

Rules Committee | Komiti mō ngā Tikanga Kooti

Consultation on Improving Access to Civil Justice

Notes of oral submission by Sacha Green, National Advisor Legal and Strategic, Citizens Advice Bureau (CAB), 6 August 2021

1. The CAB's submission concerns the Disputes Tribunal section of the Rules Committee's Second Access to Civil Justice consultation paper dated 14 May 2021.
2. It is really positive to see the Rules Committee looking beyond the remit of the first consultation paper and acknowledging wider access to civil justice issues.
3. The Disputes Tribunal reaches more people, and is more accessible, than the "formal justice system". So it is good to see the Committee turn its attention to the Tribunal.
4. But the CAB has a concern that some of the Committee's proposals would increase the formality of the Disputes Tribunal. The CAB's concern is that doing so may undermine some of the existing good features of the Tribunal.
5. The CAB questions the statement (at para 43 of the paper) that inquisitorial processes are better suited for lower value claims, with the more elaborate procedures of a court proceeding being justified when what is at stake warrants them. CAB does not understand the rationale of this statement. The fact that you take an inquisitorial approach does not of itself indicate that the claim is of lesser value. Inquisitorial processes might be equally suited to a higher value claim if there is a fair hearing, and you can get to the heart of the issue and resolve it.
6. The CAB wonders if there is more that could be learnt from the Disputes Tribunal – about the features that give it accessibility, affordability, and the ability to offer fair hearings.
7. The CAB is concerned about shifting the framing from determining disputes according to the "substantial merits and justice of the case" towards prioritising following the law – and asks how that would better serve the needs of people who use the Disputes Tribunal. Is there a view that Disputes Tribunal matters are currently being determined otherwise than in accordance with the law?
8. The CAB does not agree with the statement (at para 51(b) of the paper) that parties expect a judicial determination from the Tribunal rather than a facilitated outcome. Facilitating the resolution of the dispute should be the main objective of the exercise.
9. The CAB is not in favour of name changes for referees or for the Tribunal itself. But if the Tribunal has to be renamed, perhaps it should be called the "Disputes Resolution Tribunal" to convey that the Tribunal is trying to solve parties' problems. For most people who interact with the Disputes Tribunal, the referee is already a "judge". Changing the name of the Tribunal to a "court" would be a total backwards step – people have huge anxiety about going to court. Many people understand and experience the Tribunal as a court anyway because that's what it feels like to them when they turn up. Avoiding terms that create fear will help people feel able to engage. The term "Small Claims" (para 51(a)) is problematic because it gives the impression that the Tribunal deals with things of low value, when actually they can be

things that are vitally important to people. Moreover, an assessment of value that is made in terms of dollar value does not reflect the way that many people assess the value of their dispute. It can be a stumbling block for people to have to put their dispute into dollar terms. If it is a neighbourhood dispute it may be just about “the thing that needs to be decided” rather than the dollar value of that thing. While you can attach a dollar value to things, it’s not a natural way of thinking for people in lots of settings.

10. The CAB is not in favour of making Disputes Tribunal hearings public. What is broken about the current system that we need to fix? The CAB favours the current approach where some decisions of interest are printed with parties’ identifying details redacted. There are other ways to achieve the objective of helping people prepare their submissions by giving them an indication of how the Tribunal decides similar matters, that would have less impact on parties’ privacy. Examples, templates, case studies are more helpful than publication of actual disputes. For example, if two neighbours are in dispute about their fence, and that dispute is publicised, it might cause an ongoing rift in their relationship. If the goal is resolution of disputes, in this forum, the CAB does not see the higher value that comes from more open justice compared to the current privacy protections that apply to people’s disputes.
11. The CAB favours giving referees more certainty of employment and strengthening the infrastructure around them. The CAB does not dispute the need to pay referees more and agrees that they should have legal skills, but it wonders what led to the appointment of people who weren’t legally qualified in the first place. Would we be losing something if we moved away from that? There may be referees who, despite lack of formal legal qualifications, know how to deliver a just outcome.
12. The CAB favours resourcing the Tribunal’s support structure to help referees to understand the relevant legal principles. Is there scope for a “judicial aid/assistant” role in the Tribunal? Someone who does the “grunt work” around defining the issues, the legal position, doing work on people’s cases prior to the hearing, based on the application documents for the dispute, leaving the referee to decide the case “in the moment”. For some disputes at grass roots level where parties get stuck, there would be value in having someone who could clearly articulate to the parties before the hearing what the law is. Someone who could hold the mirror up and tell people what their obligations and rights are. This may resolve disputes quicker, perhaps without the need for a hearing. Employment New Zealand has an [Early Resolution](#) service, which engages with parties to see if they can help early on. It is helpful to get to people at the earliest possible stage and let them know what will happen if they need to go further. Sometimes people are stuck just because they don’t have a sense of a way through their dispute – a similar service for the Tribunal might help take away the power imbalance between the parties and give them a fair deal.
13. Giving the Disputes Tribunal the ability to waive filing fees makes absolute sense
14. Perhaps there could be a public information campaign to inform people that “if you have a dispute and are stuck then here is a dispute resolution mechanism for you”. Such a campaign could:

- (a) advise people what the hearing process will be like (for example, that you won't necessarily get a decision from the referee on the day of the hearing);
and
 - (b) give them support or guidance.
- 15. Increasing the jurisdictional threshold of the Disputes Tribunal to \$50,000 makes sense. In terms of a higher threshold than that, the CAB does not have a sense of what disputes are getting lost along the way. The CAB would not want to risk compromising the structure of the forum. An easy option would be a threshold of up to \$100,000 if the parties agree. But it would be helpful to compare claims to the Disputes Tribunal with claims to the District Court to understand what claims are getting lost in between those two forums.
- 16. The CAB is not sure whether people are currently feeling constrained by their inability to appeal from Tribunal decisions. The CAB is concerned that graduated rights of appeal (para 50(c)) will just be confusing for people. The CAB suggests an appeal could be on the grounds that a decision is "manifestly inconsistent with the law". This would allow the framing of cases to remain guided by the substantial merits and justice of the case with regard to the law, rather than reversing that framing to require the Tribunal to give effect to the law but with regard to the substantial merits.
- 17. Enforcement of Tribunal orders is definitely something the CAB sees problems with – where a decision has been made but the successful party can't get any action on it.

Notes written by Jason McHerron