Arbitration and Access to Civil Justice in Aotearoa

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At the end of 2020, the Chief District Court Judge, Judge Heemi Taumaunu, announced a new model for the District Court: the Te Ao Mārama model.[1] This model is inspired by the concept "mai te po ki te ao mārama", meaning: "the transition from Night to the enlightened world". It reflects the needs of a multicultural Aotearoa, where everyone should be able to seek justice and feel they are heard and understood. Speaking at the 2021 Arbitrators' and Mediators' Institute of New Zealand Conference in Rotorua, Judge Taumaunu called on arbitration and mediation professionals to rise to the challenge of Te Ao Mārama. In December 2020, the New Zealand Law Society released *Access to Justice: Stocktake of Initiatives*, which set out to identify barriers to access to justice in Aotearoa and review initiatives which could be implemented.[2]

A uniting theme of these projects is a recognition that, to improve access to civil justice in Aotearoa, the legal profession needs to look beyond merely increasing the speed and efficiency of court proceedings. This paper seeks to prompt practitioners to consider the role of arbitration in addressing barriers to justice in Aotearoa in the broader sense identified by these recent projects.

The Concept of Access to Justice in New Zealand

1 Selected Developments in Access to Justice in New Zealand

Legal aid was introduced to New Zealand through the Legal Aid Act 1939 (No 42) which authorised the New Zealand Law Society to establish committees and panels of legal practitioners for the assistance of poor persons.[3] Starting some 40 years later, Community Law Centres were established, the first centre being the Grey Lynn

1 Judge Heemi Taumaunu "Statement from the Chief District Court Judge Transformative Te Ao Mārama model announced for District Court" (press release, 11 November 2020).

2 New Zealand Law Society *Access to Justice: Stocktake of Initiatives* (December 2020).

3 Legal Aid Act 1939 (No 42), s 2.

Neighbourhood Law Office in 1978.[4] Statutory recognition for these centres came in 1991 with the Legal Services Act.[5]

Section 27(1) of the New Zealand Bill of Rights Act 1990 recognises that every

> [P]erson has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Petra Butler and Campbell Herbert observe that on the proper, generous application of s 27 it "enshrines the full gamut of already existing rights concerning natural justice."[6] As Butler and Herbert note, case law "suggests that s 27 creates a right to *effective* justice". Butler and Herbet cite examples where the fixing of (substantial) costs without parties having the opportunity to be heard, and the dismissal of an appeal under 'without notice procedures' due to a denial of legal aid, have been held to infringe s 27.[7] Butler and Herbert also note that the European Court of Human Rights has held that, for the right of access to justice to be effective, an individual must "have a clear, practical opportunity to challenge an act that is an interference with his rights".[8]

In *Women's Access to Legal Services* (NZLC SP1, 1999) the Law Commission considered women's experiences and how substantive equality between men and women could be achieved to bring about equal access to legal services. The Law Commission observed that, whilst *all* women had limited access to roles in the justice system and legal profession, minority women faced *unique* experiences and systemic barriers.[9]

The Law Commission report *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* discussed barriers to justice specific to Māori women.[10] The report acknowledged the factors of: cultural disregard,

4 Community Law New Zealand "Our History" <www.communitylaw.org.nz/about-us/our-history/>.

5 Legal Services Act 1991, s 154.

6 Petra Butler and Campbell Herbert "Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty" (2014) 26 NZULR 186 at 196.

7 *Matthews v Marlborough District Council* [2000] NZRMA 451 (HC); and *Attorney-General v Chapman* [2011] NZSC 110, 1 NZLR 462. See also, *Kreuz v Poland (no 1)* ECHR 28249/95 (19 June 2001); *PolPure v Poland* ECHR 39199/98 (30 November 2005) at [65]–[66]; and *Weissman and others v Romania* 63945/00 (24 May 2006) at [37] and [42] as cited in Butler and Herbert, above n 6, at 196.

8 At 196.

9 At [48]–[49].

10 Law Commission *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at [26].

the dominance of colonial values, as well as attitudes of those in powerful positions in the justice system.[11] In the report, the Law Commission advocated for acknowledgement of Māori values, the recruitment of Māori in the justice sector, and for improved access to information and legal services.[12] The report identifies that the following three principles of the Treaty of Waitangi are important to access to justice: [13]

(1) the principle of partnership: partnership anticipates a nation where Māori are participants at all levels of society, including policy making, management and the delivery of services;
(2) the principle of participation: the principle of participation is about empowering Māori communities to achieve their aspirations;
(3) the principle of options: in the context of the report, the principle of options suggests a choice of services – a choice of mainstream services or services developed for and by Māori.

One of the purposes underlying the establishment of the New Zealand Supreme Court in 2003 was to improve access to justice.[14] The principle of access to justice has subsequently been invoked by or before the Supreme Court of New Zealand in a range of instances, including in relation to rights of appeal, costs and security for costs, approaches to class actions, and access to the court in general.[15]

As Justice Kós explained to the AMINZ conference in 2016, access to justice is critical to a well-functioning society.[16] Without formal recourse to resolve disputes, legal rights are rendered unenforceable. This raises the risk that contract and property rights will be violated with impunity. Justice Kós noted that delays, legal costs and an inequality between litigants were some of the major factors preventing citizens from accessing justice.[17]

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11 At [26]–[27].

12 At [29].

13 At [29].

14 Supreme Court Act 2003 (repealed), s 3. The Supreme Court was continued by the Senior Courts Act 2016, without repeating the establishment purposes of the Supreme Court.

15 See, for example, *Petryszick v R* [2010] NZSC 105, [2010] 1 NZLR 153; *Siemer v Fardell* [2011] NZSC 30; *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, 2 [2005] NZLR 467; *Environmental Defence Society Incorporated v The New Zealand Kind Salmon Company Limited* [2014] NZSC 167; *Marteley v Legal Services Commissioner* [2015] NZSC 127, [2016] NZLR 1 633; *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153; *S v Vector Limited* [2020] NZSC 97; and *Southern Response Earthquake Services Limited v Ross* [2020] NZSC 126.

16 Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (Address to the Arbitrators' and Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016) at [7]–[9].

17 At [10].

The concept of access to justice in Aotearoa should be viewed through a postcolonial lens. As the Chief District Court Judge highlighted when introducing the Te Ao Mārama model:[18]

> … our current system continues the oppression from colonisation by imposing British institutions, laws, processes, and values onto Māori. This created what Dr Jackson called "monocultural myopia", whereby the New Zealand legal system has adopted almost all aspects of the British system and almost entirely ignored the other founding culture of Aotearoa New Zealand. As a result of this myopia, many facets of our justice system are inconsistent with te ao Māori and tikanga Māori principles. This lack of recognition for tikanga Māori principles still causes many Māori to feel that the justice system is a foreign entity and have "little empathy" for it.

Speaking at the 2021 AMINZ Conference, Judge Taumaunu encouraged the audience to consider the processes that are used in arbitration and mediation and how to ensure that when people leave the dispute resolution process, they feel heard and understood. Judge Taumaunu encouraged practitioners to consider how arbitration processes reflect our multicultural nation.

2 Defining Access to Justice

Lord Neuberger has described eight components of access to justice: [19]

(1) a competent and impartial judiciary;

(2) accessible courts;

(3) properly administered courts;

(4) a competent and honest legal profession;

(5) an effective procedure for getting a case before the courts;

(6) an effective legal process;

(7) effective execution; and

(8) affordable justice.

18 Heemi Taumaunu, Chief District Court Judge of New Zealand (Norris Ward McKinnon Annual Lecture, Waikato, November 2020).

19 Lord Neuberger "Justice in an Age of Austerity" (Tom Sargant Memorial Lecture, 15 October 2013) at [31].

The Law Society's *Stocktake Report* adopts an alternative definition of access to justice which "takes a person-centred approach and adopts a wide interpretation … beyond just access to the courts and lawyers."[20] The report states that access to justice: [21]

> [I]ncorporates everything people do to try to resolve the disputes they have, including accessing information and support to prevent, identify and resolve disputes. This broad view of access to justice recognises that many people resolve disputes without going to court and sometimes without seeking professional assistance.

The *Stocktake Report* cites the concept of access to justice advanced by Richard Susskind, who argues that access to justice should embrace the elements of dispute avoidance, containment and resolution. But Susskind also adds a fourth element: "legal health promotion". The purpose of legal health promotion is to "help people, in a timely way, to know about and act upon the many benefits, improvements, and advantages that the law can confer, even when there is no perceived problem or difficulty".[22] In adopting a broad, person-centred approach to access to justice, the *Stocktake Report* centres ADR, including arbitration, in access to justice.[23]

3 Recognition of Barriers to Accessing Civil Justice

It has been widely reported that there is an unmet need for civil justice in New Zealand. Symptoms of this "justice gap" include an increasing number of unrepresented litigants before the Courts.[24] The Rules Committee has noted that litigating a defended civil claim worth less than $100,000 in the District Court is routinely considered to be uneconomic.[25] The Rules Committee is considering options for expediting civil trial processes in the District Court and the High Court.[26] The Committee has noted that the rules of court should ensure "that the default, "presumptive" procedures for civil trials are proportionate to the nature and value of the issues in dispute".[27]

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20 New Zealand Law Society, above n 2, at [1.4].

21 At [1.4]. See also, Attorney-General's Department, "Access to Justice" <www.ag.gov.au/legal-system/access-justice>.

22 At [4.5].

23 At [4.5]–[4.6].

24 Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (Ethel Benjamin Address, Dunedin, 7 November 2014).

25 The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the Legal Profession* (11 December 2019) at [7].

26 At [15].

27 At [14].

The *Stocktake Report* identifies the major barriers New Zealanders face in accessing justice. These barriers include: the costs associated with the legal system, the fact that legal information feels inaccessible to many New Zealanders, insufficient government resources available to enable individuals to resolve their disputes, and cultural and social barriers that put the justice system out of reach.[28]

The *Stocktake Report* finds that many of the current discussions and initiatives in place in Aotearoa New Zealand focus on improving access to court-focused civil justice, and in particular on access to the High Court. However, the report highlights challenges in access to civil justice in the District Court. Speaking at Judge Taumaunu's appointment in 2019, the Attorney General said:[29]

> The civil jurisdiction of the District Court has decreased to, largely, default and summary judgements. The reasons are complex but changes to District Court rules and processes are expected to be needed to reinvigorate this important function to enable more New Zealanders to cost-effectively resolve their disputes.

The Te Ao Mārama model aims to improve access to justice, as well as enhancing procedural and substantive fairness. , for all people who are affected by the business of the court. The Te Ao Mārama model will operate in the spirit of partnership with local iwi and local communities to design a solution that works for multi-cultural Aotearoa New Zealand.[30]

Against this backdrop, arbitration practitioners may wish to consider whether arbitration has a role to play in providing greater access to civil justice in Aotearoa. In light of the range of barriers identified by the *Stocktake Report*, this does not mean merely considering whether arbitration can provide a lower cost option for the resolution of civil disputes. For example, arbitration may also have a role to play in addressing cultural and social barriers to the use of legal processes.

In the following sections, this paper will highlight some potential opportunities for arbitration to address barriers to civil justice in New Zealand. It touches on selected initiatives and ideas to address cultural and social barriers, information barriers and cost barriers. The ideas and initiatives referred to are by no means an

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28 At [4.17].

29 David Parker "Chief District Court Judge appointed" (press release, 25 September 2019) as cited in New Zealand Law Society, above n 2, at [4.9].

30 Taumaunu, above n 1.

exhaustive description of the work being done by many to promote and improve access to alternative dispute resolution in New Zealand.

This paper focuses on domestic arbitration, but it must also be acknowledged that international arbitration plays a significant role for facilitating access to justice in international disputes. This role, and potential initiatives for enhancing it, has been well addressed elsewhere.[31]

Initiatives to Address Cultural and Social Barriers to Access to Justice

1 Arbitration as a Model for Māori Dispute Resolution?

To rise to the challenge of Te Ao Mārama, arbitration should reflect the needs of a multicultural Aotearoa where everyone can seek justice and feel they are heard and understood. As the Chief District Court Judge has emphasised, many facets of our justice system are inconsistent with te ao Māori and tikanga Māori principles.[32] Arbitration may have a role in addressing this deficit in our justice system. As Associate Professor Amokura Kawharu highlighted at AMINZ's 2021 annual conference, arbitration may provide a model for Māori dispute resolution, by incorporating Maori procedural and substantive norms and Māori leadership. The principles of party autonomy and the resolution of disputes outside of the state court system may suggest that arbitration provides a way for Māori to exercise tino rangatiratanga in dispute resolution.

For this potential to be explored, there is a need for more people with expertise that straddles both tikanga and arbitration law. For those already operating as arbitrators and counsel, there are at least three potential responses to this need for expertise. One is to look at how practitioners and counsel may centre Māori lawyers in arbitration, another is for non-Māori arbitration practitioners to improve their own cultural competency, and a third is to work with Tikanga experts. The Honourable Justice Sir Joe Williams has encouraged arbitration practitioners to be thinking, writing and innovating in how arbitration can provide a model for iwi dispute resolution.

31 See, for example, Butler and Herbert, above n 6, at 187.

32 Taumaunu, above n 18.

2 Inclusion in Arbitration

A starting point for this development might be to seek to ensure that arbitrators and arbitration counsel themselves reflect all of Aotearoa's multicultural society.

AMINZ has created scholarships to reflect the Institute's commitment to growing diversity and leadership in dispute resolution in New Zealand. The scholarships (one focused on determinative work, including arbitration) provide developmental opportunities for the two recipients. These opportunities include: observing arbitrations, mentoring, and the opportunity to attend and speak at AMINZ events. The scholars will write a report which is presented to the AMINZ Council at the end of the scholarship term. This report will focus on inclusivity and include discussion on how AMINZ might better promote diversity, within itself, and in dispute resolution.

The participation of lawyers from a wider range of backgrounds in arbitration could be fostered through similar initiatives at an institutional or individual level. For instance, arbitrators could consider adopting the practice from international commercial arbitration of appointing lawyers newer to the profession as secretaries to the tribunal (as advocated by the recipient of the determinative AMINZ scholarship, and co-author of this paper, Sharnika Leleni, at AMINZ's 2021 annual conference).[33] Alternatively, arbitrators could consider seeking party consent for a lawyer of a different age or background to observe arbitral proceedings (subject to the observer executing an appropriate confidentiality undertaking).

At an individual level, arbitrators and counsel can work to improve their own cultural competency, and to consider and identify their own unconscious biases. The *Stocktake Report* notes that a range of providers are now offering cultural awareness and bias training for professionals involved in the justice system.

3 Gender Diversity Initiatives in Arbitration

Reference to arbitration panels suggests that arbitration remains a male-dominated field in New Zealand. In 2015, in recognition of the underrepresentation of women on international arbitral tribunals, members of the international arbitration community drew up a pledge to take action. The Equal Representation in Arbitration Pledge seeks to increase, on an equal opportunity basis, the number of women

33 See, for example, International Council for Commercial Arbitration *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1, 2014) at 29 and 30.

appointed as arbitrators. This is in order to achieve fair representation as soon practically possible, with the ultimate goal of full parity. Signatories pledge to take the steps reasonably available to them and to encourage other participants in the arbitral process to do likewise. This is to ensure that, wherever possible:[34]

- committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;
- lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
- gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and
- senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.

The pledge has been adopted in New Zealand (for instance by AMINZ). The pledge not only provides a means of encouraging greater gender diversity, but also provides examples of how to address other diversity challenges in arbitration.[35]

34 Equal Representation in Arbitration "Take the Pledge" <www.arbitrationpledge.com/take-the-pledge>.

35 Equal Representation in Arbitration "News and Information", <http://www.arbitrationpledge.com/news>; and Arbitrators' and Mediators' Institute of New Zealand *The Gender Diversity Pledge* (23 April 2018).

Initiatives to Address Cost Barriers to Access to Justice

1 Procedural Innovation

Domestic arbitration has arguably been a beneficiary of the barriers to access to civil justice in the New Zealand Courts. It has been suggested that the complexity and delay often associated with High Court proceedings, and "the expense and wastage associated with High Court discovery procedures", have all contributed to a trend towards arbitration in the last two decades.[36]

As New Zealand court procedures evolve to address the "justice gap", arbitration procedure must take notice. The procedural innovations under consideration by the Rules Committee should be kept under review by arbitration practitioners. The proposition that arbitration is less expensive or quicker than Court proceedings is not guaranteed, and should instead be viewed as aspirations. The body of practice and procedure that has grown out of the use of remote hearing technology in international commercial arbitration during the COVID-19 pandemic provides an example of arbitration adopting procedural innovations that have potential to reduce cost (and location) barriers to arbitration, including by reducing hearing costs for parties.[37]

2 Institutional Support for Arbitration of Lower-Value Disputes

There is potential to link the need to make arbitration cost-effective for lower value disputes with the need to develop a more diverse group of arbitrators. Practitioners might consider opportunities to connect newer or aspiring arbitrators with those seeking arbitration of lower-value disputes. This may give aspiring arbitrators practical experience, and parties access to arbitration at a lower cost than may be available otherwise. Of course, the cost of *arbitrators* is only one element of the cost of *arbitration*. For arbitration to be cost effective, an efficient or expedited arbitration procedure will need to be adopted.

Arbitral institutions worldwide have adopted measures to accommodate low-value disputes, ensuring the processes are inefficient and inexpensive. This was first adopted by the Geneva Chamber of Commerce in its Arbitration Rules in 1992.[38] Now it is common for arbitral institutions to offer a fast-track option. This is

36 David AR Williams, Amokura Kawharu (eds) Williams *& Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at 1.1.9.

37 Collated resources on virtual hearings are available at https://delosdr.org/resources-on-virtual-hearings/.

38 Norton Rose Fulbright "Using fast track arbitration for resolving commercial disputes" (Norton Rose Fulbright, 2018) at 25.

most commonly introduced through additional or alternative arbitration rules for expedited arbitration. Efficiency is usually achieved by simplifying procedures and imposing strict deadlines on the Tribunal.[39] This may mean parties limiting their submissions.

For example, under the Stockholm Chamber of Commerce rules, the request for arbitration must also constitute the statement of claim.[40] In the same vein, the answer to this request also constitutes the statement of defence.[41] Further, most arbitrations proceed on a documents-only basis unless the arbitrator considers special reasons for a hearing. In all instances, the arbitrator has a strong mandate to limit proceedings and reject requests for further submissions.[42] In its anniversary review of the expedited rules, the SCC found that roughly one third of new arbitrations registered in 2017 were expedited, most relating to commercial arrangements between small and medium-sized enterprises.[43] This was recognised as beneficial, with parties receiving quick and just resolutions to relatively straightforward business transactions which did not require a full-fledged arbitral proceeding.

In a domestic context, the New Zealand Dispute Resolution Centre has introduced policies to accommodate their services for disputes of lower value. These include different rules for arbitrations based on the quantum of the dispute in question. For claims under $250,000, the 45 day Expedited Commercial Arbitration Rules of the NZDRC apply, which are designed to allow for the quickest and most cost-effective resolution of commercial disputes, using an 'on-the-papers' process. NZDRC also offers a fixed-fee regime for disputes of less than $50,000.[44]

The AMINZ Arbitration Rules 2017 also introduced an expedited arbitration process.[45] These rules, introduced under rule 33, deal with disputes of less than $2,000,000. Along with the monetary threshold, expedited arbitration is reserved for Arbitral Tribunals which comprise only one arbitrator, and where the issues in dispute do not raise any significant disagreements of fact, or complex legal issues.[46] Expedited arbitration under the AMINZ rules can mean truncated periods of submission or other actions for the parties,

39 Norton Rose Fulbright, above n 38.

40 Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce, Article 6.

41 Article 9.

42 Article 33; Article 24.

43 Anja Havedal lpp "Expedited Arbitration at the SCC: One Year with the 2017 Rules" (2 April 2018) Kluwer Arbitration Blog <www.arbitrationblog.kluwerarbitration.com/>.

44 New Zealand Dispute Resolution Centre *ECA45 Arbitration Rules* (2018), Rule 4.0.

45 John Walton "AMINZ Arbitration Rules 2017" (2017) 911 LawTalk 24.

46 AMINZ Arbitration Rules, Rule 33.

arbitral proceedings being dealt with on a documents-only basis, and an interim award provided within a month of the final submission of parties. The final award, which must include a determination for costs, is required within two months of the final submissions of parties.

3 Is Access to Justice Relevant to Costs Awards in Arbitration?

In New Zealand litigation, the successful party can generally expect to receive only a contribution towards their legal costs. Reasons for this approach are said to be to increase access to justice, to encourage settlement and to facilitate an efficient approach to litigation. It has been suggested that the rationale behind this approach may not apply to arbitration in New Zealand. This is because the principle of access to justice may not be a relevant consideration for arbitrators who are dealing with disputes in which the parties have agreed, and are usually contractually bound, to refer to arbitration.[47]

However, this suggestion arguably rests on a narrow view of access to justice which is restricted to access to the courts. This narrow view ignores the question of whether there should be access to justice in arbitration. If a person-centred approach to access to justice is adopted, then the fact that a party has agreed to submit a dispute to arbitration perhaps should not mean that they have contracted out of access to justice. If that is the case, then there is an argument that costs awards in arbitration should take into account the principle of access to justice and should generally allow successful parties to recovery only a reasonable contribution towards their legal costs.

Initiatives to Address Information Barriers to Access to Justice

1 The Information Gap and Arbitration

There is a prospect for arbitration to address the civil "justice gap". However, there is in turn an information gap that acts as a barrier to the use of arbitration. Moreira argues that, while voluntary commercial arbitration may be well suited for large disputes between sophisticated commercial parties, it is not competitive in smaller disputes.[48] In small commercial disputes, there are difficulties in the parties agreeing to and operating an arbitral agreement. It is a costly

47 Anthony Willy, Terence Sissons *Arbitration* (2nd ed, Thomson Reuters New Zealand Limited, 2018) at 266.

48 Joao Ilhao Moreira "The Limits to Voluntary Arbitration in Establishing a Fair, Independent and Accessible Dispute Resolution Mechanism Outside Large Contractual Disputes" in Leonardo V.P. de Oliveira and Sara Hourani (eds) *Access to Justice in Arbitration: Concept, Context and Practice* (Wolters Kluwer, The Netherlands, 2021) 59 at [3.04].

process to ascertain whether arbitration, litigation or some other form of ADR should be chosen, and how to draft an arbitration clause.

Traditional ways in which arbitration institutions and practitioners have sought to address the information gap is through the provision of free information (including online) and through the provision of training (traditionally at a charge, and often directed primarily at the legal profession). More modern innovations have included making arbitration services available online.

2 Court-directed Arbitration of Lower-value Disputes

The information gap may be addressed by courts directing the use of arbitration. This is a concept that has been considered at various times in New Zealand.

The District Court has had the jurisdiction, since the Magistrate's Court Act 1908, to refer parties to arbitration with their consent.[49] The rationale behind allowing the District Court to have this power is to allow caseloads to be reduced by diverting appropriate cases (or certain issues in dispute) to arbitration. While the Court may suggest and encourage arbitration, no power is conferred to order a transfer without the consent of both parties.[50]

Unlike the District Court, there is no express power for the High Court to refer parties to arbitration. The High Court Rules provide for parties to a proceeding to agree to transfer their dispute to arbitration at any stage in the proceedings.[51]

In 1997, New Zealand's Courts Consultative Committee proposed the introduction of court-sanctioned arbitration (amongst other processes).[52] The motivation for this proposal was to increase public access to justice and reduce the delays and costs of civil hearings.[53] This proposal generated significant discussion between key legal institutions over whether Judges should be empowered to refer cases to mediation or arbitration.[54] The Australian and New Zealand Council of Chief Justices was in favour of enhancing the use of some ADR processes through a court-sanctioning regime.[55]

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49 The power is seen in s 61 District Courts Act 1947, r 7.71 District Court Rules 2014 and, currently, s 111 District Court Act 2016.

50 *District Court Practice (Civil)* (online looseleaf ed, LexisNexis) at [DCA2016.111.1].

51 Rule 7.80. The District Court Rule 7.71 provides an equivalent rule for the District Court.

52 Nicola Baker "McCaw Lewis Advocacy Contest: Legislated Court Authority to Refer to Mediation or Arbitration" (1997) 5 Wai L Rev 65.

53 Claire Baylis "Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions" (1990) 30 VUWLR 279.

54 Baylis, above n 53.

55 P D Mahony "Private Settlement – Public Justice" (2000) 31 VUWLR 225 at 229.

The New Zealand Law Society rejected the idea of court-sanctioned ADR and instead proposing a 'court-filtered' process.[56] This suggested a parallel system of judges encouraging parties to engage in ADR services and granting adjournments to enable the processes.[57] The Law Society argued that arbitration "fell outside the citizens' right of access to justice", and that mixing ADR with the Court system blended public policy and fundamental rights in a dangerous way.[58] They argued that implementing a court-sanctioned regime took away the fundamental principle of ADR as being a voluntary process.[59]

In May 2021, the Rules Committee released a consultation paper titled: *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community*.[60] In its submission to the Rules Committee, AMINZ suggested that disputes between $30,000 and $125,000 should have the option of being referred to short-form 'on-the-papers' arbitration. AMINZ suggested that this process could use similar processes to those applying to adjudications under the Construction Contracts Act 2002. As to cost, whilst it would be necessary for parties to pay for the time of the arbitrator, the parties would not need to pay the hearing and filing fees required in the District Court. If a quicker and more confined process is adopted then legal fees should be reduced. AMINZ further suggested that the Ministry of Justice could consider subsidising such arbitration proceedings.[61]

There is a recent precedent for subsidised arbitration in New Zealand. Following the implementation of periods of lockdown in the COVID-19 pandemic in 2020, the Government sought to assist parties in the resolution of commercial lease disputes relating to the liability of tenants for rent during the lockdown. Eventually introduced in September 2020, the Covid-19 rent relief arbitration scheme allowed for a subsidy of up to $6,000 to go toward the arbitration, anticipated to cover 75% of the total costs. The subsidy was targeted at small to medium businesses who had suffered a "material loss of revenue"

56 Mahoney, above n 55, at 226.

57 At 226.

58 At 226.

59 At 226.

60 *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (Judicial Sub-Committee on Improving Access to Justice, Consultation Paper, May 2021).

61 Arbitrator' and Mediators' Institute of New Zealand *Improving Access to Justice: Comments of the Arbitrators' and Mediators' Institute of New Zealand on the Paper of the Rules Committee of the High Court dated 14 May 2021* (Arbitrator' and Mediators' Institute of New Zealand, July 2021) at [9].

during the lockdown.[62] Importantly, participation in the arbitration was voluntary and had to be agreed upon by both parties.[63] Another requirement was that, to qualify for subsidised arbitration (as opposed to the fully-funded mediation option), the commercial lease in dispute was required to contain an "Emergency Rent Relief clause".[64] The government set aside $40m for the scheme, offering to subsidise the arbitration of these commercial disputes by up to $6,000 if conducted through Immediation NZ, Fairway Resolution or the New Zealand Disputes Resolution Centre (NZDRC).[65] Ultimately, it appears only a fraction of this budget was used, only 13 arbitrations had commenced at the end of the scheme in March 2021.[66]

Conclusion

Rallying cries on the importance of improving access to justice in Aotearoa have come in recent years from senior members of the judiciary. Delivering the 2014 Annual New Zealand Law Foundation Ethel Benjamin Address, Justice Winkelmann challenged the legal profession "to initiate and engage in debate … and to question, and if necessary change, its current way of doing business".[67] To mark Arbitration Day in 2021, this paper seeks to encourage such debate and promote change amongst arbitration practitioners. By adopting a person-centred approach to access to justice, and recognising the challenges and opportunities of Te Ao Mārama, arbitration can be part of the change called for by the Chief Justice.

62 Sam Sachdeva, Jo Moir "Poor uptake for commercial rent dispute scheme" *Newsroom* (online ed, New Zealand, 2 April 2021).

63 Greg Simms, Katherine Binsted and Katrina Hammon "Covid-19: Avenues to resolve rental disputes and cancellation for non-payment of rent" (6 October 2020) Wynn Williams <www.wynnwilliams.co.nz/Publications/Articles>.

64 Catherine Green "Rent Relief in the Covid-19 Lockdown" (9 April 2020) New Zealand Dispute Resolution Centre <www.nzdrc.co.nz/>.

65 Simms, Binsted and Hammon, above n 63.

66 Obtained under Official Information Act 1982 Request to the Ministry of Justice.

67 Winkelmann, above n 24, at 15.