which is different to that of vested interests whose main objective is to make as much money as possible and who**

have shown over many decades that they have no concern about most citizens being deprived of their fundamental rights to justice.

As predicted above, making a detailed submission from the perspective of a client was a waste of time. The vested interests on the Rules Committee did as they intended and ignored submissions they did not like and they only proposed doing what lawyers would agree to as a token gesture towards reform. The proposals which had been put forward for submissions were watered down to the point where the new proposals would only make a difference to improving access to civil justice for a very small number of citizens who could take disputes in the $30,000 to $50,000 bracket to the Disputes Tribunal. Access to affordable justice would be unlikely to improve for the vast majority of citizens who are forced to go through the courts or arbitration if they have a significant dispute. As previous experience has shown, lawyers would make sure that their chargeable work and in comes would not be affected by any tinkering with court rules.

We should have been advised of the decisions of the Rules Committee and been sent the current document requesting further submissions but this did not happen. It was only by chance that we were sent the document by another party. This is another indication of how unacceptable the whole process is.

Last year we also made submissions on a different issue to the Auditor-General and were sent his report on the day it was issued to the news media. The report confirmed almost all the negative problems we had highlighted. The Rules Committee secret document is a huge contrast to the approach to facts taken by the Auditor-General. The Rules Committee has ignored decades of evidence and Ministry of Justice research together with everything that we had revealed from a clients' perspective and the quotes we had provided from Sir John Hansen and other judges and lawyers.

THE PROPOSED CHANGES WILL NOT IMPROVE ACCESS TO AFFORDABLE CIVIL JUSTICE

The following quotes are from a 2006 lecture to lawyers and law students by Sir John Hansen who was a judge for 27 years
'While in the main lawyers are honest and honourable, there is a small proportion who manipulate the system for their own benefit. In my experience, it is a proportion that is increasing.'
'I suspect much modern civil litigation culture is fee-driven.'
At long last we need to confront a conflict that has always been inherent in legal practice. That is the conflict of the need of a lawyer to make a living and the interest of the client. They do not always coincide. The best answer for the client does not always maximise fees.'
'At least in the area of civil litigation, surely there is enough evidence to suggest we should be seriously considering alternatives to our costly system which prices the bulk of citizens out of the Courts. I believe we need a radical rethink as to how we resolve disputes. The law is no longer a profession - it is a business.'

The proposed changes will not make any real difference for the following reasons:

(a) **Lawyers only allow a tiny percentage of dispute cases to go to a court hearing. There is a huge litigation industry which operates outside the control of the courts where anything goes. Lawyers do not like hearings because they disrupt their business and they have to work longer hours and may have to be away from home. They prefer to do all the work preparing for a hearing without a judge imposed timetable and restrictions and then they advise accepting a settlement. This avoids the risk of the creator of a dispute not being adequately rewarded after payment of lawyers fees.**

(b) Lawyers usually tell clients that arbitration will be quicker and cheaper when they know that the opposite is the case. They do a huge amount of preparation work until the client's money runs out and then they recommend a low settlement. Alternatively, they suggest mediation which is usually a splitting the difference exercise and the client is then responsible for the outcome. These strategies allow the creator of the

dispute to be rewarded and no precedents are set so this does not limit many more similar disputes being created in future.

(c) Lawyers know that judges are on high salaries so have gone from wanting to make disputes as long as possible prior to their appointment to wanting to do as little work as possible. This means that most are no longer tolerant of lawyer delays and dispute creation and expansion activities. Lawyers are required to not knowingly mislead a court in matters of fact or law so this restricts dispute creation and expansion. In contrast, arbitration is a secret process with no accountability so, in our experience, lawyers make misleading and sometimes false statements to assist the creator of a dispute. Retired judges can make a lot of money from arbitration despite their declining memory and cognitive abilities. The fundamental errors they make are not exposed because appeals are not allowed. The availability of this money making option helps ensure that retired judges do not speak out about what is wrong with the justice system.

(d) Lawyers want to steer clear of the courts for the reasons outlined above and they have created a big industry which is beyond the control of the courts. This work provides a significant proportion of the income of law firms and firms who provide the expert witness evidence to suit the requirements of lawyers.

The Arbitration Act needs to be changed to prevent it being exploited by lawyers. This should include requiring informed consent and not allowing arbitration to be made compulsory an permitting appeals when major factual errors are made.

In 2006 Sir John Hansen said the following:
`Our attempts at reform have essentially been designed to refine our existing system. Cost and delay (and its impact on increased costs) are now having a serious impact on access to justice. Even quantitative figures show a trend that none of the steps we have

taken have reduced costs, and they have only had partial success in relation to delay.'

In civil cases, we could make case management more draconian, with significant cost implications for those who fail to comply. But nothing in our years of tinkering to date gives me any optimism that the problems in our system will be successfully addressed.'

In his concluding remarks Sir John Hansen said:
'In an address to the 1999 Australian Institute of Judicial Administration's Annual Conference, I concluded by saying:
'It will be pointless in ten years' time to say that the case management experience has been no more than a finger in the dyke and not a complete answer. We must immediately consider whether the adversarial system is the most cost efficient and fair way of meeting litigants' expectations. We must also, in the interests of litigants, begin inquiries into ways in which substantive and procedural laws of other jurisdictions can be incorporated into our existing body of law to meet litigants' expectations. Commercial litigants expect greater harmonisation than presently exists.'

Seven years on I have concluded that case management is no more than " a finger in the dyke". There is little evidence to suggest the challenge I issued has been taken up, and the great bulk of the population continue to be effectively denied access to the Courts. The time has come for a more radical rethink of our approach to litigation. The concern I have is that I doubt this will be seriously and objectively considered. Judges and lawyers are perhaps too wedded to our present system to objectively consider change. I would like to think the same would not apply to academic lawyers, notwithstanding their backgrounds being the same as Judges and lawyers, but my reading of Zander and Resnik suggests otherwise.'

In 2007 we established the University of Otago Legal Issues Centre to carry out research on how to achieve a more affordable, accessible and efficient legal system in the area of civil litigation. Unfortunately, it has failed to deal with the major problems of access and affordability where cases cannot be taken to the Disputes Tribunal. It has instead concentrated research on efficiency and on areas where lawyers cannot make money and so

are not involved. All the efforts we made to get work done on affordable access failed and it appears that academic lawyers are more interested in retaining their jobs by encouraging students to enroll for law degrees in the expectation that they will become rich lawyers. Students are not told that half of them will not be able to get a job directly related to their qualifications because lawyers want to restrict competition and only serve high fee paying clients. As the Legal Issues Centre had not fulfilled its objectives for 13 years, the University decided to cease its operations in 2020. This is another example of how lawyers look after each other and block any attempt to get affordable access to justice for citizens.

The radical reforms which introduced ACC eliminated a huge amount of litigation. However, when lawyers got involved in the appeal process the average time for a case to be completed was 5 to 7 years. About two years ago the ACC decided to not use lawyers and a recent report by Dunedin barrister and ACC researcher, Warren Forster, said that cases were now being completed in about two weeks. This demonstrates that lawyers need to be barred from the business of dispute creation.

THE ADVERSARIAL COURT SYSTEM IS BADLY FLAWED AND VERY EXPENSIVE AND TIME CONSUMING BUT HAS BEEN LEFT LARGELY UNTOUCHED BY THE RULES COMMITTEE.

If the proposed minor tinkering with court processes reduces work for lawyers, past experience indicates that they will find ways of offsetting this. The only way to ensure access to justice for all citizens is to make major changes which cannot be undermined by lawyers.

Sir John Hansen said the following in 2006: `The effect of delay on the participants in the court process is all too frequently overlooked by Judges and lawyers. Not only are there significant financial costs (both direct, in terms of legal fees; and indirect, in terms of management costs, lost opportunities and such like), but the associated anxiety is with most litigants as long as the litigation continues. We all too frequently overlook, or ignore, the financial and psychological cost of litigation. All of this impacts on the public perception of the legal system.'

`It seems to me that we have got it seriously wrong at the present time. The cost of litigation, including substantially increased Court fees, effectively excludes a significant portion of society from seeking redress for their disputes in the Courts.'
'The horror stories surrounding costs that are the standard fare of legal gossip are too numerous to warrant enumeration here, but the level of litigation cost is notorious.'

`I imagine that the public at large would think the object of trials would be to ascertain the truth and to arrive at a just result but our adversarial system is not designed for that. There are judicial pronouncements to this effect in the civil jurisdiction.'

He went on to say:
`In a series of recent articles 31, Hon Geoff Davies, has strongly suggested that it is the adversarial system itself that prevents reform. He considered there are two underlying assumptions in our civil justice system. The first is that once proceedings are commenced they will be resolved by trial and judgment. The second is that the best way of resolving a dispute is by a contest between competing adversaries. He considers these assumptions fallacious. In relation to the first, because the vast majority of proceedings are resolved by agreement in any event. As to the second, he gives three reasons. The first is that adversarialism, by its nature, tends to distort the truth, whether that be fact or opinion. The second is that the main reason for the high cost of legal services is that the adversarial system is labour-intensive, and it is the adversarial nature of the system that makes it labour-intensive. The third fallacy, in his view, is that "it is wrong to think or assume that, even if our system is very costly and does not require a search for or necessarily uncover objective truth, it has the advantage of fairness. In practice, however, it is fair only between parties of equal bargaining power and, more often than not, that is not the case.'

In his 2006 article in the CJO he is also critical of `the adversarial mindset of Judges and lawyers that exists because of our legal training, the natural conservatism of lawyers, and the fact that the economic driver is the business of litigation.' He considers that

`there is a subconscious reluctance by lawyers to embrace reforms which, it is perceived, will reduce incomes.'

Sir John Hansen said: `People that I have spoken to in the United Kingdom with extensive experience of civil litigation in Europe, say the cost there would be well under half that for litigating in the United Kingdom.'

`In New Zealand today, the reality is that very few standard civil proceedings are heard within a year of filing. In the civil jurisdiction the effects of delay are well documented. There is financial uncertainty, which in many cases can cause significant psychological trauma to individuals. It can have a significant impact on businesses, their future planning, contingencies and lost opportunity costs. As well, as I demonstrated in an earlier article, the longer cases take to get to trial, the greater the quantum of costs. This includes not just the direct legal costs, but also the inevitable costs to businesses and individuals that are usually overlooked.'

Those involved in the litigation industry do not have any regard for the negative impacts of long drawn out litigation on innocent or largely innocent parties who do attempt to get justice. Clients can have their lives put on hold while a case is hanging over them and find the whole process very difficult to deal with. They will probably end up being forced to give up and accept a low settlement.

> **The standard litigation lawyer strategy is to create financial difficulties for the weaker party so that they cannot afford a long drawn out and expensive legal battle. Another strategy is to create delays and put stress on the weaker party in order to force acceptance of a low settlement offer. Litigation lawyers refer to this as 'burning off' the weaker party. They have no scruples or concern about the damage they could be doing.**

Retired lawyers who were not involved in the litigation industry but had defended it to others, have told us that they changed their minds when they became a client and had stress and trauma dominating their lives for a long time and they found out all the unacceptable things that went on.

Adversarial civil litigation turns something simple into a long drawn out and complicated muddle with no lawyer prepared to predict the outcome. The only reason for retaining ancient out of date rituals and processes is that they create an extremely profitable virtual monopoly for lawyers.

In professions requiring a high level of skill, the work done on a particular task by one person will be very similar to that done by another person and the outcome can be predicted. In the litigation industry most of the work done does not require a high level of skill and the quality and quantity of work done on a particular task can vary widely between lawyers. No lawyer is prepared to predict an outcome. The hourly rate fees charged by lawyers are two or three times higher than those charged by architects, engineers and others who have skills which the average person does not have.

It has been said that the litigation industry is a mixture of moral and immoral, ethical and unethical, honest and dishonest, true and false, right and wrong, accurate and inaccurate, complete and incomplete,complex and simple, biased and unbiased, considered and ill considered,fair and unfair, just and unjust. There is nothing about the industry and the way lawyers operate in it which is satisfactory so big changes are needed.

THE PROPOSED DISPUTES TRIBUNAL CHANGES ARE INADEQUATE

The Rules Committee have no right to propose preventing citizens from gaining access to affordable justice through the disputes Tribunal if a dispute involves more than $50,000. No reasons are given to justify this proposed cap.

> **The only way to improve access to civil justice is to remove the monopolies which have been written into law by lawyers. The courts should then adopt the modern decision-making processes used by the Disputes Tribunal and other Tribunals so that those who know their case best can represent themselves. Decisions can be made without any delay and at a vastly lower cost. The activities of lawyers should be restricted to giving advice**

on the interpretation of statutes, documents and precedent cases.

An inquisitorial process would be a huge improvement on what currently happens. Overseas research has shown that an inquisitorial process is quicker, cheaper and better and it is already used in various tribunals here. It should not matter whether the amount involved is a 4,5,6, or 7 figure sum. Lawyers should not be permitted to turn a simple dispute into an extremely complex one in order to extract in fees a substantial proportion of the amount involved. The often mentioned proportionality is the excuse used by lawyers to justify using the legal process to get for themselves a significant proportion of the amount in dispute.

An inquisitorial process is much better than the current adversarial legal process. It aims to establish the truth and arrive at a just result. Written evidence by each party has to be sworn and there is no need for opening and closing submissions and cross examination. Anything proven to be untrue or misleading should attract a penalty to discourage the dishonesty which is currently encouraged and widespread. If independent legal or expert advice is required, this could be obtained and the parties could be jointly charged. If one party wanted to appeal a decision, they could do this if they paid the equal costs of the other party.

Disputes can usually be outlined in a paragraph but can be expanded by lawyers into hundreds or thousands of pages of evidence. As lawyers have little knowledge of the subject, they often make errors and omissions. The amount of time lawyers put into preparing a case will depend on the amount of money their client has available and the lawyers other commitments at the time. How well expressed and accurate and complete a case is will vary widely so using a particular lawyer is a gamble people are forced to take. Self representation at the Disputes Tribunal would be far better than what parties to a dispute are currently subjected to.

Processes have not been put in place to force citizens to use Chartered Accountants to deal with their finances and taxes, even though very large sums can be involved. The processes which have been put in place to force citizens to use lawyers to deal with

disputes should be removed so that everyone has the option of easily representing themselves.

The citizens of today are not the illiterate peasants of the 18th century who needed representation using the oral evidence of witnesses. Those who have more than $50,000 at stake in most cases have the education and ability to represent themselves if given a simple set of rules to follow.

The parties to a dispute have a far better knowledge and understanding of the facts then their lawyers and if they were given a set of instructions to follow, they could quickly present a better and far cheaper case at a Disputes Tribunal than a lawyer can do in a different setting. Lawyers get clients to check most of their work in a dispute and normally a variety of mistakes have to be corrected so there is no reason why the clients could not do the work themselves. When clients are asked to do checks, they may not realise that important facts have been left out due to the lack of basic knowledge by the lawyer.

Some lawyers have said that it is better for the majority of those with a significant dispute to be unable to afford to get it justly resolved than for them to take the risk of a mistake being made if they were to take a dispute involving any amount to a Disputes Tribunal. This idea is just an excuse for maintaining a monopoly and is ethically and morally wrong.

The Disputes Tribunal provides an accessible, affordable and relatively quick means of resolving disputes. While it is not perfect, it is vastly better than no access or what is currently provided through the court system. It should be allowed to deal with all cases regardless of the amount involved and for larger sums this could be on a user pays basis.

If the Disputes Tribunal can deal with a dispute involving a small amount of money, there is no reason why it should not be allowed to deal with the same sort of dispute involving a large amount of money. If it obtained independent advice from experts and lawyers, this would eliminate a lot of costly adversarial arguments.

The criminal justice system penalises those who do not do what it has been stated that they must do but the civil justice system does not do this. It rewards dishonesty and failure to comply with signed agreements because lawyers make a lot of money from this and they want to encourage more disputes to be created in future. Innocent parties who are dragged into a dispute by those wanting to make money from it are penalised and defrauded by the civil justice system.

If percentage penalties were imposed on those who deliberately create disputes or delay proceedings or make false statements, this would result in greater honesty and eliminate a large proportion of disputes. Appeals could be made to the courts by anyone prepared to pay the costs for both parties. All decisions should have to be prepared immediately after a hearing and not months later when most of what was said has been forgotten.

CONCLUSION

It seems clear that the Rules Committee are only interested in looking after the money making interests of their former colleagues and their relatives and friends who are lawyers.
They have no concerns about the financial and other impacts of the litigation industry on its victims. They are not prepared to admit that some of what they did in the past was wrong and that the civil justice system is fundamentally flawed because it has been badly corrupted by those who make money from it and it does not deliver justice.

All previous attempts to make minor improvements to increase access to civil justice have failed so the only way forward is to appoint a panel of non lawyers to investigate what is going on and to make recommendations for radical reforms that will result in all citizens having access to affordable civil justice.