Dear Rules Committee

My name is Callum Martin and I am an employed solicitor in the litigation team at Saunders Robinson Brown, a law firm in Christchurch. I write in my personal capacity to offer my views on the Committee's report on Improving Access to Civil Justice (**Report**).

1. **Introduction**

1.1 I agree with the general response received so far that the civil justice system, while efficient in some cases, could use improvement. I welcome that change has been proposed and hope that we can seize the opportunity to improve the Court process for all users, notwithstanding the difficult circumstances which require people to make use of it.

1.2 I have taken the approach of responding to the main headlines in the report individually.

2. **Disputes Tribunal:**

2.1 As a general comment, a surprising amount of my work is devoted to assisting clients who are making or have been served with claims within the jurisdiction of the Tribunal. I raise this only because it does highlight the involvement lawyers have with the Tribunal despite not being permitted to appear there (as the Report notes).

2.2 Recommendations 1 and 3: Increasing the jurisdiction to $70,000.00 as of right and $100,000.00 by agreement/representation within the Tribunal:

2.2.1 It is trite to say that the Tribunal exists for the purpose of determining small claims. That purpose informs the policy that appeal rights and the rights of appearance enjoyed by counsel are restricted, as the Report has noted.

2.2.2 While the limits proposed above may be modest in cases of corporations or businesspeople enjoying financial stability, it is the concern of this writer that the amounts proposed could be monumental to those of more modest means.

2.2.3 Of note is that the median wage in New Zealand in June 2022 was approximately $62,000 per year.

2.2.4 The result is that determinations made by the Tribunal for sums of that gravity could have a crushing impact on those affected and the integrity of that system may be better served with such determinations being made in a more robust process with professional advocacy advancing each side's cause.

2.2.5 The writer is most concerned about the power imbalance between laypeople and, for example, insurers who make a habit of appearing in the Tribunal and are far better armed and resourced to advance their cases.

2.2.6 On that basis, the writer is opposed to the increasing of the jurisdictional bands without the added safeguard of counsel being able to provide representation to their clients within those higher bands.

2.2.7 The Report notes that many claimants and respondents already have lawyers preparing them for the hearing. That may be the case, but it is within the Tribunal that the substance of the dispute is heard and determined. It is within the Tribunal that the parties are encouraged to mediate and resolve their dispute as a last resort before the Tribunal makes its ruling.

2.2.8 There is a clear advantage to having counsel appear for higher value cases:

2.2.8.1 Counsel would focus the issues on what is likely to be a more complex claim at higher values.

2.2.8.2 The power disparity would be lessened where lawyers, familiar with the nuance of litigation and disputes process, were permitted to advance their client's case on their behalf.

2.2.8.3 Settlement discussions could occur with the benefit of legal advice provided at the time the Tribunal Referee was discussing settlement.

2.2.8.4 The presence of counsel would improve confidence in the process as the case would be ably argued and the relevant facts would be more likely to have been appropriately put to the Referee. This may serve to reduce appeals to the District Court. It is noted that the aim of the Tribunal is the speedy and efficient disposition of modest claims – reliance on extended appeal rights to ensure confidence in the system does not meet that aim.

2.2.9 The new bands are supported, but with a party's right to appoint counsel for claims greater than $40,000.00.

2.2.10 It is suggested that litigants often desire Counsel to advance their cases. Despite ostensibly being designed for litigants in person, the norm in the Employment Relations Authority is for parties to be represented, as is the case in the Family Court. The writer understands that the Family Court in particular saw a marked increase in without notice applications following reforms disqualifying lawyers from appearing in standard-track care of children proceedings.

2.2.11 Many practitioners likewise complain that litigants-in-person add more cost and complexity to proceedings than they save. For this reason a balance must be struck between the value and cost of the proceeding, and the efficiency and public good that can be added by allowing counsel to appear.

2.3 Recommendation 2 - Add a general right of appeal to determinations greater than $30,000 in value:

2.3.1 This is supported.

2.3.2 The writer notes representation in the Tribunal will reduce the probability of an appeal being lodged in a higher-value case.

2.4 Recommendation 5 - No costs awards other than that a successful applicant should be able to claim their filing fee disbursement:

2.4.1 Successful applicants should be permitted to claim back their filing fee disbursement.

2.4.2 If lawyers were permitted to appear in the Tribunal in higher level claims, it is suggested that a discretion should be afforded to the Referee to award costs. This could be set at a higher standard than usual, such as where a party has needlessly prolonged the proceeding or the like.

2.4.3 The writer likewise suggests an amendment to section 43 of the Disputes Tribunal Act 1998 which clarifies that costs may be awarded to a party where a term of the contract between the parties provides that one party will pay the legal costs of the other for enforcing the contract. It is understood that this is already the practice of the Tribunal. However, the wording of s 43 may convey to a potential claimant that there is no entitlement to legal costs, regardless of a term of the contract which entitles the claimant to legal costs when enforcing the contract.

2.5 Recommendation 6 - Clarification that referees must be legally qualified:

2.5.1 This is supported.

2.6 Recommendation 7 - Decisions to be made pursuant to the law but for where it would cause substantial injustice:

2.6.1 This is supported but with the comment that it is the writer's understanding that the reason for the restricted appeal right and the main hurdle to challenging a Tribunal decision through judicial review is the reality that the Tribunal is not bound to uphold the strict legal rights of the party and is required to decide disputes pursuant to the substantial merits and justice of the case. Regard should be had to the effect of adding the proposed addendum on cases brought for judicial review.

2.7 Recommendation 8 - $200 enforcement fee to be abolished or waived:

2.7.1 This is supported.

2.8 Recommendation 8 - Enforcement:

2.8.1 Orders in the Tribunal other than work orders are enforced in the District Court. For this reason enforcement will be discussed in the context of the District Court.

3. **District Court:**

3.1 Recommendations 10 and 11 - Create a separate civil division of the District Court and invest in better judicial civil expertise:

3.1.1 This is supported.

3.2 Recommendation 12 - Appointment of Deputy Judges:

3.2.1 This is supported. The concern about judicial independence is noted but, provided that conflicts are eliminated, there seems no reason that an experienced civil litigator should not be able to take appointments on a part-time basis.

3.2.2 The writer asks that the Committee consider whether Deputy Judges would be best suited to summary or interlocutory matters rather than full defended hearings.

3.3 Recommendation 14 - Remitting Judicial Settlement Conferences to the Disputes Tribunal:

3.3.1 The benefit to a Judicial Settlement Conference and what likely encourages settlement in a number of cases, is that a judge is able to speak with an air of authority and speak to the reality of the litigation.

3.3.2 It can be a useful "*reality check*" for a party to hear one of the judges with the qualification to hear their case summarise the issues and identify the jeopardies. It carries a gravity that advice from the party's lawyer or a Tribunal Referee can lack.

3.3.3 On that basis it is submitted that Settlement Conferences should remain in the District Court.

3.4 Recommendation 15 - Pre-proceeding protocols for debt recovery claims:

3.4.1 There would need to be more information provided regarding what these protocols would be.

3.4.2 The immediate concern is that the cost of debt recovery would be increased for those who are already out-of-pocket because the debtor has failed to honour their obligations under a contract.

3.4.3 The writer is somewhat sceptical about what more pre-proceeding protocols can do to safeguard the process – the Notice of Proceeding already contains a fulsome description of the Court process and the consequences of failing to respond. Short

of requiring a defendant to appear physically in Court (which they are unlikely to if they do not intend to respond to a claim), it is unclear what further protocols will increase defendant engagement with the system.

3.5 Enforcement:

3.5.1 The unfortunate experience of the writer is that it is all-too easy for judgment debtors to shirk their obligations to repay judgments. A great deal of expense and wasted time is expected of judgment creditors in pursuing judgment debtors for unpaid debts.

3.5.2 The writer suggests filing fees be abolished for enforcement actions but rather be recoverable from the judgment debtor directly by the Court.

3.5.3 Applications for enforcement hearings such as financial assessment hearings are subject to long delays while they are processed by the central registry. These processing times must be improved.

3.5.4 There is a power under s 149 of the District Court Act to require the judgment debtor to open their books at a financial assessment hearing. However:

3.5.4.1 There is no provision in the approved Ministry of Justice form to request the specific documents to be produced at the hearing.

3.5.4.2 There are no consequences on the judgment debtor for failing to produce those books.

3.5.4.3 There is no provision for the judgment debtor to be required to produce their evidence **in advance of** the financial assessment hearing.

3.5.5 This generally results in a financial assessment hearing where the judgment debtor arrives without any evidence of their financial position whilst alleging they have no or limited assets to satisfy a judgment. Not uncommonly, the hearing is required to be adjourned so that the judgment debtor can assemble that evidence.

3.5.6 While there are provisions under the District Court Act to present a judgment debtor with a financial statement and require its completion, this can require multiple acts of service if the judgment debtor does not comply and there are no consequences for non-compliance unless the judgment debtor fails to appear at a hearing.

3.5.7 The Waitematā Community Law Centre mentioned in its submission that the Disputes Tribunal could implement an enforcement plan within its decision in order to streamline the enforcement process (paragraph 104 of the Report). Such a process in the District Court, at least for debt collection matters, is supported.

Judgment Creditors should not have to jump through such a large number of hoops to get an attachment order against a judgment debtor's wages.

4. **High Court:**

4.1 Recommendation 16 - Inclusion of "*proportionality*" as a key purpose of the Rules in Rule 1.2:

4.1.1 Not opposed to this but there could be more specificity outlined as to the effect of the inclusion.

4.2 Recommendation 17 - Exchange of witness briefs before discovery is commenced:

4.2.1 The concern of the writer is that this will result in more work being placed on the system.

4.2.2 The process may work for simple short-cause trials but for those longer and more complex proceedings, there is concern that there will be many more applications to the Court to admit supplementary briefs as evidence after the completion of the discovery process.

4.2.3 A concern has likewise been raised that this serves to front-load the cost of litigation when that money could be better spent negotiating settlement. Parties are essentially being put to the cost of preparing for trial at a very early stage in the proceeding.

4.2.4 While not opposed in principle, if the exchange of briefs is to be done at an early stage in the proceeding, it should perhaps be on a case-by case basis and following the first Issues Conference which the Committee proposes to introduce. Parties can be asked if there is any availability for settlement and, failing that, any reason that discovery should proceed in advance of briefs being filed. The Judge can make directions accordingly at that time.

4.3 Recommendation 18 - Extend the definition of initial disclosure to "*adverse documents known to the party*":

4.3.1 This is supported.

4.4 Recommendation 18 - Have discovery ordered following the first judicial issues conference "*as is necessary*" and proportionate to the issues in the case:

4.4.1 This is supported.

4.5 Recommendation 19 - Introduce a Judicial Issues Conference following the exchange of pleadings and briefs of evidence to identify the key issues, prospects of settlement and set down trial if possible:

4.5.1 Other than to oppose the notion of witness briefs being required prior to the conference, this is supported.

4.6 Recommendation 20: Interlocutories – presumption of remote participation with time limits and make allowances for interlocutories to be dealt with on the papers where the interests of justice are served.

4.6.1 This is supported.

4.7 Recommendation 21 - Reduce the expense on experts:

4.7.1 The recommendations of one expert per topic and a presumption of expert conferences are supported.

4.8 Recommendation 22 - Streamlining evidence:

4.8.1 The general recommendations that the evidence can be drawn from an agreed bundle of documents, admissible as to the truth of its contents, are supported.

4.8.2 In particular, the writer has found that the practice of reading briefs adds little to the proceeding and is unhelpful for assessing a witness' demeanour or veracity. Taking the evidence as read seems sensible or, alternatively, insisting that evidence in chief be undertaken *viva voce*, as in criminal proceedings.

4.9 Recommendation 23 - Remote hearings, and electronic filing and document management should become standard practice.

4.9.1 This recommendation is supported.

4.10 General note - Pleadings

4.10.1 As identified in the Report, Counsel feel compelled to adopt a scatter-gun approach to pleadings which over-complicates the initial pleadings and results in significant double-ups.

4.10.2 For example, a party in a building dispute should not be required to plead a breach of contract for failing to act with reasonable skill and care alongside a separate cause of action in breach of warranty under the Building Act for precisely the same failure. Yet lawyers feel the need to do so for fear of admonishment should they be criticised following an adverse result for their client.

4.10.3 It is noted that this problem can be traced to some degree to the way legal practice is overseen by bodies such as the Law Society and its disciplinary arm. However, to the extent that changes to the rules can be worked to alleviate this problem, they should be so amended.

4.11 General note - Summary Judgment Applications

4.11.1 There is a difference in practice between the District and High Courts that appears to lack any justification. The summary judgment practice followed in the District Court should be adopted by the High Court.

4.11.2 Rule 12.4(2) of the District Court Rules 2014 states that an interlocutory application for summary judgment may be made by a plaintiff at any time up until the expiry of 10 working days after the date on which the statement of defence has been served on the plaintiff (or later by leave of the Court).

4.11.3 Rule 12.4(2) of the High Court Rules 2016 states that an interlocutory application for summary judgment must be filed alongside the statement of claim (or later by leave of the Court).

4.11.4 The result is that plaintiffs are expected to gamble on the response of the defendant and go to the extra expense of preparing an interlocutory application with supporting affidavits when they do not know if the defendant:

4.11.4.1 will reply with an untenable defence, in which case the application can safely proceed;

4.11.4.2 will fail to reply at all, in which case the application was unnecessary and the plaintiff could have proceeded to default judgment; or

4.11.4.3 will reply with a genuine dispute of fact or other response rendering the summary judgment process unsuitable, in which case the application should generally be withdrawn and the legal costs for preparation of the application are wasted.

4.11.5 This is an inefficiency putting Court participants to unnecessary expense and it would be easily remedied by affording a plaintiff some time after receipt of the statement of defence to decide their course of action. Time would also likely be saved for the Courts themselves.

4.11.6 The writer understands this practice is the norm in Australia and, indeed, it is adopted by the District Court in New Zealand.