community law
free legal help throughout aotearoa

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Submission on 'Improving Access to Civil Justice', Rules Committee report
Community Law Centres o Aotearoa, 24 February 2023

1. Overview

1.1. Community Law Centres o Aotearoa (**CLCA**) welcomes this report following the three consultation papers over recent years. The contact for these submissions is [redacted]

1.2. CLCA is the national body that coordinates and advocates for the 24 Community Law Centres (**CLCs**) across Aotearoa. Our member CLCs work out of over 140 locations 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 240 staff, CLCs' services are supported by more than 1,200 volunteer lawyers who operate, or assist with, legal advice clinics and deliver free assistance.

1.3. Each year, CLCs provide free legal support to 45,000 clients and free law-related education to 30,000 people. In addition, free legal information is provided via the Community Law Manual (the digital version of which has 4,000 views per day on average) as well as to an estimated 200,000 people who contact Community Law Centres directly. Te Ara Ture is the nationwide clearinghouse for pro bono legal services and is a division of CLCA.

1.4. We are pleased to see that much of our previous feedback and many of the recommendations from our CLCs have been incorporated into this report.

1.5. We have limited our comments on the report to the Disputes Tribunal and District Court recommendations as these are the forums where we have the most experience.

1.6. In relation to the High Court our CLCs noted that the barriers of entry are significant. We see the primary issue as being about finding legal representation, particularly given the dearth of civil legal aid providers.

2. Disputes Tribunal Recommendations

2.1. Overall we support the recommendations relating to the Disputes Tribunal. We are pleased to see the jurisdictional cap increases to $70,000 as of right and $100,000 by consent. We agree with the proposal for a graduated appeal right with appeal rights expanded for awards over $30,000. We reiterate our comment from our 2021 submission on the Rules Commitee consultation that there will need to be a significant increase in the resourcing of the Disputes Tribunal to reflect the increase in caseload that will accompany the increase to the jurisdictional cap.

2.2. We support the suggestion of a review in 3 – 5 years time of the increase in the jurisdictional cap.

2.3. We agree with the proposals at paragraph 64 to expand the types of claims that can be brought to the Disputes Tribunal and the orders that can be made. In particular, our CLCs were in support of

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bringing the trimming and removal of trees within the jurisdiction of the Disputes Tribunal. The current situation, where damage to or from trees can be dealt with in the Disputes Tribunal, but the underlying cause cannot, is unsatisfactory. One of our CLC lawyers has been involved in a few of these matters in the District Court and commented that the Courts seem to see it as a waste of their resources. Our lawyers noted that the Property Law Act would need to be amended, and it may be that the orders available for the Disputes Tribunal would need to be reviewed, to ensure that any orders can be made correctly. The Disputes Tribunal would need to retain the ability to refer any complex matters involving trees to the District Court.

2.4. Our CLCs are also concerned about debt disputes, particularly between individuals. Debts involving amounts that are not worthwhile dealing with in the District Court can still be very important to our clients. We would like to see debts owed to private individuals dealt with by the Disputes Tribunal somehow, without overrunning the Tribunal with claims by debt collectors and similar. People who are determined to avoid accountability can simply say "I will pay you next week" consistently, and the Disputes Tribunal will not accept the claim.

2.5. This overlaps with the recent IPCA report[1] into how the police deal with fraud, including Facebook Marketplace fraud or paying deposits. These claims are often not 'in dispute', but are never worthwhile pursuing through the District Court

2.6. Connected to this issue in our experience, is that the Disputes Tribunal does not deal with substituted service, or anything similar. Many more deals are moving online, and finding a physical address can be very challenging, not everyone updates their electoral roll details, and a private investigator is often more expensive than the claim.

2.7. Our CLCs noted that the increase in jurisdiction must bring with it an improved process for moving matters from the Disputes Tribunal to the District Court. The higher financial limits means that more technical or legal arguments will be filed in the Disputes Tribunal, which given the bar on legal representation, may not be the correct place to hear those arguments. It would be helpful to make parties aware of the option of applying to have complex matters referred to the District Court from the Disputes Tribunal as part of initial information, or making it a simple template.

2.8. Our CLCs also noted that a refusal by the Disputes Tribunal to transfer an application to the District Court[2] is not able to be appealed[3]. Given the jurisdictional increase this legislation may need to be amended to allow for such refusals to be reviewed.

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[1] Independent Police Conduct Authority, 2022, *Review of Police Management of Fraud Allegations https://www.ipca.govt.nz/Site/publications-and-media/2022-reports-on-investigations/2022-nov-15-police-management-fraud-inadequate.aspx*

[2] Section 36(2) of the Disputes Tribunal Act 1988

[3] Section 50(1) of the Disputes Tribunal Act 1988

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2.9. We have some reservations in relation to maintaining the status quo on the bar on representation, particularly the absolute bar on lawyers. We agree with the comment at paragraph 77(b) in relation to occasions where a vulnerable party is on one side of the dispute involving a corporate party with a very experienced representative on the other. Our CLCs often assist clients with preparing their documents and arguments, particularly in cases where the other side is a corporate party or other disparities or power imbalances exist. In some cases our clients do not have anyone who can appear with them as support person or representative. We would like to see some flexibilty and relaxing of the absolute bar on lawyers appearing for vulnerable parties. We suggest consideration is given to incorporating a provision similar to section 93(3) of the Residential Tenancies Act 1986, which allows representation by counsel if it is appropriate given the complexity of the issues involved and the disparities between the parties affecting their ability to present their respective cases. With the increase to the jurisdictional cap we suggest that it is likely that the complexity of the issues involved may also increase. While we agree with the principle that people can have their disputes heard in a forum without lawyers we suggest that providing referees the discretion to allow legal representation is also a strong access to justice message that power imbalances will be addressed and that those with additional needs will be catered to. In particular we are mindful of the needs of clients who come to Community Law, those with limited English or limited literacy, with disabilities that impede their ability to present their case.

2.10. Another way of addressing the power imbalance is the question that was raised in the previous Rules Committee consultation document, that investigators are appointed to assist with disputes. As we noted in our 2021 submissson, this would be useful when parties are vulnerable and may not understand what information they are required to present as part of their claim.

2.11. We are pleased to see, and agree with, the recommendation that hearings remain private but that the number of published decisions increases as well as the proposal for a library of decisions. This addresses our concerns about the reluctance of our clients to participate in a public proceeding. In relation to the library of decisions, we would like to see this as public and as user-friendly as possible as our CLCs noted the difficulties in navigating the current decisions database. One option could involve dividing the proposed 600 published Tribunal decisions into a number of specific categories (as with the proposed “internal library”), to save users going on fishing expeditions by typing random search terms.

2.12. We would like further clarity around the scope of “interested academics” who will have access to the “internal library”. We suggest that this should include lawyers. We would like to know whether the “internal library” might be published on a database such as Westlaw, and/or whether

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there could be a Tribunal librarian appointed who could be contacted by practitioners seeking access to the internal library.

2.13. We support the recommendations that costs continue to fall where they lie, that the filing fee be recoverable for successful parties, and that the filing fee be subject to waiver although some CLCs were concerned that this could lead to frivolous claims.

2.14. We support the recommendation that referees be legally trained and the suggested amendment to section 18(6) of the Disputes Tribunal Act 1988.

2.15. We are in strong support of Recommendation 8, in relation to improving enforcement and recovery as this aspect of the process is a significant barrier to our clients in accessing justice. We are pleased to see the recommendation that the $200 enforcement fee be removed or that there is the ability to apply for a waiver.

2.16. Finally, we agree with Recommendation 9 that the name of the Disputes Tribunal remain the same and that 'referee' be changed to 'adjudicator'.

3. District Court Recommendations

3.1. We support the creation of a civil division in the District Court and the appointment of a Principal Civil Judge. In particular, we welcome the suggestion that a focus of this role be the information barriers experienced by many in our communities. Going to court is incredibly daunting for most of our clients and straight-forward accessible information would assist people in knowing what to expect.

3.2. We also agree with investing in improving the expertise of registry staff and with appointing part-time judges or 'deputy judges'. One of our CLC contributors has UK experience of the appointement of barristers to part-time judge roles and noted the value of this system as it allows greater flexibility, allows barristers to see cases from the point of view of the adjudicator, and allows barristers the opportunity to experience the role of a judge before moving to a permanent role.

3.3. We would have liked to see a move to an inquisitorial process and are disappointed that this is not recommended. We appreciate the Committee's comments that the Rules are already sufficiently flexible to allow for inquisitorial processes and suggest that some guidance and training could be implemented to encourage judges to use these approaches more often.

3.4. We support the recommendation that pre-action protocols be introduced for debt claims in the District Court. We agree with the suggestion at paragraph 152 regarding introducing a requirement that creditors:

a. warn debtors that proceedings are to be issued,

b. urge them to obtain either representation or advice from Community Law Centres or similar, or

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c. request that the debtor attempt to agree a payment plan with the creditor as an alternative to seeking judgment.

3.5. The report of the Rules Committee has primarily focused on financial claims, but our CLCs also raised the matters of restraining orders under the Harassment Act 1997, or various orders under the Harmful Digital Communications Act 2015. These get lumped in with general civil claims, and can take a very long time, e.g. delays of over a year for a restraining order to be heard. During that time, the person has no protection, unlike in family violence proceedings where a temporary order may be granted without notice, despite the harm often being similar.

3.6. While the Harmful Digital Communications Act is advertised as a friendly process not requiring legal representation, we are unsure how realistic that is. There is very little information on what the process is, and the publicly available information can be incorrect. In our experience Judges take very different approaches, which makes it harder to advise.

3.7. Further our CLCs noted that while delays in civil claims for money can be ameliorated to a degree by calculating interest there is no equivalent for other types of claims.