The Rules Committee
Te Komiti mō ngā Tikanga Kooti

Improving Access to Civil Justice

Further consultation with the Legal Profession and Wider Community

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Address for Digital Submissions	RulesCommittee@justice.govt.nz

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Submission of Kate Davenport QC

Introduction

This is my personal submission to the Rules Committee. The New Zealand Bar Association will be providing a submission which reflects the views of the wider community of barristers. I support these excellent and innovative proposals. However, there are a number of matters which I submit that the judicial sub-committee or the Rules Committee, may wish to consider further.

A. Resources

1. The changes proposed to the District Court civil jurisdiction and the Disputes Tribunal are far reaching. The attempt to rejuvenate the District Court's civil jurisdiction is a necessary step if a civil jurisdiction is still sought in the District Court. As the consultation paper notes civil litigation is currently the poor cousin of crime and family law in the District Court with parties struggling for fixtures and with an under resourced Registry. For example, a member of my chambers has been trying for two years to get a fixture allocated for a civil case in the District Court. She reports her client's frustration and despair at the delays. Therefore, it is imperative that steps are taken to remedy this situation, or the difficult decision needs to be reached that civil litigation simply be abandoned in the District Court. In that case the High Court and Disputes Tribunal would be the sole actors in the civil litigation arena. This may be a proposal that finds favour with some, as both operate effectively but, this proposal leaves the middle band of disputes ($150-300k) to be dealt with in the High Court or abandoned. This does not meet the need for the 'People's Court' to be also a People's Court for resolution of civil disputes. In my view these changes are therefore imperative for access to justice.

2. I agree with the Committee that the District Court Rules are currently fit for purpose. The major resources required for the proposals are judicial and administrative. The proposals will require further significant resources in both areas. The consultation paper recognises this need but in my submission without these resources the planned changes will fail.

B. District Court

3. The idea of engaging part time deputy judges or recorders is a good one. I believe there are unlikely to be many at the senior bar who will have conflicts given that the jurisdiction limit of the District Court is only up to $350,000 and this would not normally be economic work for senior members of the profession.

4. Recorders should be paid a daily rate which represents the daily rate of a District Court judge.

5. Recorders should be offered 2 - 3 year contracts but with no obligation to use their services for any set period of time during a year but with an obligation that they will guarantee to be available if required for 4 – 6 weeks per annum.

6. The consultation paper raises at paragraph [63] the issue as to whether further flexible processes should be provided for in the District Court Rules. In my view there is no need for further flexible processes.

7. The Rules themself already allow for sufficient flexibility (Rules 10.1 to 10.2). However, if needed an additional sub clause could be added at Rule 10.1(1)(d) to say, "or such other modified trial and/or procedure as the Court deems appropriate".

8. One of the purposes of the Rules is to give certainty in the conduct of litigation. Too much flexibility in the Rules and in the hands of judges and the parties can lead to unwanted appeals. I would not favour any but the most minor changes to ensure that predictability and certainty remain. I consider that the most useful method of assuring the profession that the proposed changes will be effective and enduring is that the new system proves itself as efficient, effective and legally sound. It does not require amendment to the Rules to achieve this.

C. The Disputes Tribunal

9. The Tribunal should be renamed as the Small Claims Court. This will show its proper role in resolving disputes for smaller amounts. Its rules should remain essentially flexible, but it should be required to make decisions in accordance with the law so as to ensure a fair/consistent outcome.

10. The limit of the Small Claims Court should be $30,000 with the right to agree to extend the jurisdiction up to $50,000.

11. Appeal rights from the Small Claims Court to the District Court should be widened as $50,000 is still a lot of money to most New Zealanders. The right of appeal should be for any error of law or manifestly unreasonable decision.

D. High Court

12. The proposals made for the changes to the High Court Rules involve an increase in judicial involvement/intervention in all civil cases. As a High Court practitioner, I am aware how case management changes some years ago which began with all parties and counsel attending case management conferences has given way to essentially rubber-stamping

counsels' joint consent memoranda. This has meant that there has been no need or opportunity for early judicial scrutiny of any case.

13. If the profession sees that the system can be manipulated to allow the new proposed conference to be avoided by consent, then they will certainly try. The current system is an illustration of this. It would be interesting to know what percentage of cases (where consent memoranda are filed) proceed under R7.3A to a first case management conference. In my experience almost none.

14. Thus, in my submission to make the proposed changes effective the High Court Rules will have to specify:

    a. Whether the conference will be handled by Judge or Associate Judges;

    b. Determining that in all cases a first conference **will** be held. (See proposed amendment to R 7.3 and deletion of R. 7.3A)

    c. If heard by an Associate Judge whether there be a named High Court Judge who also takes responsibility for the file and who can be kept up-to-date with progress of the file?;

    d. If interlocutory applications are to be dealt with on the papers is this to be dealt with by the same Associate Judge and/or a High Court Judge?;

    e. There is merit in having the Associate Judge and High Court Judge who will oversee the case through to trial being consistently involved.

15. The proposed changes will only work in the High Court if the judiciary are prepared to implement the changes by acting in a more interventionist manner. Not all judges are inherently suited to an interventionist type of judicial management. All judges will need to be educated on how to effectively run such conferences or those judges who have a natural bent towards file management will need to do more of this work.

16. There are always going to be counsel who will try to use the system to their client's advantage (or what they perceive to be their client's advantage). Some counsel are particularly known for taking every application and every point because their clients have the means to do so. I am not certain that this conduct will ever be entirely removed but if one Judge or Associate Judge is assigned to a case they should quickly develop a feel for which one of the parties (if either) is undertaking that kind of litigation and may be more prepared to address it. It would be helpful to counsel who try not to conduct litigation in that way if unreasonable behaviour was recognised by adverse costs consequences.

E. Court fees

17. To expediate access to justice consideration should be given to having court fees on a sliding scale depending on the amount at issue. Care will need to be taken not to cut across the work of a revitalized District Court civil proceeding so the lowest fee band must be for cases worth more than $350k. Thought would need to given to how this could be managed for cases where a remedy other than damages was sought. I suggest those cases have a fixed

fee but set at a lower figure than standard filing fees currently in place for issue of proceedings.

F. Discovery

18. Discovery is a perennial problem in the civil system. The proposed changes suggest that discovery should be abbreviated to maximise efficiency. Most civil lawyers have concerns about proceeding to trial without ensuring that they fully understand their case and the case against them. Attempts to significantly limit discovery will frustrate litigators and be counterproductive. To ease concerns the requirement to initially disclose documents is proposed. Fears that clients will not proffer adverse documents to their counsel might be reasonable. I have no data on how frequently parties fail to disclose documents which are adverse to their interests. However, many clients do not appear to understand that their lawyer's principal obligation is as an officer of the Court so continue to believe that their interests are paramount. Those who are told often do not understand what this means to conduct of the case.

19. To address these issues I propose that the Notice of Proceeding be amended in the High Court to be on different coloured paper so that when the document is served on or sent to the parties the Notice of Proceeding is visually drawn to the client's attention. I propose additional wording in the Notice to deal with concerns about discovery. My proposed wording is set out below:

    These sentences are to be inserted at the end of paragraph 3 of the existing G2 form (that is, if R7.3 is amended to make attendance at first conference compulsory) after the words "Rule 7.3 High Court Rules" **add**

    1. You must attend this conference with your lawyer; or if you have no lawyer then on your own.
    2. Once you have prepared and filed your defence you/or your lawyer must disclose (ie. give to the opposing party) **all** the documents you (with your lawyers assistance) consider are relevant to and prove your case.
    3. You also need to locate and produce all documents which are **adverse** to you. This means if you have documents, letters, emails, text, bank statements or any other record which proves the other parties case you **must** provide copies to the other side. These must be produced at the same time as the documents in paragraph 2.
    4. You will be asked to prepare and **certify** (sign) a memorandum for the first case management conference confirming you understand this obligation and that you have complied with it.
    5. If you do not comply with this requirement or say you have but have not complied with proper discovery the Court will have the right to make you pay costs or take other steps set out in R 8.22.

6. You must keep discovering any new and relevant documents you subsequently discover.

20. R 7.3 needs to be amended by removing 7.3(5) and 7.3(e) so that a first case management conference is **always** held. R 7.3A can be deleted.

21. R 8.4 (to the extent it remains) will need to add a requirement within R. 8.4(1) as follows:

    "(c) Any document adverse to the parties' interests."

22. The first memorandum should be signed by lawyer **and client** where the lawyer certifies that they have explained to their client their obligations to disclose adverse documents. The client themselves will sign the first document that is filed confirming that they understand discovery requirements.

G. Debt collection

23. I agree that pre-action protocols will assist in debt collection cases.

24. I would also advocate improving the Notice of Proceeding served on defendants by making it a different colour, with larger font, which urges people to seek legal advice, stressing how important it is to get advice early and advise them where they can get advice (eg. Community Law).

H. Legal Aid in the District Court

25. By way of general comment, legal aid for access to justice in New Zealand is all but unavailable to people with civil disputes unless they are wealthy or in receipt of a benefit. While a number of practitioners have recently become registered on the civil legal aid list (me included), I have been on the list for almost two years now and have not had a single case referred to me on legal aid.

26. Many practitioners that I speak to feel that it is preferable to do the work pro bono or low bono simply because that in the end turns out to be more efficient than dealing with the Legal Services Agency. However, in these cases clients receive no protection for costs. When considering civil legal aid civil reform for the District Court, consideration should be given to whether civil legal aid could also allow practitioners to offer low bono or pro-bono contracts to their clients and have legal aid costs protection.

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