Enhancing access to justice through our courts, but what about ADR?

The Rules Committee has now released the much anticipated Improving Access to Civil Justice report. Focused on the widening justice gap in New Zealand, a number of significant reforms to the policy, legislative and rules framework for our Courts and Disputes Tribunal have been proposed. Largely silent on the role of ADR in facilitating access to justice, this article explores the ways in which arbitration can help to support the aims of the intended reforms.

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Financial barriers are identified as the key hurdle for New Zealanders seeking to resolve disputes. Simply put, dispute resolution through traditional methods has become too expensive for a significant proportion of New Zealanders and lower-cost alternatives like the Disputes Tribunal are not capturing a sufficient number of disputes.

Alongside expensive court fees, the Committee identified the current maximalist approach to litigation as a key driver of high costs and lengthy proceedings. Equally hindersome are the psychological, cultural and information barriers which have left a number of New Zealanders feeling unable to navigate legal processes.

The Report notes submissions from community organisations which describe the shame, lack of knowledge, inferiority, embarrassment and self-doubt that a number of their clients express while engaged in our civil justice system. In a bid to tackle these issues, a variety of reforms to the policy, legislative and rules framework for our Courts and Disputes Tribunal have been proposed, including:

- expanding the Disputes Tribunal's jurisdiction from the current limit of $30,000 up to $70,000 by right and $100,000 with the consent of both parties;
- appointing part-time District Court judges from the pool of Kings Counsel and senior practitioners to assist with the Court's civil workload;
- introducing witness ('will say') statements in place of briefs of evidence. In a significant departure from current practice, these will need to be served shortly after the exchange of pleadings but prior to discovery and the judicial issues conference;
- disclosing known adverse documents (which contradict or materially damage the disclosing party's contention or version of events and/or support the opposing party's position) at the point of initial disclosure; and
- hearing interlocutory applications remotely with time limits as the standard course and on the papers in certain circumstances.

A variety of other changes have also been proposed, including limiting the number of experts that parties can call, and entrenching COVID-19 practices such as electronic filing, document management and remote hearings.

Alternative Dispute Resolution's (ADR) role in facilitating access to justice

While focused on the role of traditional dispute resolution mechanisms, the Committee recognised the importance for any initiatives to have proper regard to the overall structure for civil dispute resolution in New Zealand.

ADR is now a well-established pillar of that framework with parties across the country regularly using processes such as arbitration, mediation and expert determination to resolve disputes. The Report's silence in addressing ADR as a useful mechanism to achieve just outcomes in an efficient and proportionate manner highlights, however, a critical gap in the analysis.

Arbitrations represent a significant proportion of the dispute resolution processes adopted by parties. The Inaugural Aotearoa New Zealand Arbitration Survey has, for the first time provided reliable data as to the number and nature of arbitrations in New Zealand. It is clear that arbitration is regularly being used to resolve a wide range of disputes, and provide access to justice in a more efficient manner than through the courts. Moreover, the confidential nature of arbitrations means that given the variety of commercial, personal and other considerations at play, justice can be achieved without the unintended and lasting consequences of resolving matters in a public forum. In this way, arbitration can be seen as providing a further route by which proportionate outcomes can be achieved.

Between 1 January 2019 and 31 December 2020 there were at least 213 arbitral appointments across New Zealand. In this same period, the District Court saw a total of 550 defended civil cases nationwide[1] and the High Court saw 1,056 general proceedings filed.[2] The speed of resolution, however, differed considerably. On average, proceedings in the High Court took approximately 13 months to be heard once ready for a hearing (with the average age at disposal being approximately 2 years). Arbitrations on the other hand were resolved on average between 9 and 10.4 months for domestic disputes.[3]

While the impacts of COVID-19 during the period in which data was collected cannot go unmentioned, it is clear that arbitrations both alleviate the burden on our courts and offer parties an often quicker and easier solution for resolving their disputes. Quite aside from these efficiencies, there are a variety of other ways in which arbitrations can assist with the access to justice issues that the Report grapples with:

- The inherent flexibility, comparative procedural informality and confidentiality of arbitration provides greater scope to deal with the psychological and cultural barriers which people face through the traditional court system.
- This same flexibility can be deployed to tackle issues with discovery and maximalist litigation by adopting a tailored approach suitable to the case at hand and utilising the expertise and experience of an arbitrator chosen for their familiarity with the subject matter at issue.
- A range of options become available, including adopting a flexible schedule to suit parties who may find it difficult to attend hearings during court sitting hours or having the matter determined by an arbitrator who the parties can more closely relate to.

There are low-cost routes to accessing arbitration, including through the NZIAC's fixed fee service for certain claims less than $100,000.[4] The AMINZ Arbitration Rules also introduced an expedited arbitration process for lower-value disputes which includes a truncated submission process and operating on a documents-only basis.[5]

While arbitrations by their very operation help to alleviate the burden on our courts, there is scope for these alternative processes to be utilised in a more proactive way. By way of example,

1 https://www.districtcourts.govt.nz/reports-publications-and-statistics/statistics-2020/civil-statistics-3/defended-civil-statistics-3/

2 There were 15,224 undefended civil cases filed in the District Court during this period. General proceedings in the High Court do not include filed originating applications and judicial reviews; https://www.courtsofnz.govt.nz/the-courts/high-court/annual-statistics/annual-statistics-for-the-high-court-31-december-2020/

3 Royden Hindle and Anna Kirk *The Inaugural Aotearoa New Zealand Arbitration Survey* (2022) at 27.

4 https://www.nziac.com/arbitration/arbitration-fees/

5 "AMINZ Arbitration Rules 2017" (6 October 2017) New Zealand Law Society https://www.lawsociety.org.nz/news/publications/lawtalk/issue-911/aminz-arbitration-rules-2017/

the Victorian Courts not only allow judges to refer parties to arbitration with their consent, but encourage this where a dispute needs to be resolved quickly, confidentiality may be a concern, flexibility would assist or where the amount claimed is small.[6] The courts also support parties to arbitration in a variety of ways, including determining discrete questions of law which arbitrators or parties are able to refer to court. Utilising arbitration for such disputes also has the added benefit of providing opportunities for a wider and more diverse pool of lawyers looking to gain valuable experience sitting as arbitrators.

Where to from here?

Changes to our court system appear inevitable in light of the Report's recommendations. The proposals will, it is hoped, go a long way to enabling better access to civil justice through traditional means. We should not, however, lose focus of the benefits ADR already provides to countless New Zealanders and the potential to significantly enhance access to justice if embraced by our courts as a further tool at their disposal. While additional changes to civil procedure rules would be required to enable this, the steps taken by the Victorian Courts is proof that more can be done.

6 https://www.countycourt.vic.gov.au/going-court/commercial-division/management-and-lists/arbitration-list

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