**CONSULTATION: IMPROVING ACCESS TO CIVIL JUSTICE**

1. I set out below my submissions on the Rules Committee's further consultation on improving access to civil justice.

**Disputes Tribunal**

2. I support increasing the jurisdiction of the Tribunal to $50,000, or perhaps even $100,000 (to recognise the issues with making litigation cost-effective), but on some provisos:

    a. *Referees should be legally qualified*. They will be making decisions on significant sums of money, and should have an understanding of how this fits within the legal framework. It also relates to the proposed appeal rights.

    b. *There should be more CPD for referees, particularly in the area of inquisitorial processes*. I work in the coronial jurisdiction, and have seen how effectively coroners work using inquisitorial powers. It is quite a different process to the adversarial system, and referees need to understand it properly. With a move to referees becoming legally qualified, there is a risk that they could themselves become overly legalistic and focused on rules of procedure and evidence (indeed, there is some anecdotal evidence that this is happening already). If this happens, then the benefits of the jurisdiction are lost.

    c. *Amendments to the rights of appeal*. This reflects the much larger sums that will potentially be at stake. I support a graduated right of appeal, with the existing right of appeal for awards of up to $30,000, and then appeals for errors of law thereafter. I have concerns about appeals for decisions that are "manifestly unreasonable". This could result in the District Court being flooded with decisions on this ground – particularly from lay litigants. The parties will have self-represented in the Disputes Tribunal and accordingly may not seek legal advice on what "manifestly unreasonable" actually means. This could lead to unmeritorious appeals, which will have costs implications for the other parties.

3. If the jurisdiction is to be extended, this does raise the question as to whether lawyers should be permitted in the Disputes Tribunal. If lawyers are allowed, the procedural rules would need to be very clear (for example, no interlocutory applications). There is otherwise a risk that matters would simply blow out in the Disputes Tribunal instead of in the District Court. I would not see a role for lawyers below the current jurisdiction of $30,000. There may be one between $30,000 and $50,000. Certainly if the jurisdiction was extended beyond that, I consider that there should be a role for lawyers. The sheer volume of information likely to be provided to the referees at that level is vast, and lawyers would at the very least play a role in reducing that to what is relevant.

4. *I do not support the proposal to extend the jurisdiction beyond $50,000 with the parties' consent*. In my experience, the reaction of the proposed defendant is simply to decline. This is done on the basis that the plaintiff will then have to expend the additional money required to take the matter to the District Court (both on filing fees and drafting documents), and this may then force the plaintiff into taking a pragmatic view and reducing its claim to ensure that it gets into the Disputes Tribunal. This means that plaintiffs compromise their claims. They will of course have to do that anyway wherever the jurisdiction is set. But I have never seen a successful use of the ability to extend by agreement, and it can simply result in a waste of time on correspondence.

5. *I support greater use of court-appointed experts*. The Disputes Tribunal may, in particular, find itself deciding a number of construction disputes where the plaintiff is a homeowner, claiming for defective work.

6. *I support increasing the daily fee for referees*. Given the sums at stake, it is important to attract referees who can deal with more complex claims of higher value.

**District Court**

7. I support all three proposals at paragraph 58 of the consultation paper. Given the understandable focus on criminal and family matters, it feels the civil constantly falls by the wayside. A Principal Civil Judge would play an important role in ensuring that this did not continue to occur. It would be essential for him/her to be supported by registry staff with renewed expertise. Their expertise might be enhanced if they were able to follow files through, rather than having them dealt with centrally.

8. Most of the judges appointed in the District Court have a criminal or family background, rather than civil. This can mean that they do not enjoy the civil work. Those that do have civil warrants sit in that jurisdiction so seldom that they do not often get to exercise their civil brains. That must surely make the process more difficult for them. The jurisdiction could benefit from judges who are practising more often in this area (that is not a criticism of the quality of the decision-making).

9. The introduction of Deputy Judges/Recorders is certainly one way of achieving this. The remuneration would again need to be sufficient to attract appropriately qualified people. Given that the Deputy Judges/Recorders would also be running their own practices, the roster for them would need to be set out well enough in advance to allow them to fit in their practice commitments.

10. Consideration would need to be given as to whether Deputy Judges/Recorders would be allowed to sit in their hometown. There may well be concerns about conflicts of interest. If they are not allowed to sit in their hometown, this will increase the travel costs for the Ministry.

11. The New Zealand legal community is a small one. We do not simply practice in our hometown. It could be conceivable that a Deputy Judge/Recorder could be the judicial officer in a case within a relatively short time of also being opposing counsel with the same counsel who were appearing before them. The ability to manage that will depend upon how many Deputy Judges/Recorders there are, and how flexible the rosters are.

12. Careful consideration will also need to be given to how long Deputy Judges/Recorders are to sit for. I have seen an indication that in England, they only do so for two weeks. I am not sure that this is sufficient to allow them to get used to assuming a judicial position. It requires time to be familiar with sitting, as well as getting one's head into a different mindset. But against that, counsel can only afford to take so long out of practice.

13. For practitioners who are involved with entities like NZLS or the NZBA, having a judicial role may cause conflicts with those other roles.

14. From a practitioner's point of view, it gives different opportunities to those practising solely within the civil space. It also gives practitioners a chance to try a judicial role before committing themselves to an application.

15. Overall, it is a good potential solution that will need to be worked through.

16. As an alternative, could judges be appointed to the District Court with solely civil warrants (or at least more civil time than criminal time)? The judges could perhaps sit on circuit, moving around the country for sitting days. This would also work to ensure that there were judges with good civil experience and who enjoyed the work in the position. Again, there are drawbacks to this approach. The judges may have to be fairly mobile, and this would likely have a negative impact on their personal lives. But presumably use could be made of AVL for list days as the High Court does. The Rules Committee will have a better idea on the practicalities of this. Again, it could make judicial office more attractive for civil practitioners.

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Please note that while I am the President of the Otago Branch of the New Zealand Law Society, and a council member of the New Zealand Bar Association, these views are my own personal views and do not represent the views of those organisations.