2 July 2021

The Rules Committee
Te Komiti mō ngā Tikanga Kooti
C/- The Clerk to the Rules Committee
By Email to: RulesCommittee@justice.govt.nz

RE: Improving Access to Civil Justice – Further Consultation Submissions

Tēnā koutou katoa to the members of the Rules Committee.

Introduction

1) I would at the outset like to express my gratitude for being invited to make further submissions in response to the Committee's further consultation document dated 14 May 2021.

2) As suggested in my initial submission dated 13 August 2020,[1] my somewhat extensive experiences as a self-represented litigant provide me with a very different lens than that of many submitters and I greatly appreciate the opportunity try to speak on behalf of the many that have fallen through the 'justice gap'.

3) I will limit my submissions to the areas in which I am experienced as well as those which I see as critical to improving access to civil justice.

The Challenge

4) The Rules Committee has, correctly in my opinion, noted that, "*Inequality of access to civil justice has the potential to erode individual dignity, insofar as it risks some individuals being able to wrongfully abrogate the rights of others with practical impunity, contrary to law, in a manner therefore corrosive of rule by law."*[2]

5) I suggest that inequality of access to civil justice is not potentially eroding human dignity in that way, but is actually doing so, and in a widespread and frequent manner.

[1] https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/access-to-civil-justice-consultation/Submissions-to-Initial-Consultation-Redacted/Peter-Stockman-Submission.pdf
[2] The Rules Committee Further Consultation Document dated 14 May 2021 at [11]

6) I also agree that the changes necessary to get much closer to equal access to civil justice will be broader in scope than what is within the remit of the Rules Committee and as such I applaud the proposed report to the Attorney General.[3]

7) The scarcity of "*judicial resources (which are ultimately funded by taxpayers)*"[4] demonstrates that necessary changes may well also include increased funding to ease that scarcity. That is a political decision which under the separation of powers principle is 'out of bounds' for the Judiciary. In my submission, that does not mean that the Rules Committee could not point out to the Attorney General that modest increases in Court funding may have significant pay-offs in improving access to civil justice. It would then be up to the Legislature to independently gauge the electorate's interest in paying more for increased access to civil justice.

8) I am heartened that the Rules Committee are tackling this invidious problem, but as a general critique, it seems to me that the proposed response is considerably too conservative to make anything more than a minimal difference.

9) I applaud the changes proposed for the Disputes Tribunal, but the proposed changes in the District and High Courts are insufficient. Making Court processes marginally less expensive simply means that the rich won't have to pay so much for their justice. The proposed changes, however, do nothing to make the District and High Courts accessible to the poor and/or the under privileged.

10) I would also like to alert the Rules Committee to some quite strong vested interests in this area. Barristers make a handsome living from having exclusive representation rights in our Courts. Opening the Courts up to more of those who can't afford to pay barristers' fees (and that is the majority of New Zealanders) may result in barristers perceiving a smaller income pool which is not in the financial interests of barristers. As such their submissions to the Rules Committee on these matters must commensurately be 'taken with a grain of salt'.

Proportionality

11) It is pleasing to see that the Rules Committee share the Law Commission's aspirations in assessing proportionality as between investment of litigation resources and "*the nature, complexity, value, and importance to the parties in question and wider society, of each dispute*."[5] as a guiding principle.

[3] Ibid 2 at [7]
[4] Ibid 2 at [37] (g)
[5] Ibid 2 at [37] (d)

12) However, this raises some critically important questions about how the 'nature', 'value', 'importance to individuals' and 'importance to wider society' are to be measured and assessed. The Rules Committee have not addressed these questions.

13) It is also, I suggest, obvious that litigation resources come at a cost. As it stands the representation resource is, for the very most part, paid for by the parties. Court resources are in part paid for by the parties and in part paid for out of the public purse. The Rules Committee have not addressed any questions around the desirability of (in the interests of improving access to civil justice) rebalancing who pays how much for each of these litigation resources. This is not an area where the Rules Committee can effect change, but it is an area where the Rules Committee could, if it so chooses, work collaboratively with the other branches of Government to make real change in significantly reducing the 'justice gap'.

14) It is submitted that there has historically been too much emphasis just on the dollar value of what is in dispute. This erroneous emphasis has skewed Courts' concerns towards what is important to the rich in our society whilst giving scant regard to what is important to the poor, the underprivileged, the working class, and even the middle class, all of whom hitherto have not had any realistic opportunity for access to civil justice in our Court systems (other than in Tribunals) because they simply cannot afford to engage competent counsel.

15) Most regrettably, but understandably considering the vested interests of barristers as alluded to above, many submitters used proportionality as an excuse to propose that when the stakes are high more formal and elaborate procedures with legal representation are warranted.[6] Such positions are antithetical to access to civil justice reform.

16) The proposed reforms would see lower dollar value disputes (say up $50,000 to $100,000) dealt with by an inquisitorial "*Small Claims Court*". Disputes with a dollar value (at present up to $350,000) would be dealt with by the District Court who would be "*drawing on the more inquisitorial aspects of the procedure of the Disputes Tribunal*"[7] (Quite what these more "*inquisitorial aspects*" would mean in practice is not canvassed by the Rules Committee.) Above that dollar value, matters would be determined using conventional adversarial procedures in the High Court. It would appear that the Rules Committee see this progression as being proportional.

17) However, that progression of procedures is based solely on dollar value and totally ignores the "*importance to the parties in question and wider society*." $25,000, for example, may represent one party's hard earned life savings, whereas for another party $25,000 is petty cash for the weekend. Large sums of money are important to the wealthy and have hitherto been

[6] Ibid 2 at [42] (a)
[7] Ibid 2 at [77] (i)

important to senior civil Courts because only the wealthy have hitherto had realistic access to the senior civil Courts.

18) I submit that the proposed reform is not proportional. It is inversely proportional. The formality and elaborateness of the procedure is, I admit, proportional to the dollar value at stake but that is nothing more than a statement of the status quo. It is nothing more than a reiteration of the problem the Rules Committee have been charged with remedying. The proposed reform is inversely proportional because as the dollar value goes up, access to civil justice goes down.

19) It must also be noted that barristers engaged by wealthy parties can artificially manipulate the dollar value of the proceedings to ensure the chance of equality that might be found in an inquisitorial Disputes Tribunal hearings is obliterated by claiming amounts that must be heard in the District or High Courts.

More Inquisitorial Processes

20) If the problem as stated is, "*some individuals being able to wrongfully abrogate the rights of others with practical impunity, contrary to law",* then leaving in place a system whereby the wealthy can abrogate the civil rights of the poor with impunity because of a virtually insurmountable inequality of arms in the District and High Courts is an abject failure in not solving the core problem.

21) The Rules Committee could be forgiven for not finding a solution to an intractable problem but the problem is not intractable. A workable outline of a solution has been proposed by the President of the Court of Appeal, but this excellent solution has, in my opinion regrettably, been given scant regard by the Rules Committee.

22) As noted in Mr Hartley's précis of the responses, *"There is general support for exploring the use of more inquisitorial procedures along the lines set down by the greater use of case management in recent decades, but submitters expressed concern as to matters of detail."* "*Nearly two-thirds of submitters engaged with the proposal to introduce more 'inquisitorial' type procedures in respect of at least some types of cases. Members of the wider community were especially supportive of this proposal, expressing the view this would address the difficulties faced by self-represented litigants in understanding substantive and procedural law."*[8]

[8] Précis of Reponses to Initial Consultation Papers on Access to Civil Justice dated 6 October 2020 at Paragraph 7 and preamble.

23) The greater reluctance of the 'narrower' community (being lawyers) to support more inquisitorial processes, is perhaps readily explained away by the aforementioned vested interests.

24) It should go without saying that the Rules Committee (as with the Judiciary) exist to help bring justice to all the people of New Zealand. It is then unconscionable to give unprincipled weight to the number of submissions received by lawyers (who were much more likely to know of the request for submissions and who have a vested financial interest in the outcome) at the expense of the fewer submissions from the wider community which the Rules Committee must serve.

25) The Rules Committee propose expanding the role of the Disputes Tribunal with its inquisitorial features rather than changing the role of the District and High Court.[9] With the greatest of respect, that proposal is entirely 'wrong-headed'.

a) Failing to change the District and High Court procedures is so reasoned based on submissions received.[10] Most submissions, however, were received by members of the legal profession. The Rules Committee is then making proposals, on what is best for the disenfranchised, based on submissions from the highly privileged and remunerated elite members of a profession that considerably benefits from maintaining the inaccessible and entirely adversarial status quo. That is akin to the colloquial 'turkeys voting on Christmas'. It is logically indefensible for the Rules Committee to make proposals on what is best for all manner of people based on listening almost exclusively to all manner of lawyers.

b) The Rules Committee purport that, "*Nor does the use of such procedures appear to run contrary to widely held conceptions of justice, as identified in submissions*."[11] As noted earlier, the conceptions of justice identified by lawyers with vested interests cannot be seen as "*widely held*".

c) The "*inequality of arms*"[12] identified by the Rule Committee can in no way be overcome in an entirely adversarial system of justice that pits the poor and under-privileged in battles against the wealthy who can afford highly knowledgeable and skilled counsel.

d) I suggest that any "*conceptions of justice*" that accepts curial processes whereby the poor and under privileged have virtually no chance in prevailing against the wealthy and the privileged could only be conceived by those who have very little understanding of what "*justice*" actually means.

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[9] Ibid 2 at [42]
[10] Ibid 2 at [42] (a)
[11] Ibid 2 at [42] (a)
[12] Ibid 2 at [38]

e) It would seem that the lack of judicial experience and training in inquisitorial systems[13] is a further reason for maintaining the status quo. That is a quite galling proposition. The judiciary it seems would prefer to avoid any retraining rather than doing what is necessary to ensure the best possible access to civil justice for all New Zealanders. What does the Rules Committee think the reaction of ordinary New Zealanders would be to that suggestion? Ordinary working people are almost continually being retrained, but heaven forbid the judiciary having to undertake retraining to the end of ordinary people having access to justice!

26) I have put before the Rules Committee a proposal[14] that takes Justice Kós's proposals[15] and, in my humble submission, enhances and expands on the best parts of those while ameliorating some of the less desirable aspects.

27) I submit that this hybrid inquisitorial / adversarial proposal would largely do away with the justice gap. To be implemented though, it would take cooperation between all of the branches of Government as is already acknowledged by the Rules Committee.[16] I'm not so arrogant a person as to believe that this proposal is the correct solution for the problem but I have not heard any opinion from the Rules Committee suggesting that the proposal wouldn't be effective.

28) Lawyers don't like facing the prospect of potentially losing some income. Judges don't like the prospect of having to retrain to do things slightly differently. These are, however entirely inadequate reasons for the Rules Committee to fail in trying to do the very best it can to achieve the best possible access to civil justice for every New Zealander.

Other Miscellaneous Matters:

29) The Rule Committee suggest that, "*More generally, greater emphasis is to be placed on documentary, as opposed to oral, evidence*."[17] That may be okay when the parties are equally literate. However, many in New Zealand have problems with reading and writing and most will not be able to compete with well-educated plaintiffs assisted by erudite counsel who then file eloquent and compelling affidavits. To have more equal access to justice, parties who can't write as cogently as most barristers must be given the opportunity to tell their story using a medium that best suits their abilities. For many that will be orally.

[13] Ibid 2 at [42] (b)
[14] Ibid 1 at [12] to [17]
[15] The Rules Committee Circular 40 at [48]
[16] Ibid 2 at [29]
[17] Ibid 2 at [40] (c)

30) I support increasing the jurisdictional limit of the Disputes Tribunal to cases worth up to $100,000.[18] From a purely commercial point of view it is entirely uneconomic to engage counsel for disputes of up to that value.

31) I support having Disputes Tribunal appeal rights that are of the same kind that exist from the District Court to the High Court or High Court to Court of Appeal.[19] It is utterly untenable for the interests of the wealthy, as played out in higher courts, to be appealable while the interest of the less well to do are deemed less worthy of equivalent legal rights.

32) I suggest that the difficulties that self-represented[20] parties have in filing a statement of claim cannot be readily met by providing more advice, information and resources.[21] On my review of the authorities in regard to inadequate pleadings it would appear that even junior, and some more senior, counsel struggle with meeting all the esoteric common law nuances pertaining to the writing of pleadings. In my initial submission I proposed either filing a statement of claim or in the alternative a "*statement of allegation*".[22] Should this proposal not find favour with the Rules Committee then I suggest, as a minimum, that the common law on pleadings should be codified within the District and High Court Rules.

33) The Rules Committee propose abrogating discovery rules and replacing these with disclosure rules that mimic existing initial disclosure rules.[23] It is further proposed that, "*parties will also obliged* (sic) *to disclose adverse documents in accordance with a duty of candour*;"[24] It would appear that the Rules Committee see general proceedings being conducted akin to what sometimes happens currently in judicial review proceedings. The significant problem I see here, is with presuming honesty and integrity on the part of parties. I have personal experience with public officers failing to meet their "*duty of candour*" and suspect that less publicly minded parties may be even more inclined to do the same. I applaud making disclosure or discovery (whatever you choose to name it) more streamlined and less onerous. However, I am alarmed at the prospect of parties choosing not to disclose relevant documents and being met with a proverbial 'slap on the back of the hand with a wet bus ticket'. I submit that failure to disclose relevant documents, in either judicial review or general proceedings, should be treated as contempt of court and be punishable accordingly.

34) The Rules Committee envisages interlocutory matters being presumptively disposed of on the papers.[25] That presumes that parties will have relatively equal capacities in writing cogent

[18] Ibid 2 at [45]
[19] Ibid 2 at [46] (c)
[20] It is demeaning to refer to the self-represented as "*unrepresented*"
[21] Ibid 2 at [68]
[22] Ibid 1 at [14]
[23] Ibid 2 at [69]
[24] Ibid 2 at [69] (b)
[25] Ibid 2 at [74]

submissions. In the case of an indigent litigant-in-person opposing a party represented by competent counsel, an "*on the papers*" battle will most likely not be fought on a level playing field. I support the Rules Committee's caveats[26] on this proposal and suggest that judges need to be mindful of such "*inequality of arms*" and allow less literate parties to be heard orally on interlocutory matters.

Thanks for listening.

Nāku iti noa, nā

Peter Stockman

[26] Ibid 2 at footnote 46