



28 August 2020

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RE: Consultation on Improving Access to Civil Justice

Tēnā koe Sebastian, Tēnā koutou Committee members,

Thank you for the opportunity to comment on these matters. As this phase of consultation is a preliminary one, I keep the comments at a general level and would welcome opportunities to comment on more detailed proposals as the reform progresses.

General Comments

- [1] The Rules Committee has articulated a clear goal for the potential areas of reform: “to improve access to justice by reducing the costs associated with bringing a civil matter to court”.¹ It is encouraging to see this goal being pursued given the significant issues of cost-driven barriers to accessing our District and High Courts.
- [2] Before commenting on the potential areas for reform suggested by the Committee to address this problem, I make some general comments.

Evidence

- [3] The consultation paper states that: “If rules of procedure are contributing to justice being unaffordable, by imposing burdens disproportionate to the cost and complexity of the disputes being litigated, then arguably the rules are not fit for purpose”.² The difficulty we

¹ Sebastian Hartley, “Improving Access to Civil Justice” Rules Committee Discussion Paper 16 December 2019 at [1]. (Consultation Paper)

² Consultation paper, at [6].

face is the “if” in this sentence. There is, unfortunately, a lack of empirical evidence about how the complexity of procedure, as opposed to any other factors, is driving the cost of litigation. It is possible that this starting assumption is incorrect or that procedural complexity is only a minor factor.

- [4] While there is not the time or resource to fill this evidential gap currently, and there is a strong desire to do something to address the problems we can observe in the system, it would be helpful to put in place evaluation measures as part of the reform package. The effect of the eventual reforms can be measured against the goal of the reforms – to what extent, if any, did the rules reforms lower the cost of litigation? Ensuring that there are means to collect this data, and that there is a plan to measure the effects, will inform future reforms and move our procedural process towards a stronger evidence base.

Limits of the Rules Committee’s Influence

- [5] We do not have sufficient evidence to determine to what extent procedure is contributing to unaffordability, but we do know that the expense of litigation is not solely caused by procedural factors. The primary cost of litigation is lawyers’ fees. Court procedure can minimise the number of hours that can be justified for each step of litigation, but it cannot change the underlying structure of fees, nor can it control all of what lawyers do on a file. The reasons for the expense of legal fees are complex and so are the responses to lowering them.³ These lie outside the control of the Rules Committee.
- [6] Another driver of litigation expense is inequality in antecedent wealth; people come to court with varying levels of resources. This means that their ability to use the available court processes varies, and this can enable parties to use litigation tactics that exploit this difference.⁴ Court process can try and protect against this but cannot provide complete protection and cannot alter the underlying imbalance.

Culture Change

- [7] The consultation paper recognises that culture change in litigation may be necessary to reach the goal of reducing cost.⁵ As Lawrence Friedman observed, “law reform is doomed to failure if it does not take legal culture into account.”⁶ It is not clear, however, that changing procedural rules would achieve culture change. There would need to be acceptance within the

³ Bridgette Toy-Cronin “Explaining and Changing the Price of Litigation Services” (2019) New Zealand Law Journal 310.

⁴ Bridgette Toy-Cronin and others *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, 2017) at 87-88 available at <http://hdl.handle.net/10523/7762>.

⁵ Consultation Paper, at [12]-[14].

⁶ Lawrence M. Friedman, “Is There a Modern Legal Culture?” (July 1994) 7:2 Ratio Juris 117 at 130.

judiciary of an altered model of adjudication and adjudicative role, particularly if the reforms change a presumptive starting point, but still make traditional procedures available. There also needs to be support within the profession and while changing the presumptive model might assist, by itself it is unlikely to change deeply embedded culture. Furthermore, arbitration remains a competitor to the court system and lawyers and clients have the ability to opt-out of the court system if they do not like the reforms. This acts as a brake on culture change because lawyers and their clients can go elsewhere.

- [8] None of this is to say that rules reforms should not be undertaken or that culture change should not be attempted; the reasons for the change are compelling. It is, however, a reflection on the limits of the power to lead change from within the constraints of procedural reform. Ideally, the rules reforms should be part of a coordinated effort encompassing all court users' perspectives to improve access to justice. Undertaking rules reforms with a plan to evaluate their effectiveness will also assist in this overall strategy.

Designing the procedure for which court users?

- [9] It is important to keep in mind that not all users of court rules are lawyers. It is encouraging that the Committee has sought feedback on the proposals from outside the profession and this may deliver some useful insights. I note that when considering next steps in the reforms, it should be kept in mind that both lawyers and litigants in person (LiPs) need to be able to access and use the procedures.

The Rules Committee Proposals

Short Form Trial Procedures

- [10] I agree that the use of a short trial process could be implemented in the High Court. I also support measures in the District Court that either encourage the use of the current short trial process, or that mirror the procedure that is implemented in the High Court.
- [11] A system where a presumption in favour of short trials applies to all cases that meet particular criteria, is preferable to a system which gives counsel the ability to elect a short or long trial in all cases. I say this because in some circumstances, lawyers may be reluctant to indicate that their party's case fits short trial criteria. For example, in proceedings where settlement is likely, a party may be disadvantaged if they admit that the issues are "relatively uncomplicated" (see DCR 10). A lawyer may not wish their client to know that the matter is so classified out of fear that the client will not be understanding if the court does not find in their favour.

[12] I consider that the NZBA's "short causes procedure" should be implemented in favour of a return to the fast track procedure. One issue that may arise with this procedure relates to the credibility of witnesses, which may not always be apparent when proceedings are at an early stage. The extent to which credibility is relevant to the outcomes sought may need to be considered in situations where one party resists the short cause presumption on this basis.

Inquisitorial-type processes

[13] I am in favour of exploring and adopting models that provide a greater level of judicial control in the process. There are three compelling reasons why judicial control of proceedings should be increased. First, greater judicial control fits more comfortably with lay understandings of court process. Many people who have been exposed to court process only through popular culture, expect that the court process will involve strong judicial control of proceedings. They can become confused and disappointed to find that the onus rests on the parties to run the litigation. Many LiPs experience their interactions with the court as entering a "foreign land".⁷ Represented litigants have the advantage of having a lawyer educate them about the process before they encounter it, but they are still having to go through this process of learning a "foreign" system. I consider the justice system should be responsive to the needs and expectations of the community, rather than expecting the community to become acquainted and accepting of the traditions of the system.

[14] Second, I consider increasing judicial control avoids or at least minimises the difficulties created where one party (the client or the lawyer or both) is deliberately slowing proceedings. In our research on the pace of litigation in the High Court, we found that while the system works well when there are two "good" lawyers instructed to proceed swiftly with the case, proceedings become bogged down when this is not the case.⁸ The judge is the only actor with the potential to unlock this type of behaviour, forcing the hand of the parties and/or lawyers to narrow the focus of the proceedings and move it forward.

[15] Third, and related to the second point, is that core to making decisions about procedure should be the idea that court time is a public good. It is, therefore, reasonable to ration the amount of procedure available (the function of short causes and short trial) or to use judicial control to focus the proceeding.⁹ I take the view that civil litigation has many functions: "private dispute resolution, rule creation, ordering of the capitalist economy, and providing a

⁷ Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis University of Otago, 2015) at 210-211 available at <http://hdl.handle.net/10523/6003>.

⁸ Toy-Cronin and others, above n 4 at 3.

⁹ Adrian Zuckerman "A Reform of Civil Procedure - Rationing Procedure rather than Access to Justice" (1995) 22 Journal of Law and Society 155.

check on government” and that due to the multiplicity of functions, civil litigation is a “public good that goes beyond the interests of the individual who calls on the system”.¹⁰ As such, court resources must be rationed fairly, rather than allowing them to be called upon by anyone who has sufficient resources and will to use them. The judiciary is best placed to make those rationing decisions and judges need sufficient control to allow them to do so.

- [16] I consider it risky to label any procedures that increase or change the role for judges as “inquisitorial”. I have found in informal discussions with members of the profession that there are vastly different understandings of what this term means. It is also seen as a direct challenge to our adversarial tradition, as inquisitorial and adversarial are framed as two opposed systems. Talking about “inquisitorial” systems is, therefore, likely to heighten resistance within the profession. This is unnecessary, as Kós J has observed, we have a significantly inquisitorial system already. The shift is really just moving the level of judicial control further along the spectrum. Therefore, I consider it is more productive to talk about it in terms of “judicial control”.

Pankhurst J Model

- [17] The Pankhurst J model is a significant departure from the traditional adjudicative process. It has only been applied to a small group of litigants who were all experiencing a similar fact situation. As the Committee notes, while the process was effective at achieving settlement prior to adjudication, this may have been because of the particular circumstances of the litigants, or because of the conduct of the facilitating Judge.¹¹
- [18] While it provides an interesting model, it needs further investigation about its applicability in other contexts before it should be considered as part of a wider reform. In particular, more detail is needed about how a claim is filed. The proposal as outlined has similarities to the District Court Rules 2009 information capsule which did not prove successful. Curtailing appeal rights is also a significant step which whilst saving costs and time, also leaves very limited safeguards in an already curtailed process.

Kós J Model

- [19] The Kós J model is less radical in that it does not depart from adjudicative justice, but provides greater judicial control in the adjudicative process. I support the model as it offers substantive change in the level of judicial control while still preserving the familiar trial process.

¹⁰ Toy-Cronin and others, above n 3.

¹¹ Consultation Paper, at [33].

- [20] Part of the proposal is the appointment of a court-appointed assessor. I assume this person might be a senior member of the independent bar, or similar. Engaging an assessor to review pleadings could be relatively unproblematic, but problems may arise where the assessor becomes involved in assisting parties with their pleadings and working on identifying defences and lists of issues (step c of the proposal). How meaningful assistance could be given to both parties, while the assessor remains impartial, needs further consideration. The relationship between the assessor and counsel/LiPs would also have to be clearly defined. Where parties are insured, further issues regarding control of the proceedings could arise.
- [21] While supporting the proposal in general, I do not support the idea of having more or less judicial control depending on whether the parties are represented or not. I do not consider that representation status is a principled basis on which to make a significant case management decision. It tends to encourage stereotypical thinking about LiPs rather than recognising that they are not a homogenous group and have many different needs, vulnerabilities, and abilities. It can risk alienating them further by treating them as special cases when at law they have an equal right to access the system. As a more practical consideration, it is worth remembering that changes in representation status frequently occur during the life of a proceeding and using representation as the basis for case management could create a great deal of complication and uncertainty.
- [22] Similarly, I am not convinced that this procedure should only be applied to cases up to the value of \$100,000. Presumably this is based on the idea that cases worth less than this may be uneconomic to litigate with the assistance of a lawyer. The cost is, therefore, shifted to the state in the form of intensive judicial resource to guide the parties, which also reduces legal assistance costs by minimising procedural steps. However, if this procedure is effective in balancing justice with efficiency and cost, why should this procedure not be available for any District Court claim, and indeed for High Court claims.
- [23] Part of the answer to this may be that lawyers do not have a significant interest in cases worth under \$100,000 as their services are uneconomic in this context. It is, therefore, likely to be met with less resistance if introduced at this level. This may provide a justification (although not a highly principled one) for introducing it at this level. It would need to be evaluated once in place to consider its efficacy. If it does provide significant benefits, this evidence could be useful in justifying its extension.

Summary Judgment

[24] The justifications for this proposal seem logical but I am concerned that there is a significant risk this could increase costs (adding an extra step) when the aim of these reforms is to reduce costs. Therefore, I do not consider this proposal to be the most promising of the suggested innovations.

Streamlining process

Briefs of Evidence

[25] I support the introduction of will say statements in place of briefs of evidence. The paper by Sebastian Hartley highlights that the debate over briefs of evidence is well traversed and there is ample domestic and international experience to draw on. One aspect of this experience is that there is consensus that they do create expense. This has been seen as justified by other benefits briefs bring. However, given the primary motivation for the Rules Committee's current consultation is reduction of the cost of litigation, the association between briefs of evidence and increased costs should be a paramount consideration.

[26] Despite the hopes of Lord Woolf and others that preparation of briefs can be kept proportionate and focused, it is apparent that briefs of evidence do tend to be thoroughly prepared and lengthy. This is unsurprising as there are strong motivations for writing very carefully constructed briefs: defensive lawyering (to avoid claims of negligence) and financial incentives. Rather than imploring lawyers to reduce the time that goes into preparation of briefs, it would be more effective to change what is allowed to be prepared.

[27] In addition to the financial reasons for moving away from witness briefs, it is also important to keep in mind the experience of witnesses and LiPs. Witness briefs can provide security for the witness: "They are greatly comforted by the knowledge that they can read their evidence".¹² I am not aware of any compelling empirical evidence on the experience of witnesses using briefs versus giving oral evidence. However, the existing evidence and theory would suggest that a witness will only have a sense that justice has been done if they have had an opportunity to tell their story.¹³ If their story is instead heavily crafted by a lawyer, this sense of justice will be undermined. Similarly, if a litigant does not sense they have heard their adversary talking in their own words, they are unlikely to come away from the proceeding

¹² Memorandum from Clerk of the Rules Committee to Access to Justice Working Group Members on Written Briefs of Evidence and 'Will-Say' Statements 13 August 2019, quoting Jan McCartney SC at 10.

¹³ Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006).

feeling the judge has been fully appraised of the facts. This can undermine the legitimacy of the system in the eyes of the public and should, therefore, be a relevant consideration.

[28] The discussion in the briefing paper is predicated on witness statements being filed by lawyers but of course a significant number of court users are LiPs. Witness briefs are very difficult for LiPs to draft as they require writing a narrative of legally salient facts, absent of argument, from a single perspective (that of the witness).¹⁴ This is a form of writing peculiar to the legal realm and, therefore, not one that a LiP will be adept at carrying out; indeed, not all lawyers master the form.¹⁵

[29] Will say statements and oral evidence would balance cost concerns with ensuring that parties were not ambushed and had sufficient information on which to base settlement discussions. There is a concern that oral evidence is too time consuming but the following should be kept in mind: (1) this proposal is combined with support for greater judicial control over proceedings so it is within the power of the judge to limit the scope of the oral evidence (see paras [13]-[15] above); (2) few cases reach trial, so the time dedicated to oral evidence in a trial is an issue limited to a small minority of cases filed.

Greater judicial control

[30] For the reasons stated when discussing the Kós J model at paragraphs [13]-[15] above, I support rules reforms which provide for greater judicial control of proceedings. The suggestions such as more short and simplified trial procedures, time limits, and interventions in witness examinations, are also steps I support as means to ration procedure and control costs.

Nāku, nā

Bridgette Toy-Cronin

¹⁴ Elizabeth Mertz *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press, Oxford, 2007).

¹⁵ Toy-Cronin, above n 8 at 129.