community law
free legal help throughout aotearoa

Submission on the Rules Committee consultation on improving access to civil justice

Community Law Centres o Aotearoa, 2 July 2021

1. **Introduction**

1.1. Community Law Centres o Aotearoa (CLCA) welcomes this opportunity to provide feedback on this follow-up consultation on improving access to civil justice in Aotearoa New Zealand. The contacts for this submission are
please contact us to discuss any matters outlined below.

1.2. CLCA is the national organisation for the Community Law network. Twenty-four Community Law Centres ('**CLCs**') work out of over 140 locations across Aotearoa to provide free legal help to those who are unable to pay for a private lawyer and do not have access to legal aid. As well as around 200 staff, Community Law Centres' services are boosted by over 1,200 volunteer lawyers who run legal advice clinics and deliver free assistance.

1.3. CLCA did not submit on the initial consultations on this issue but a number of the CLCs that we represent did so. We have worked with some of these CLCs, along with others that have not previously submitted, to draft this submission. Our specialist youth focused CLC, YouthLaw Aotearoa, has provided significant input into this submission. YouthLaw Aotearoa was established in 1987 as a national centre providing free legal advice and advocacy specifically for children and young people under 25 years of age.

1.4. We acknowledge and support the comprehensive work that the Rules Committee has undertaken in identifying and addressing the difficulties in accessing civil justice. Civil justice matters occupy 48% of the work undertaken by our CLCs and in the 2019/20 financial year CLCs undertook just under 25,000 civil legal matters. Therefore, our CLCs are very familiar with the numerous barriers people face when they attempt to engage with the civil legal system. Our clients are largely from disadvantaged groups who find the civil legal system intimidating and difficult to navigate including youth, Māori, people with low literacy and limited education or limited English ability, people with disabilities, resettled refugees and vulnerable migrants, family violence survivors, and the elderly.

1.5. We agree overall with the proposition that the jurisdiction of the Disputes Tribunal be widened and that District Court & High Court procedures be strengthened with more specialist court staff in the civil jurisdiction, and with streamlined processes to remove unnecessary litigation. We do have some reservations as to whether the proposals are adequate to address the complexities associated with vulnerable people accessing civil justice.

1.6. As highlighted in earlier submissions from our CLCs, our clients do not perceive civil litigation as a realistic way of resolving their issues because of the expense and complexity involved. We encourage our clients to see civil litigation as a last resort option. However, it is frustrating to see clients with valid claims deterred from legitimate civil litigation, even as

a last resort, because of the cost and complexity of proceedings. Even where legal aid is available it can be very difficult to access legal aid providers to undertake civil litigation, this is the case across the country in both cities and smaller centres. It is our opinion that this is a significant contributor to unjust and unfair outcomes.

1.7. We note the establishment of Te Ara Ture, the pro bono clearing house recently lauched as a subsidiary of CLCA. The purpose of Te Ara Ture is to facilitate the collection and distribution of pro bono opportunities in Aotearoa. It is based on models in similar jurisdictions to Aotearoa New Zealand. In those jurisdictions, clearinghouses play important roles in increasing the amount of pro bono work being done. Our hope is that Te Ara Ture will assist in addressing 'the justice gap' and increase access to civil justice for the most disadvantaged.

2. Disputes Tribunal

2.1. We submit that any changes to Disputes Tribunal must keep these objectives as a focus:

a the ability to enter an accessible, efficient and productive process with real outcomes, not just an empty and unenforceable order,

b the ability to use the protective mechanisms of the law to achieve redress for the parties and to hold those who have offended through negligent or predatory behaviour to account.

Jurisdiction

2.2. We support the monetary jurisdiction of the Disputes Tribunal being increased to $50,000 or more provided that the Tribunal is properly resourced and funded to accommodate this increase. Many of our CLCs have observed that the recent increase to $30,000 has led to capacity issues within the Tribunal with some smaller claims not being heard at all. We are concerned that there is a risk that increasing the Tribunal's jurisdiction will lead to delays and small claims being even less likely to be heard.

2.3. We suspect that increasing the Tribunal's jurisdiction is likely to lead to increased complexity in the cases lodged with the Tribunal. We submit that consideration needs to be given to whether the overall jurisdiction of matters heard will need to increase as well, including a definition of 'property' matters that can be heard. In our recent submission on the Law Commission's review of succession law we recommended that the probate limit be increased and that the Disputes Tribunal be granted the jurisdiction to hear disputes regarding wills under the probate threshold. We suggest that the Rules Committee consider this recommendation.

2.4. We are aware that there is some uncertainty about whether some torts claims are able to be heard by the Disputes Tribunal and submit that this is an opportune time to clarify this matter.

Appeals

2.5. We support the grounds for appeal of Dispute Tribunal decisions to the District Court being widened but note the catch 22 situation. Increasing grounds of appeal risks undermining the principles that this current consultation is based on; that the civil process needs to be accessible and easily understood. If many cases in the Disputes Tribunal are appealed our clients land back in the same boat of confusion in the District Court. For these reasons we are supportive of the graduated right of appeal outlined in paragraph 46, point d.

2.6. We agree with the suggestion at paragraph 46 (a) that, if decisions of the Disputes Tribunal can be appealed on a point of law, the Disputes Tribunal should be required to give effect to the law in all cases (though still with regard to the substantial merits and justice of the case) and that referees need to be legally qualified and experienced.

Inquisitorial processes

2.7. We submit that the use of inquisitorial processes ought not to be limited to the Disputes Tribunal and consider that there is merit in allowing inquisitorial processes in the District and High Court. As highlighted in the initial submission of YouthLaw, there are some legal matters that must be bought before the District Court or High Court and therefore bypass the Disputes Tribunal entirely. For example, a judicial review about an education matter must go before the High Court, and an application under the Harmful Digital Communications Act for a "take down" order or another sort of order must go before the District Court. Currently, many of these cases will not be bought before the District Court or the High Court because of the complexity and cost of proceedings. This is particularly the case with young people, who are vulnerable because of their age and experience, but is also true of the other disadvantaged groups that we represent - Māori, people who may not speak English and those with low literacy, beneficiaries, resettled refugee and other vulnerable migrant communities.

Other suggestions outlined in the consultation paper

2.8. In relation to the Committee's other suggestions about the Disputes Tribunal:

a. A name change from "Disputes Tribunal" would cause confusion for many of our clients. Some of our clients still refer to the Disputes Tribunal as the "Small Claims Court", and that name change occurred many years ago. Any other name change would likely cause the same confusion for our clients. Renaming the Disputes Tribunal to the "Small Claims Court" is also inappropriate as a $50,000 claim is not a "small claim" to many, if not most, of the population. Any name change should be subject to consultation with the community.

b. Changing the term "referee" to "adjudicator" would also cause similar confusion. It is our submission that laypeople will not appreciate the subtleties between the two terms, and that this is just a matter of legal terminology.

c. We support greater resourcing being provided to the Disputes Tribunal to appoint investigators to assist with disputes. This will be useful when parties are vulnerable and may not understand what information they are required to present as part of their claim. Often, our CLCs advise clients about what information they should

present, and we are concerned that many disadvantaged groups do not receive this assistance.

d. We also note though the potential risks or problems of appointing investigators to assist the Tribunal as observed in relation to the Motor Vehicle Disputes Tribunal (**'MVDT'**). This is referenced in *New Zealand Tribunals Law & Practice - Thomas Gibbons & Meenal Duggal*[1]:

> *'In practice, the MVDT has described what role the assessor performs in a number of ways, not all of which are easy to reconcile. An assessor has given "expert evidence", has given "advice" to the MVDT, has "considered" evidence given by witnesses together with the adjudicators, has "not accept[ed]" evidence given by witnesses, has expressed a "view' of matters which the adjudicator then adopts and has "confirmed" technical evidence given by witnesses'*.

The Authors go on to explain that there is a risk of unfairness if the role of assessors is not clear within hearings. If assessors are functioning as expert witnesses on an issue but unable to be cross examined because they are members of the MVDT, then that raises natural justice issues. We submit that it is important that an investigator or assessor be independent in a similar manner to the role of lawyer for child or lawyer for subject person in the Family Court, while acknowledging that the investigator would not be an advocate.

e. We support the principle of open justice; however, we are concerned that public Disputes Tribunal proceedings could deter vulnerable claimants from raising claims. Many of the clients that we advise about the Disputes Tribunal have never had contact with the court system and are already intimidated and anxious about what to expect, having open proceedings would be an even greater stressor and deterrent to bringing claims forward. For example, claimants who have a dispute about a car crash or debt can be embarrassed about bringing claims to the Tribunal, particularly if there is a risk that they could face public attention. In our experience, clients have been unwilling to go to the Tenancy Tribunal or the Employment Relations Authority because their names are published. Future employers and landlords can search for their names and this can have a prejudicial effect on whether someone is offered a role or a tenancy. The purpose of the Disputes Tribunal is for parties to come to an agreed settlement; however, open proceedings could deter this from occurring. Many of our clients are nervous about appearing in the Disputes Tribunal as they are not allowed representatives and are anxious about presenting their claim. If proceedings were open, this anxiety would worsen as they are effectively speaking in public in front of people they may not know about personal issues. We note that some anonymised decisions are already available on www.justice.govt.nz so we are unsure of the relevance of the inference in the Rules Committee consultation document that holding open hearings is required in order to make decisions publicly available. We also note that anonymised decisions by the Immigration and

[1] Page 56-57

Protection Tribunal are readily available online despite being heard in private or on the papers.

f. We support the Disputes Tribunal being given the power to waive fees and suggest that there is one set filing fee regardless of claim value. Our CLCs have also suggested that filing fees ought to be refunded to the successful party.

g. Finally, we support attention being given to increasing the efficiency of enforcement options for successful claims. The experience of most of our clients who are successful in the Disputes Tribunal, and most other tribunals, is that they struggle with civil enforcement. It is essential that this be addressed with as otherwise people are left with an empty and unenforceable order after engaging in a process that can be challenging and stressful.

Protections for family violence survivors

2.9. We submit that a further issue for consideration is how to protect survivors of family violence when they engage with the civil legal system, particularly the Disputes Tribunal and other tribunals. Financial abuse is often a significant component of family violence and some of our CLCs have assisted survivors in attempting to recoup money or property that was taken from them by an abusive ex-partner. In our experience the Disputes Tribunal, and other tribunals (e.g. the Tenancy Tribunal), have had little understanding of the dynamics of family violence and have not been well-equipped to ensure that appropriate safety measures are in place. Our clients' experiences include:

(a) The release of a survivor's physical address to their abuser despite numerous requests, backed by extensive evidence, for this information to be kept confidential;

(b) Resistance or refusal towards organising a safe means of participation, for example over Zoom or a teleconference, and insisting that the Applicant (a survivor) must sit in the same room as the Respondent (their abuser);

(c) Failure to intervene when a Respondent became verbally abusive towards the Applicant;

(d) Difficulties in ensuring that a support person can attend the hearing;

(e) Survivors having to explain their situation and experience to tribunal staff repeatedly, often in open public settings, in an attempt to ensure that appropriate safety precautions are put in place.

2.10 These experiences are troubling barriers to accessing civil justice and we recommend that training on family violence be undertaken by Disputes Tribunal referees and staff and protocols for safe participation be developed. We recently submitted on the Joint Venture's National Strategy on the Prevention of Family and Sexual Violence and made the same recommendation.

3. **<u>District Court</u>**

3.1. There is general support from our CLCs for the proposals outlined for the District Court and a range of feedback. We appreciate that the Rules Committee has acknowledged the

financial barriers, alongside other barriers, faced by many people in accessing civil justice. While the proposed reforms to the District Court go some way to addressing some of the accessibility issues faced by the communities that we work with, financial barriers - particularly in relation to obtaining legal representation - remain the strongest disincentive. Many of our clients simply cannot engage in a civil court process, even if it is streamlined, without legal representation for all of the reasons outlined in previous submissions from our CLCs and acknowledged in the consultation paper.

Principal Civil Court Judge

3.2. Generally, we support the creation of a Principal Civil Judge in the District Court. This change is consistent with the existing "Principal Judges" in the District Court. The situation is slightly different, however, as the other Principal Judges (Family and Youth) are specialist divisions of the District Court, and we do not see the civil jurisdiction as being a specialist division in the same way.

3.3. We are not convinced that the establishment of a Principal Civil Judge will address the significant barriers faced by our communities in accessing civil justice. A Principal Civil Judge in the District Court could be helpful administratively, but it is unclear how this will improve access to justice for lay people, particularly young people and other disadvantaged groups. It is also unclear how the appointment of a Principal Civil Court Judge will allow court staff to take greater advantage of the flexibility of the District Court rules as the current lack of flexibility and responsiveness to each case seems to be based on caseload and capacity of staff, which is a resourcing issue.

3.4. The Rules Committee has advised that the Principal Civil Court Judge will be responsible for addressing barriers to accessing civil justice, but it is unclear what powers the Principal Civil Court Judge will have to enact this change. We do agree that greater advocacy is needed about the barriers to accessing civil justice, and we acknowledge that a Principal Civil Court Judge may be able to put a spotlight on this issue.

Part-time Deputy Judges/Recorders

3.5. We support the introduction of "part time" Deputy Judges/Recorders, provided that this does not lead to any increased costs for parties. We agree that Deputy Judges/Recorders will help to reduce backlog and waiting times.

3.6. It is important that Deputy Judges/Recorders understand and can engage with self-represented litigants and vulnerable groups. We submit that all Deputy Judges/Recorders will need to be trained in how to help young people, Māori, self-represented litigants, people who may not speak English and those with low literacy, resettled refugee and other vulnerable migrant communities, to access civil justice. We recommend that Deputy Judges/Recorders receive the same training program that judges currently receive from the Institute of Judicial Studies.[2]

[2] https://www.ijs.govt.nz/prospectus/2021_Prospectus_for_Internet.pdf

Other proposals

3.7. We support the proposed pre-action protocols, particularly in relation to debt collection proceedings.

3.8. In relation to debt recovery our CLCs commented on the need to protect disadvantaged clients from unscrupulous creditors and those willing to abuse court processes. An example of this is finance companies that buy up debt books, get summary judgement (frequently after substituted service), and then an attachment order against benefits. There is concern that some of those summary judgments do not disclose a valid claim and that there is no formal checking undertaken. Our CLCs have also seen successful claims that exceed the Limitation Act 2010. We submit that there is a need for an enhanced role of the District Court Registries in relation to debt recovery and that the Registry could undertake checks for formal proof of debt when a claim is lodged.

3.9. We also submit that the ability of creditors to get attachment orders against benefits should be removed and, until this is removed, protections need to be weighted in favour of debtors who are receiving benefits.

3.10. We support the District Court Rules being amended to allow for more flexible procedures including inquisitorial processes. Decisions to use inquisitorial process should be based, in part, on the vulnerabilities and needs of the parties.

3.11. We recommend that the proposed Community Court and Primary Court model in the Law Commission's "Delivering Justice for all: A Vision for New Zealand Courts and Tribunals" be revisited by the Rules Committee.

4. **<u>High Court</u>**

4.1. We support the proposed amendments to the High Court but note that our comments in relation to financial barriers and access to legal representation as outlined at 3.1 above.

5. <u>Other issues</u>

5.1. We have also identified issues with access to civil justice that may not be within the ambit of the Rules Committee. We ask that these issues and recommendations be included in the committee's report to government:

a. Improvements to the accessibility of legal representation, particularly for children/minors (under 16) and young people (under 18). Currently, it is very difficult for minors to access civil legal aid support, particularly if they are under 16 and need a representative to apply on their behalf. We ask that the Rules Committee recommend that consultation and research be undertaken about children and young people and civil legal aid.

b. Disputes Tribunal fees should be able to be refunded if a claim cannot be lodged because of jurisdiction issues. We are aware of situations where people have made an application to the Disputes Tribunal and have paid the required amount, but then

have been told by the Tribunal that they cannot lodge their claim because of a jurisdiction issue and that they cannot receive a refund for the application fee. As an example of cases which may not be able to be lodged: the person they are filling the claim against may be in another country, the amount they are claiming for may be over the amount allowed by the Tribunal, the matter may not be an issue that the Disputes Tribunal can deal with (i.e. employment or caregiver/guardianship issues). We ask that the Disputes Tribunal be empowered to offer refunds when a claim is rejected based on jurisdiction.

c. If the jurisdiction of the Disputes Tribunal is increased, it may be appropriate to increase parties' rights to representation. Currently, minors can ask the Disputes Tribunal if a representative can help them to present their case. We recommend that there be a presumption that minors will have a representative, who they will choose, unless they advise that they will represent themselves. We also recommend that the Disputes Tribunal have more discretion in relation to allowing other vulnerable people to have a representative assist with presenting their case.
d. We are concerned about delays in the delivery of judgments as access to justice requires disputes to be determined in a timely fashion. We understand that there are significant delays in most courts. We are particularly concerned about delays in the Family Court, as long delays are contrary to statutory requirements that the Family Court consider a child's sense of time. We are also concerned about delays in the Human Rights Review Tribunal. We strongly recommend that time limits be introduced for delivery of judgments after the date of the hearing. Time limits for delivery of judgments should apply to all courts and tribunals.