THE RULES COMMITTEE
TE KOMITI MŌ NGĀ TIKANGA KOOTI

Improving Access to Civil Justice Further Consultation

To: Clerk of the Rules Committee
Date: 2 July 2021
Submitter: Lay Litigant, Ms Sarah Sparks

Tēnā koutou Rules Committee Members,

Thank you for the opportunity to contribute to your wider consultation on access to civil justice.

Specifically, I wish to place my thoughts based on **lived experience** to further assist you in how to identify the pathway of potential reforms discussed in, '*Improving Access to Civil Justice – Further Consultation with the Legal profession and Wider Community*' discussion paper published 14 May 2021.[1]

1. Introduction

(Ko tēnei taku pepeha poto ki te taha o tōku Māmā)

Tēnā koutou katoa
Ngā mihi nui kia a koutou
Ko Parapara tōku Maunga
Ko Tokumaru tōku Waka
Ko Parewhakaoho tōku Awa
Ko Onetahua tōku Marae
Ko Te Ātiawa tōku Iwi
Ko Ngāti Tama tōku Hapū
Ko Sarah Sparks tōku ingoa
No reira tēnā koutou tēnā koutou tēnā tātou katoa

I whakapapa to Te Atiawa and Ngāti Tama (ki Te Waipounamu) on my mother's side.

I am a lay litigant and have no legal training other than studying The Companies Act 1993 during my under-graduate degree at university.

Between 2011 and 2013 I was represented by legal counsel; two Barristers and one instructing solicitor.

However, I have been self-representing ever since for 8 years both the Family Court and the High Court jurisdictions in the following matters:

i. Relationship Property
ii. Insolvency
iii. Trust
iv. Care of Children

During that period, I was served with a plethora of substantial and interlocutory applications filed by my former husband's legal team. At one stage 21 applications were live on foot in Family Court, High Court, the Court of Appeal and Supreme Court.

[1] Source: https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/access-to-civil-justice-consultation/Second-Civil-Justice-Consultation-Paper-PUBLISHED-01-06-2021.pdf

(Image: Boxes of documents on my legal matters dated from 2011-2013 uplifted before self-representing)

He was represented by a multiple of 'big firms' in his personal litigation (matrimonial) and over the period engaged at least 20 legal counsel at various times totalling $2.3M for the period up until 2013

Legal Fees Traced From 2015- April 2017	**Fees**	
Minter Ellison	$	1,266,208.72
Keegan Alexander	$	706,498.01
K3 Legal Ltd (formerly Kirkland Morrison O'Callahan)	$	138,808.29
Thomas & Co (Don Thomas)	$	55,439.04
Kirkland Morrison O'Callahan	$	36,368.91
Antonia Fisher	$	1,758.00
RB Stewart QC	$	52,324.00
Lownes & Associates	$	25,214.00
Simon Jefferson QC	$	16,181.50
Deborah Chambers Ltd	$	4,163.51
	$	2,302,963.98

All litigation was paid for by the Bank of New Zealand through debt secured to nuptial assets.[2]

In response, I spent nearly $2M on legal fees and after running out of resources with no final determination on the relationship property, guardianship and Trust matters; I chose to self-represent due to the unjust, unfair and inequitable situation.

2021

The New Zealand Herald | Monday, June 28, 2021

News A1-15 | World A16-19 | Opinion A28-29 | Classified A35-38 | Sport A30-34 | Entertainment A39-43 A25

How to keep it civil in Family Court

continued from A20

Government allocated $15 million over five years in this year's Budget to pay for Family Court associates to help with administrative matters.

But for couples who have spent years, and eye-watering amounts of money, battling through the courts armed with costly lawyers and accountants, it's too little too late. Right now, the entire Family Court system needs to be taken apart and rebuilt, they say.

Lawyer Jan McCartney, QC, would like to see a change from an adversarial system to an inquisitorial process. Instead of two sides going head-to-head, a judge would ask questions and direct the case.

"It's a better environment for everybody and no one's jumping down anyone's throat."

Divorcee Sarah Sparks, who spent $2 million fighting a fruitless relationship property battle for seven years, agrees. She's involved with the Waitangi Tribunal and is impressed with how an inquisitorial system works in that setting.

"I believe we shouldn't have an adversarial system in this context [relationship property] because it's conflict. Mum and Dad at each other. It sets up families for failure and it's brutal."

Sparks is also pushing for a code of conduct for banks to ensure they don't favour the party who controls the money, lending money to help fund one side of the legal fight.

Industry professionals also favour court-appointed valuers, similar to the Australian system, to stop experts going up against each other resulting in endless, costly reports.

Mediation is favoured as alternative to court

Frustrated by the enormous cost and delays, couples are increasingly turning to mediation as an alternative. The advantage is it's usually over in a (long) day and the decision is binding. There's no appealing the settlement through the higher courts.

Nearly 90 per cent of cases that go to private mediation settle. Judicial settlement conferences, before a judge, have a much lower success rate at around 34 per cent.

Clarification

In the first part of this two-part series in the Weekend Herald, Auckland lawyer Jan McCartney, QC, was quoted as saying: "People think it's the women who get hit hardest, and they do; it's awful. But don't think the men aren't having a hard time too."

The correct quote should have been: "People think it's women who get hit hard, and they do; it's awful…."

But it's not cheap. A day with a skilled mediator costs around $10,000 plus the cost, to both sides, of having lawyers and accountants/valuers present. In Auckland, the Northern Club is a favoured venue.

Chambers favours mediation because it gives couples a chance to air emotional issues at the beginning of the day — the hurt, anger and resentment that has invariably got in the way of resolution. Quite often that "lances the boil", Chambers says.

Former district court judge and mediator Tony Lendrum has seen a sharp uptake in couples wanting mediation, particularly in the high net-worth end. One of the big attractions is that it's confidential, he says.

"No one is ever going to learn about their wealth, how its structured, what entities it's in."

If couples have had a hand in making the agreement they tend to accept them. And a lot of the "pre-match bolshiness" disappears in the mediation room, he says.

Let's sit down and talk

Apart from mediation, McCartney says she'd like to see more lawyers sit down and sort things out rather than exchanging demanding letters and attending court hearings. More talk, less court.

She has one case that she can't progress to any sort of settlement until she recommends her client pays $150,000 to the other side for their legal costs. That's not a good start, she says.

"The costs involved in taking a relatively simple case through the Family Court are often more than a complex commercial case in the High Court."

Sarah Sparks (left) spent millions on a relationship property dispute but believes an inquisitorial approach would be better for everyone. Former Judge Tony Lendrum (above) says mediation is increasing.

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Tips for protecting your share of relationship property:

1. Don't sign documents, including trusts, unless your fully understand them; get independent legal advice.
2. With regard to trusts, question who does the appointment of the trustees and beneficiaries, and who can remove them.
3. Make an effort to understand the family finances; ask questions.
4. Be familiar with family assets – property, businesses, investments, superannuation etc.
5. Be aware that your ex can quickly empty joint bank accounts in the event of a split. Make sure you have access to funds before separation.
6. If a break-up is imminent and you think your ex might be difficult, snoop. Photograph/photocopy bank statements and relevant documents.
7. Change passwords if your ex is likely to know yours.
8. Encourage your lawyers to have meetings to resolve relationship property matters.
9. Try to tell the children together and protect them from any arguments. Consider "bird nesting," where children remain in the home and the parents alternate.
10. Don't over share on social media. Avoid posting photographs of your new love interest until settlement is concluded.

[2] Revealed in discovery evidence CIV-2015-404-2828

2. Structure of Submission

This submission is structured according to the following sections:

i. Access to Justice
ii. Lived Experience
    a. Procedures
    b. Barriers
    c. Practice culture
    d. Court room control
iii. Solutions
iv. Conclusion

i. Access to Justice

Coercive control The "justice gap" is alive and well in Aotearoa. The divide between the haves and the have nots. The divide between the ones wielding the sword over those that can't afford a shield. The divide between the abuser and the victim-survivor. In my case, challenges in *access to justice was a form of coercive control that accounted to abuse.*

Brutal experience The legal system and all its rules were used to gain dominion and wield brutality over me as a Mother, as a Company Director, as a Settlor of a Trust and as a beneficiary of a Trust. The ultimate goal was misogynistic intending to invoke silence, obedience and discontinuance.

Unforeseen consequences When I discontinued in one matter (there were many on foot) it triggered cost applications of unprecedented and monumental proportions requiring the equivalent oppositional response from me to avoid bankruptcy. Those costs determinations have yet to be handed down.

Culturally isolating As wahine Māori accessing justice, at no time was I afforded the grace to speak Te Reo Māori when addressing the Court formally or felt I could have kaumātua supporting me when appearing in the matrimonial matters that my former husband successfully sought suppression orders over. The effect kept me isolated and severed me from the support of my people and Te Ao Māori and I felt whakamā.

ii. My Lived Experience

In 2018 at the behest of the Legal Issues Centre at the University of Otago, I was part of a panel discussion on access to civil justice where I shared my lived experience filmed here**:**
https://www.youtube.com/watch?v=pF8iu5_WP9E

a. Procedures

No Playbook There is no 'playbook' for self-representing in matrimonial and guardianship matters to navigate Family Court or High Court. A novice with no institutional or technical knowledge about the process, legislation, Court rules, sequencing, evidence filing, cross examination and correct format of documentation is in a vulnerable position from the start. They are not set up for success due to not having clear, succinct, information that's accessible. The experience can be unsafe and biased towards those with more resources. I didn't even know how to make up a bundle or have the page stamp and I was the originating applicant after my Barrister no longer represented me.

Tidal wave of issues Pleadings if poorly done by a lay litigant, can cascade into an expensive tidal wave of issues for the Court to manage. Discontinuance made with the very best of intentions to reallocate valuable Court time has resulted in me fending off an unforeseen prohibitive costs application.

Desensitised to duress Lay litigants in matrimonial and guardianship matters are physically, financially, technically and psychologically under serious duress juggling whānau, creditor and full-time employment demands with zero access to the law library or legal databases with essential reading. Both Court and the Law Society can be very desensitised to this fact and inequity of access to information and resources.

Lay Litigant cross examining abuser As First Defendant in the guardianship matter made on a without notice basis, to my absolute horror, Her Honour expected me to cross examine my former husband. At the time, my chronically ill Mother was dying in a hospice in another part of Aotearoa. She passed away days after the week-long hearing.

Locked out of Law Library Access during lockdown to the Davis Law Library was prohibitive as I was denied access to the library services of the Law Society that only provides material to lawyers who hold a practising certificate and have an account with them.[3]

Denied Access to Transcripts Access to High Court transcripts or an audio record of critical evidence that would've been helpful in an acrimonious matter were sought however were unable to be supplied. [4]

Lags in Discovery As Plaintiff in the matrimonial property matter, it took nearly three years in the process of case management to successfully be granted tailored Discovery orders against my former husband.

Lags in legislation That delay, factored with the compulsory two year 'stand-down' period before I could even apply to get a divorce decree, enabled the fruits of the marriage to be ringfenced and plundered beyond my reach. It took a herculean effort over 7 years against forces beyond my control, to realise that the equity had disappeared.[5]

a. financial barriers

Litigation liquidates all you have of value The cost of litigation has meant I've sold my jewellery, car, chattels, clothes and worked non-stop to pay outstanding legal fees (weekly drip-feed) and honour filing and fixture fees.

Coercive control The impact of the litigation has affected my credit rating. I nearly went bankrupt after a $11,000 costs order that I could not drip-feed to Court by mutual arrangement. Legal counsel for the other side advised, "*our client has instructed us that it is not prepared to grant any indulgences to you.*"[6] Currently I am opposing another costs application by my former husband totalling $444,000.

David v Goliath uneven playing field Whereas by comparison, the Bank of New Zealand wholly funded the litigation strategy of my former husband. It was well documented in the media in 2015 and again in 2020.[7]

I wrote about this for the New Zealand Herald here: https://www.nzherald.co.nz/nz/sarah-sparks-cash-calls-shots-in-marriage-split/A7SOWABZ56AV6EOBZFTF2XFZPA/

b. psychological barriers

Desensitised to duress The judiciary have witnessed me be abused in open Court and not stopped the matter until I asked for this to happen and in tears. It happened in the Judicial Settlement Conference in High Court too before the Court registrar and witnesses. I have had furniture thrown at me also in Family Court. This is against a backdrop of Trespass Notices, Restraining Orders and a Without Notice Protection Order being issued previously against my former husband.[8]

c. practice culture

Vindictive and vexatious litigation tactics Exploited the imbalance of power between myself, a lay-litigant and the represented party. I have been up against more than one party who are represented in matters I have not applied for but been a defendant. I have had bailiffs serve me at home publicly before the neighbouring school

[3] Email dated 28 April 2020 – Declining request to the Law Society to access Westlaw Commentary
[4] Email dated 14 November 2018
[5] Submission by S.Sparks to the New Zealand Law Commission on the Property (Relationships) Act 1976
[6] Email dated 11 August 2020 and Bankruptcy Notice (the sole Director of St Heliers Capital Limited is my former husband)
[7] Revealed in discovery evidence CIV-2015-404-2828
[8] Submission by S.Sparks to the New Zealand Law Commission on the Property (Relationships) Act 1976

and serial bullying treatment in High Court before the judiciary essentially commanding all the air-time and constantly interrupting, rendering me a thin-slice of time to present my case. There has been a conscious desire by legal counsel to use procedural devices as a tool of attrition.

Delay, Deny, Defer After 11 case management conferences, more than 118 documents filed over 855 days and an adjourned hearing back in July 2017[9] due to a lack of discovery evidence, our matrimonial matter was due to be heard in 2020 however it was discontinued because by then all the fruits of the marriage had evaporated due to a highly effective litigation strategy.

Breaches of confidentiality A third party, the Bank of New Zealand was copied into High Court matters by my former husband's legal counsel when they were not parties to the proceeding. This was a clear breach of privacy by legal counsel.[10]

Misrepresentative & Fraudulent Costs Application Costs of $444,000 were sought against me for accounting work by my former husband that was not related to the proceeding but for his own benefit concerning tax advice. The intention was to exert as much coercive pressure as possible.

d. court room control

Violence condoned There appears to be no clear mandate safeguarding litigants from abuse when in Family Court, when giving oral submissions to High Court, attending Judicial Settlement Conferences in High Court or afterwards when they take time to write to Chief Judges of the jurisdiction raising the issue due to seeking protection.

I have written on several occasions reporting violence in Court to the Principal Family Court Judge[11] who advised after I followed up "*decisions can be reviewed by way of an appeal"* and Chief High Court Judge[12] who also advised "*The conduct of individual hearings before Court is a matter for the Judge presiding over the hearing. That includes making directions at to the level of security that may be required for a particular hearing.*"

Judge Paulsen even commented on the violence in his High Court costs decision, "*While Ms Sparks was presenting submissions, she was interrupted by Mr Olliver. He shouted at her across court and argued with his lawyer. Mr Olliver's behaviour was inappropriate, undignified and upsetting*."[13]

Voluminous Written & Oral Submissions In both High Court and Family Court jurisdictions the judiciary was unable and unwilling to exercise sufficient control over the litigation that became a tangled web of interlocutory applications from the other side predominantly. The Register of Documents of 3 years ago shows in one matter alone 118 documents filed over 855 days.

Slippage in case management Matters drifted and COVID-19 had an influential impact by delaying decisions and timetabling and case management conferences.

iii. Barriers

The legislation, lack of technical knowledge, lack of access to the law library materials online during lockdown and lack of financial resources were the primary barriers.

The process has not been fair or timely or cost effective.

The two year compulsory stand-down period after separation before a divorce decree is granted prejudiced me tremendously. By the time I had an opportunity to trace funds years later, the equity had disappeared, and I had incurred huge debt due to legal fees clocked up in the process.

I wrote about this issue for Stuff here: https://www.stuff.co.nz/life-style/life/300341635/when-patience-is-not-a-virtue-abolish-divorce-laws-twoyear-stand-down

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[9] Register of documents filed dated 11 October 2017

[10] Email from Ms Parker, Deputy Registrar dated 2 August 2017

[11] Letter of correspondence dated 12 April 2017 from Principal Family Court Judge Laurence J Ryan, cc Her Honour Chief District Court Judge JM Doogue

[12] Letter of correspondence dated 21 November 2018 from Chief High Court Judge, Hon Justice GJ Venning

[13] Para 14 Costs Judgement of Associate Judge Paulsen dated 16 June 2020

iv. Solutions

Holistic structural solution Access to civil justice in matrimonial and guardianship matters would be better served by taking an eco-system approach that is culturally sensitive to the Treaty partner:

i. Law reform by the government
ii. Rules amendments
iii. Resources to support & strengthen lay-litigants
iv. Legal Clearing House as another cost-effective option
v. Inquisitorial system, not adversarial serves a whānau more humanely
vi. Legal practitioner training to be sensitive towards collective impact

There needs to be law reform (FPA and PRA), rule amendments to expedite matters, system processes redesigned, better resources made for lay-litigants that outlines what the process involves, the timeframes involved, obligations, and where to quickly and affordably, access help.

A legal clearing house co-funded by big law firms so there is another cost-effective pathway to legal representation for those that cannot afford for pay $500-$1000 an hour for legal counsel.

In matrimonial and guardianship matters the current adversarial approach harms whānau and needs to be more inquisitorial like the Waitangi Tribunal where I serve. Mothers should not be traumatised by the process, or financially burdened due to the imbalanced powerplays by a better resourced former spouse.

Legal practitioners should listen to lived experience in their professional training to understand the impact of their actions when litigation is used in a harmful way, 'just 'cause you can, doesn't mean you should'.

v. Conclusion

Reform needs structural, transformational change with rules amendments to achieve the Committee's overall aspiration that the justice system must deliver civil justice "*for all through fair and timely processes*" and "*procedures that are relevant and responsive to the needs and expectations of the people who use the courts*", so that "*public confidence in the courts will be maintained*" by "*just, speedy, and inexpensive determination of proceedings and applications*".