waitematā
community law centre

te korowai ture ō waitematā

SUBMISSIONS ON

IMPROVING ACCESS TO CIVIL JUSTICE – FURTHER CONSULTATION WITH THE LEGAL PROFESSION AND WIDER COMMUNITY

2 July 2021

Waitematā Community Law Centre
Te Korowai Ture ō Waitematā

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BACKGROUND

We appreciate The Rules Committee – To Komiti mō ngā Tikanga Kooti (*the Committee*) taking the time to consult with Community Law. We welcome the opportunity to make written submissions in respect of the Committee's further consultation on improving access to civil justice.

About Waitematā Community Law Centre

The Waitematā Community Law Centre (*WCLC*) offers free legal help to people who are most in need in Waitākere, North Shore and Rodney. We are a walk-in service and also provide advice by phone and email. We offer a dedicated Kaupapa Māori Legal Service and a Pasifika Legal Service for our clients. We regularly support people living in poverty; those in insecure housing; and those experiencing family violence.

Our submissions

This document includes our written submissions in response to the specific questions raised in paragraphs 50-63 of the consultation document *Improving Access to Civil Justice – Further Consultation with the Legal Profession and Wider Community* (issued 14 May 2021) (*the consultation document*). Our submissions follow the paragraph numbering used in the consultation document.

We have not provided submissions on the proposals in respect of the High Court (paragraphs 64-76 of the consultation document). We do not represent clients in High Court matters and therefore we defer to members of the legal profession who have specific experience and expertise in this area.

In our submissions, we refer to our responses in our submission on *Improving Access to Civil Justice – Initial Consultation with the New Zealand Community*, 11 September 2020 (*our initial submission*).

We acknowledge the submission prepared by Community Law Centres Aoteaora (CLCA) in response to the consultation document (*CLCA submission*).

SUBMISSIONS

Disputes Tribunal

50(a) Whether the Dispute Tribunal's jurisdiction ought to be increased to $50,000, on the current model

We note that increasing the jurisdiction limit is unlikely to significantly improve the systemic issues faced by Community Law clients in regards to access to justice, as detailed in our initial submission. However, we acknowledge that it will be simpler procedurally for self-represented litigants (SRLs) to bring a civil claim in the Disputes Tribunal.

Therefore, we do not have any particular objections in principle. We submit that an increase in the jurisdiction limit will need to be balanced with considerations in regards to the capacity and expertise of Disputes Tribunal referees and registry staff. There is also a possible risk that higher-value claims may be prioritised in terms of processing/scheduling etc, leading to a further sense of justice not being done (or being seen to be done). This is a matter that will need to be managed at the registry level. We support the comments in the CLCA submission in regards to resourcing and funding in this regard.

50(b) Whether the parties to individual proceedings should be able to consent to the Tribunal's jurisdiction being increased beyond $50,000 in their particular case

As noted above, this proposal is unlikely to significantly improve the systemic issues faced by Community Law clients in regards to access to justice. We submit that disparities between the parties and an issue as to an "uneven playing field" remains. Parties in the Disputes Tribunal may lack an understanding of the process – however, they are still in the process and a decision will be made. The higher the amount in question, the more risk there is for our clients. In particular, in debt dispute matters there can be a need for accounting information/financial literacy, which many people do not have access to. There is a greater need for legal advice if the amounts in question are increased, however legal aid is not available for Disputes Tribunal matters (we note the difficulties in accessing civil legal aid overall).

50(c) Whether the Tribunal's jurisdiction ought to instead be increased beyond $50,000 (regardless of consent by both parties), to align with the MVDT, which has jurisdiction in respect of claims up to $100,000 (or more with the consent of both parties), and if so, what changes to its processes would be required, in particular in respect of appeal rights

A further increase as proposed would not serve the best interests of the clients we serve. If claims are increased to this extent, greater appeal rights at the end of the process will be of limited benefit for parties who do not fully understand the process at the outset. We submit that there would be greater improvements in regards to access to justice if there were mechanisms available to ensure access to legal advice and support with pleadings (we refer to our responses to questions 14 and 15 in our initial submissions in this regard).

We propose that, before a matter is heard, the Registry could carry out a checklist exercise to determine whether the parties:

- Have obtained legal advice or know where to seek legal advice;
- Have obtained budget reports, if appropriate;
- Have compiled all relevant documents;
- Understand the likely timeframe for the hearing and decision; and
- Need interpretation services or any other type of support.

51(a) The Disputes Tribunal could be renamed, potentially as the Small Claims Court or Community Court

With respect, we submit that a change of name will not have any impact on access to civil justice. Many of our clients still refer to the Disputes Tribunal as the Small Claims Court. We submit that the use of the term "Community Court" could be misleading and cause frustration and disappointment for vulnerable users of the Court system. We respectfully request that a Māori name should not be adopted in any renaming, unless and until there are substantial and meaningful changes to bring the Court process more in line with tikanga Māori. Overall, we submit that the Disputes Tribunal name remain unchanged.

51(b) Changing the title of "referee" to that of "adjudicator"

We do not have any particular objections to this change of title, and acknowledge that the terminology would be consistent with that used in the Tenancy Tribunal.

51(c) The Tribunal could be resourced to make greater use of its powers to appoint investigators as Tribunal appointed experts

We support this approach, as it has the potential to address concerns about any power imbalance between the parties, as well as the often-prohibitive costs of obtaining an expert report in advance. We envisage the appointment of any such investigator would be at the Court's cost.

51(d) The Tribunal would conduct public hearings unless the referee considered that it is proper to conduct the hearing in private

We refer to our response to question 14(e), page 4 of our initial submission. We submit that many individuals are uncomfortable with the public nature of hearings. We note that Disputes Tribunal decisions with identifying details removed are already published on the Disputes Tribunal website.

51(e) The daily fees for referees could be increased, given the need to attract referees who are able to deal with claims of higher value

Given our responses above in regards to the proposed increase in the value of claims, we do not see this as a necessary step in regards to ensuring access to civil justice.

51(f) The Tribunal could be allowed to make decisions to waive filing fees

We support this approach as it would have a direct and immediate benefit for low-income communities in regards to accessing the Disputes Tribunal. We submit that if this power is introduced, any applicable regulations and the resulting process should be kept as simple and user-friendly as possible. For example, the request to waive the fee could be included in an additional section on the application form; and the requirement for supporting documents could be limited to a letter from Work and Income or a social service provider.

51(g) The Tribunal could also be granted a limited costs jurisdiction, and an express ability to award disbursements (for example, in respect of specialist reports obtained by claimants)

We refer to our response to question 14(a), page 4 of our initial submission. Perceived cost is a deterrent because individuals are fearful that they may be burdened with costs awards if they are unsuccessful.

We submit that the Tribunal could exercise discretion in regards to awarding disbursements, for example where one party had no choice other than to incur costs because of the behaviour of the other party (e.g. obtaining a building report or an electrician's report in matters where work has not been done to an appropriate standard).

However, we note that there is a cost barrier for parties who need to obtain expert evidence or reports to support their application. We refer to our response to question 15(j) and (k), page 6 of our initial submission. This cost barrier arises at the outset and before the matter even goes to a hearing. Therefore, the ability to recoup the cost of any report as part of a disbursements award has no practical benefit for parties who do not have the financial means to obtain a report at the outset.

51(h) Consideration could be given to providing for a more effective or straightforward way for successful claimants to enforce a successful award

We support this being given further consideration. We described the issues our clients experience in enforcing a successful award in our responses to questions 15(m), page 6 and 16(g) pages 7-8 of our initial submissions.

A party who does not comply with an award and who cannot justify their non-compliance, or who does not otherwise make an arrangement for payment of the award, is directly contravening an express decision of the Court. Therefore, we submit that consideration could

be given to a system whereby the Courts have more involvement in pursuing enforcement of awards, rather than enforcement being entirely on the claimant to pursue. This could be similar to Court enforcement of fines payments, with reminder letters and possibly penalties/interest being added to the principal sum.

District Court

58(a) The role of Principal Civil Judge for the District Court be created

We support this proposal.

58(b) Focus on improving or restoring the civil registry expertise

We support this proposal and see a real need for this in terms of access to civil justice for marginalised/disadvantaged communities, as Registry staff are the first point of contact for participants in the Court system. Skill and expertise at the Registry level will have a flow-on effect in respect of people's ability to navigate the civil Court system, and ultimately their experience of access to justice.

58(c) Focus on addressing the information barrier issues referred to in submissions from community groups

As above at paragraph 58(b). We refer to our response at question 15(a)-(h), page 5 of our initial submission.

59 Introduction of part-time Deputy Judges/Recorders

We support this proposal and submit that it could operate similarly to Visiting Justices in Corrections matters. We agree that such Judges could perform the role in a cost-efficient manner as they would have motivations for taking on the role outside the level of fees. We agree that their expertise would enhance the civil registry. We submit that any potential conflict of interest issues could be addressed in the usual manner, and do not consider that this would cause an insurmountable obstacle to introducing such a role.

We support the comments at paragraph 3.6 of the CLCA submission in regards to the ability of Deputy Judges/Recorders to engage with SRLs and marginalised/disadvantaged groups.

60-62 Introduction of pre-action protocols

In our experience, we are seeing this as usual practice for many creditors, as most companies do not wish to pursue a Court action if an arrangement can be agreed on. However, it could be useful to introduce an express protocol that these criteria must be met before a creditor can file Court proceedings, to ensure consistency. We agree that this must be balanced with the possible risk of increased costs for borrowers. We submit that it is most likely that costs will be

added to any financial arrangement at the outset, in the interests of covering the creditor's time and expenses should enforcement action be required. This would further disadvantage lower socio-economic communities, particularly in regards to agreements with finance companies etc.

63(a) Judges direct that the proceeding be set down for determination on the basis of the initial disclosure alone, and without any further interlocutories, given what is in issue as revealed by the first judicial conference

We support this approach as we see it operating in a similar way to a Family Court Directions Conference.

We refer to our response at questions 12(c) page 2, and 15(f) page 5 of our initial submission, in support of an inquisitorial process to assist parties in defining their dispute. We support the comments at paragraph 3.8 of the CLCA submission in this regard.

63(b) Providing for the substantive determination of disputes using an 'iterative' process whereby the issues in dispute may be narrowed and resolved at successive hearings, with Judges allowing parties to call evidence more than once and in the order the Judge directs

We refer to our response at question 14(b), page 4 of our initial submission. Court processes are perceived to be time-consuming and to require ongoing expense and effort because of multiple appearances.

Further, we submit that there is a risk particularly for SRLs that they will not feel heard in an 'iterative' process. At first this may seem counter-intuitive, but we have identified that the perception of SRLs is likely to be that the issues in question were narrowed without sufficient understanding/involvement on their part. As a result, they may keep trying to re-open issues which in the Court's mind have already been addressed/resolved. This will lead to frustrations with the Court system on the part of SRLs, and inefficiencies for the Court in its decision-making, neither of which enhance a sense of access to justice.