



# YouthLaw

Free legal help throughout Aotearoa

[www.youthlaw.co.nz](http://www.youthlaw.co.nz)

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11 September 2020

The Rules Committee Te Komiti mō ngā Tikanga Kooti  
Auckland High Court  
24 Corner Waterloo Quadrant & Parliament Street  
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Tēnā koutou,

Thank you for the opportunity to give feedback on the Rules Committee “Improving Access to Civil Justice” consultation paper. We would like to offer the following comments:

## **1. Who we are**

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty four community law centres throughout Aotearoa / New Zealand. We are a national service providing free legal advice and advocacy specifically for children and young people under 25 years of age. We also develop legal information resources and deliver legal education to children and young people, and those who are guardians of them, or who work with them.

## **2. Our experience with children and young people**

Just over a third of our clients contact us for legal advice about civil matters (please see our 2018/2019 Annual Report at <http://youthlaw.co.nz/wp-content/uploads/2016/07/YouthLaw-Aotearoa-Annual-Report-2019.pdf>). Another third contact us for legal advice about administrative matters, which are predominately education issues. For the majority of the children and young people that we help, accessing the District Court or the High Court is simply unattainable. This is primarily because of the cost of counsel and the complexity of court proceedings.

When we give advice about District or High Court options, we strongly caution our clients about the costs associated with legal proceedings in these jurisdictions, particularly; the costs of counsel, filing fees, and time. Many of our clients have valid and important claims, but decide that they cannot bring their claims to the District Court or High Court because of the cost and complexity of court proceedings, in particular:

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*a) Judicial review of education decisions*

On almost a daily basis YouthLaw Aotearoa advises and assists students who are facing disciplinary proceedings before a board of trustees. The majority of our clients are primary or secondary students who have issues with their schools, and we regularly see issues related to:

- Suspensions, stand-downs, exclusions and expulsions;
- Access to learning support for students with learning or behavioural needs;
- Enrolment issues e.g. a student being refused enrolment because of their disability, and;
- Attendance issues e.g. a student being asked to attend school for less hours because of their disability.

Stand-downs, suspensions, exclusions and expulsions proceedings are the most common, quasi-judicial matters in the educational sector that we see. If a school decides to suspend a student they need to follow strict rules under the Education and Training Act 2020, such as organising a board of trustees meeting to make a decision about that student's suspension. The board can decide to lift the suspension, or lift the suspension with conditions, or extend the suspension with conditions, or exclude the student (in the case of students under the age of 16), or expel the student (in the case of students over the age of 16). If a student is excluded or expelled their enrolment at their school is terminated and they cannot return. The power to exclude or expel seriously, and often adversely impacts the lives of students. This is particularly devastating for students who are expelled, as no other state school is legally required to accept their enrolment, and the Ministry of Education is not required to assist that student into other schools.

If a student or their family, feels that the student has been unfairly treated they can ask the board of trustees to reconsider their decision to exclude or expel. In our experience very few boards agree to reconsider their decision. This is likely because a reconsideration asks the same decision-makers to reconsider their decision, which is often seen as unnecessary by the board of trustees. Students and their families can complain to the Ombudsman, but this option is also unsatisfactory because the Ombudsman only has the power to make recommendations to schools.

Further, the time the Ombudsman takes to consider this matter makes this option unrealistic. If the matter involves human rights abuses, the student can approach the Human Rights Commission for mediation. Under the new Education and Training Act 2020 there will be Disputes Panels established for serious educational disciplinary matters and disputes, which includes disputes about exclusions and expulsions. However, these Disputes Panels will not have any power to make binding decisions. Students and their families can also make complaints to the Ministry of Education, but the Ministry tends to only get involved in matters that have major procedural flaws. The Ministry also only has the power to lift exclusions, and not expulsions, but seldom gets involved.

The only informal options available that can result in the exclusion or expulsion being lifted are by reconsideration by the board of trustees, or the Ministry (in the case of exclusion). The only formal option available is judicial review.

Students may apply for judicial review of school or board of trustees decisions. However, the reality is that there have been very few judicial review cases related to education matters. This is despite judicial review being one of the main ways students can seek redress for school decisions that have been made improperly. The main barrier that our clients face is a knowledge gap about how to ask for a school decision to be judicially reviewed. Another significant barrier is the cost of proceedings and of counsel. Often our clients have valid claims that might benefit from judicial review, but the students and their families are deterred from asking for a judicial review because of the complexity of a court case. Clients may also be deterred because of the time between an application and a hearing, and the possibility of costs being awarded against them. When a student has been excluded or expelled it is essential for the judicial review to be resolved quickly, as the student may be out of schooling in the period between the exclusion or expulsion decision and the judgement by the court. We understand that judicial review proceedings about disciplinary matters can be urgently convened if counsel requests this.

Whilst, we do not necessarily believe that judicial review is the best option to resolve education sector disputes (see our previous reports in relation to an Independent Education Tribunal), it is currently one of the only effective appeal options for unfair board of trustees decisions, and as such, should be (given the vulnerability of our clients) accessible. However, we submit that judicial review is only accessible for students and families from wealthy or privileged backgrounds, who have knowledge of legal processes, access to legal advice, and the economic means to bring an action to the High Court. For students without these advantages, judicial review is an impossible option.

#### *b) Harassment Act – restraining orders*

Our clients also tell us that the process to get a restraining order is complicated and difficult. Many of our clients ask us about applying for restraining orders, particularly in situations where there is ongoing online harassment. Whilst there are restraining order application forms on the courts website, our clients are often confused about how to fill them out and how to write an affidavit. Our clients are also intimidated by the prospect of a defended hearing, particularly if they are self-represented. We are often told that our clients are afraid to face their harassers and ask questions or be asked questions. It is not uncommon for our clients to decide that applying for a restraining order is too complicated and stressful for them. This is concerning to us because our clients are exposed to ongoing harassment, which they feel powerless to confront through the courts.

#### *c) The Disputes Tribunal and the District Court*

YouthLaw Aotearoa has observed a number of issues with the interaction between the Disputes Tribunal and the District Court:

- Enforcement of Disputes Tribunal decisions – A significant difficulty that our clients face is that they must apply to the District Court to enforce Disputes Tribunal decisions.

- Disputes when one party is in Australia – Another difficulty is that disputes with people in Australia cannot be resolved in the Disputes Tribunal. In situations where the defendant is in Australia, the plaintiff would need to lodge a claim in the District Court, because the Trans-Tasman Proceedings Act 2010 permits District Court proceedings to be lodged against people who are living in Australia.

The benefit of the Disputes Tribunal is that applications are relatively straight-forward to fill out for the average person without legal knowledge. In contrast, District Court applications can be very confusing, and our clients often lack knowledge about how to apply, what documents to fill in and what evidence is needed. Hiring a lawyer is also likely to be uneconomical for these kinds of disputes. Because of these considerations our clients will often choose not to proceed with actions in the District Court.

#### *d) Debt matters in the District Court*

As a community law centre for young people we are very aware of the vulnerability of young people when they deal with consumer matters, and consumer finance matters in particular. We spend a great deal of time advising our clients about finance issues following a purchase e.g. the purchase of a phone or a car. Credit has become more available, and despite the additional requirements on finance companies to ensure the borrower understands the contract and can pay the loan, invariably a percentage of those contracts go into default once the phone is lost, broken, or stolen, or the vehicle breaks-down, or the young person loses their job.

Although minors are afforded some protections, young people are regularly the subject of debt recovery by way of a judgment in the District Court. It is standard debt recovery practice to first get the debtor to pay the debt on a payment plan arranged through a debt collection agency (the costs of which are added to the debt). If that fails, which is often the case, the agents arrange for the debt to be enforced by obtaining a judgment in the District Court, and an attachment order on their wages or benefit. There are some debt collection agencies that buy books of debt for a small amount (the original creditor can then claim the loss) with the primary intention to get as many judgments (and attachment orders) as possible.

It is our experience that young people are unaware of consumer finance protections, or the options available to them when they are faced with debt problems. We recommend that when an application for debt judgment is made, that the respondent must be advised that they should seek legal advice from YouthLaw Aotearoa or their nearest community law centre.

### **3. Proposed changes**

YouthLaw Aotearoa recently made a submission on the New Zealand Law Society's "Access to Justice" consultation paper. Many of the issues with access to justice that we canvassed in that submission, are also at play in access to civil justice. We are concerned that there is a risk that in trying to change our procedural system fundamentally, that it will only serve as a distraction from resolving the problems of Civil Legal Aid. However, we do acknowledge the important work of the Rules Committee, and support the recommendations as follows:

#### *a) Short-form trial processes*

We support the short-form trial option if that will help to reduce costs.

*b) Inquisitorial processes*

We support both the Earthquake Insurance Claim Process adopted by the Hon. Sir Graham Panckhurst QC, and the Inquisitorial Process suggested by the Hon. Justice Kós. However, in relation to the Inquisitorial Process suggested by the Hon. Justice Kós, we wish to make the following comments:

- We support an inquisitorial process for claims up to \$100,000 and for cases where one party is unrepresented. However, we do have concerns about how this inquisitorial process would operate when the parties to the dispute are vulnerable because of age, lack of knowledge, or disability. We are concerned that vulnerable people, particularly young people, will struggle to understand what is required of them by an assessor, and as a result will not be able to provide the important documents needed for the claim. In our experience, it can take a large amount of time and effort to ensure that a young person understands what is needed from them and then provide that information. This is particularly complicated when the young person has disabilities, or issues with reading and writing. If an inquisitorial process is adopted, we think that vulnerable people should be prioritised for assistance.
- We support a court-appointed assessor. It is important for the assessor to be able to successfully communicate and help people from all walks of life. The assessor will need to be skilled at communicating complex legal ideas and processes. The assessor will also need to be sensitive to the differing needs of the parties that they are assigned to help. As an example; a 19 year old applying for a restraining order against a person who has been harassing them online, and who has never had experience with the legal system before. The assessor will need to appreciate and speak to that young person's level of understanding. If this does not occur, young people will continue to feel overwhelmed and excluded from civil proceedings.
- We support assistance being available for claims that are "deficient". We think that this would be particularly valuable to our clients who often do not fully understand what materials they need to include in their claim, or in what way those materials need to be organised and presented. Templates will be a very important form of assistance.
- We are concerned about the statement "if the deficiency is irremediable, the case would not be allowed to proceed (a decision subject to judicial review)". As stated in the "Judicial Review" section above, Judicial Review is an unattainable reality for many of our clients. The majority of our clients would be unable to pursue this option if their claim was rejected for an "irremediable" fault. We also question what would classify as an "irredeemable fault". Often when we assist young people they will send us documents that they have written themselves about their legal issues. These documents can be confusing to read because of spelling and grammar. The young person may also fail to specify what the legal issue is, and what outcomes will be acceptable to them. We are concerned that young people may provide similar documents to the courts, and may have their claim refused because grammar, spelling, or failure to identify issues or outcomes will be seen as "irredeemable faults".

- We support the assessor meeting with the parties to identify the real claims and defences and devising a list of issues. This would be of particular benefit to our clients, who may struggle to identify what their legal claim is. If parties are required to provide “short affidavits” we ask that the court provides a template affidavit that parties can use as an example when drafting their own affidavit.
- We support the convening of a case management conference to consider whether a judicial settlement conference is appropriate.
- We also support the recommendations that Hon. Justice Kós has made about trial procedures.

YouthLaw Aotearoa is supportive of an inquisitorial approach in certain cases, as it will benefit the more vulnerable parties to disputes, such as young people. However, a YouthLaw Aotearoa board member with broad experience as a civil litigator, has offered the following comments, that we support, about the risks of an inquisitorial model:

- Although most judges hear the cases before them carefully before making a decision, there have been judges who “take over” a case and are influenced by their own conscious or unconscious biases. There is a greater risk of this in an inquisitorial process.
- That the Europe inquisitorial civil law system is not without its faults. In particular, that system can be cumbersome and riven with delay.
- It will be difficult for advocates who are used to the adversary system to adjust to an inquisitorial system.
- It may be disruptive to run an inquisitorial system in only certain types of litigation, unless it was for a specific pilot project.

*c) Requiring all proceedings to begin with a Summary Judgment Application*

We consider this recommendation appropriate, however most young people would not comprehend what a summary judgement application is, or the difference between that and any other application.

*d) Streamlining Standard Pre-Trial and Trial Processes*

We support the recommendations around streamlining standard pre-trial and trial processes, if they will help to reduce the cost to parties.

#### **4. Final consideration**

Community law centres will have an important part to play in the District and High Courts if these proposed recommendations go ahead. YouthLaw Aotearoa would be willing to work with assessors who are assisting young people with their claims. As an established community law centre for young people, we can communicate complex legal issues to these vulnerable clients and assist them to achieve solutions for themselves. With

additional resources YouthLaw Aotearoa could build on its 0800 adviceline to provide a valuable service for young people engaging in a District Court or High Court matter.

Nāku noa, nā



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**YouthLaw Aotearoa**