Submission of Raynor Asher QC to the Rules Committee

Thank you for the opportunity to make a submission on the second Access to Justice Consultation Paper.

Disputes Tribunal

The proposed increase in the jurisdiction of the Disputes Tribunal can be justified on inflationary grounds alone, and given the success of the model, the proposed increased level of $50,000 is appropriate. Below that figure the expense of engaging lawyers is hard to justify. Above that, the lack of the formal application of legal principles in decision making, and the very limited appeal rights set out at s 50 of the Disputes Tribunals Act 1988 mean that there is a risk of injustice and feelings of deep unfairness if parties are forced into a truncated non-lawyer process. There should be no appeal on a point of law from the Disputes Tribunal because that would change its character, requiring parties to seek legal help and requiring lawyers as adjudicators.

In respect of the other two questions relating to the Disputes Tribunal in paragraph 50, the $100,000 jurisdiction of the MVDT is not a perfect comparator. That jurisdiction applies to persons who have chosen to become Motor Vehicle Dealers, with all the responsibilities involved, including submission to the MVDT jurisdiction. In contrast, those joined to Disputes Tribunal proceedings have had no choice as to the process to which they find themselves involved.

A graduated scale of appeal depending on amount will be messy to apply, and will create yet further types of legal challenge operating within our civil justice system, which is undesirable. If there were fuller rights of appeal, the nature of the process will change, and the justification for limiting the jurisdiction to $50,000 will weaken.

It would seem that all the changes proposed in paragraph 51 should be pursued, as the Disputes Tribunal should be seen for what it is: a Small Claims Court within our Court structure that should be made as effective and fair as possible, while recognising its procedural and substantive difference from standard Court processes.

District Court

This submission responds to the second consultation paper. However, in respect of what is not in that paper, it was disappointing to find that the adoption of the German system of dispute resolution is not proposed for the District Court. This system would see more civil judges appointed to the District Court, with early control by the decision maker of all matters leading up to the hearing. While submissions may have not supported such a change to truly major civil litigation in the High Court, the opportunity to extend that concept to the District Court, where it could work very well, is not being pursued. That could have been the reform that would have produced a fundamental change to civil justice for ordinary New Zealanders.

Nevertheless the proposals for the reform of the District Court are applauded, particularly the use of part-time judges drawn from the Bar, and a special division of expert judges with a chief civil judge. Additionally, the procedural changes set out at paragraph 63 will allow judges improved control of how proceedings unfold inexpensively and quickly.

The new system will only work if the existing distrust by the Bar and litigants of the District Court as a forum for civil dispute resolution is extinguished. As the paper appears to recognise, change cannot be affected unless the right permanent and temporary judges are doing the job. To be blunt, with some laudable exceptions, some of whom are on the Rules Committee, such persons have not been sitting on civil cases in the District Court. It is critical to appoint lawyers who have a deep understanding the civil processes, the intellect which will enable them to master complex civil issues quickly, and the personality which will enable them to impose the necessary quick and fair procedures on overworked, reluctant, or incompetent counsel or litigants.

As I said in my original submission, there are many such lawyers, but most who will do this sort of work are at the Bar, save for those who can be persuaded to commit permanently to the District Court rather than remain in private practice or go to the High Court. History indicates that again with some notable exceptions, lawyers who have all these abilities are reluctant to go permanently to the District Court and commit to civil work. Part-time judges as proposed are essential.

I suggest that in the District Court these part-time judges would deal with all aspects of civil proceedings including case management, interlocutory hearings, and, on occasions at least, hearings themselves.

High Court

Case management

The same problem with case management exists in the High Court right now, and is not addressed in the Consultation Paper. More active judicial supervision of case management is proposed, and that is a laudable aim. However, this has been the aim since the original case management reforms led by Tompkins J back in 1993. The new judicial supervision worked very well when conducted by Tompkins J, but did not work at all well when conducted by other judges. The system faded for that reason in the 1990s as it became obvious that judicial supervision of civil cases, when not conducted by motivated experts, just added to cost and delay.

The proposed “Issues Conference” is just what was proposed back then. It is not a new idea. It has had its proponents ever since the case management reforms of the early 1990s, and again in the early 2010s. It did not work. It should have worked, but it did not and will not unless the right judges are presiding, who have the talent, energy and personality to manage multiple cases. The same applies even if there is no hearing, and case management issues are determined on the papers. To put it simply, specialist civil judges accustomed to and good at managing cases are required to do this work. Quick realistic decisions must be made. We are lucky to have an excellent and respected bench, but the plain fact is that not

all good judges are good case managers, and those who are good case managers, will generally not wish to do too much of that sort of work.

That is why specialist temporary judges taken from the Bar and chosen for their abilities in relation to the fair and efficient disposition of civil cases should be appointed also to the High Court to do case management. This reform should not be limited to the District Court.

I set out some detail as to how this would be done in my first submission. The part-time judge could only do the High Court case management if they had already done some work in the District Court, say two three-month sessions. This avoids the best lawyers declining appointment to the District Court but offers them the chance of moving on to the higher jurisdiction after they have worked in the lower Court. In the High Court, their duties might be best limited to case management and defended interlocutory matters, and not the trials themselves. In this way there will be good quality case management conducted by motivated practitioner judges who conduct civil litigation day to day, with a chance for them and the judicial establishment to see how they are suited to judicial work.

With one significant exception, the other proposed changes are supported, in particular upgrading briefs to affidavits and placing more judicial control over experts. But this again will require judges who know how to run a civil case and are good at it. Specialist part-time judges/recorders who would look after case management and trials in the District Court, and case management only in the High Court, are the answer.

Discovery

In my submission the proposed discovery reforms will make litigation less fair and will not save a great deal of cost and time. It is unavoidable that a fair disclosure of relevant documents lies at the heart of the present adversarial system. A fair result cannot be met unless each party has full information of the relevant evidence. In a civil trial, much if not all of this can be found in the documents.

It is respectfully submitted to the Committee that the costs and delay induced by discovery are exaggerated. There are horror stories, but they tend to arise in big litigation conducted by the big firms. The modern reciprocal electronic communications systems that prevail have only marginally reduced the importance of hunting out the private documents of opponents that may contain the key to a fair result. The fact that proper disclosure is often essential to obtaining a just result cannot be overlooked. Anecdotal evidence indicates that the obligation of discovery in this electronic age is manageable and cost-effective in establishing the necessary bundle of relevant documents. The documents assembled for electronic discovery provide the basis for the trial bundle of documents, and any appeal bundles of documents. There are thus cost savings. Tinkering further with discovery is not going to make the fair conduct of civil litigation cheaper or quicker.

The fallacy in proposing a more informal judge-controlled disclosure process is that it turns on counsel doing the job properly and acting with candour, with additional disclosure being "directed by a judge where justice requires". The whole purpose of the present standard discovery model was to take away judicial intervention, because it inevitably caused delay

and cost. The present proposal appears to be a move back to that system. It must be asked whether the proposal, while full of good intentions, would be workable in the adversarial context. Better to abolish the need for discovery altogether or postpone it to later as is done in New South Wales.

Questions must also be asked about the establishment of a duty of candour. How is that to be defined? The committee is proposing that we move from a relevance test which can be determined objectively, to something much less tangible that is capable of giving rise to disputes. There is a danger of over-discovery because of the anxiety of practitioners to comply with the new duty.

Other jurisdictions where there is no such discovery system have other compensating systems. These include close judicial intervention by career-trained judges who are running the whole case on a docket system, where it can be directed that relevant documents be supplied. This is practiced in European countries such as Germany. The other is delayed discovery after setting down, as is done in New South Wales.

The initial discovery proposed is only an expansion of the present provision, and not likely to satisfy parties seeking key background documents not referred to in the pleadings. Parties will seek to not disclose inconvenient documents. I would point out that "proportionality" is already a part of the existing rules. There is a danger that by trying to pare down discovery and move away from the simple concept of disclosure of relevant documents, the fine distinctions involved will actually add to the cost and time of discovery.

If it is intended to move away from the principle that parties in discovery should be able to see all the relevant documents, then the answer is to abolish discovery obligations, or limit them to documents that are referred to in the pleadings and briefs filed in Court, but not to create a half-way house of the type proposed.

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