**Peter Gerard Stockman**

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**RE: Improving Access to Civil Justice**

Tēnā Koutou to Mr Hartley and the members of the Rules Committee

## Introduction

1) At the outset I would like to thank the Rules Committee for inviting other Court users (not just the legal profession) to make submissions on the issue of improving access to civil justice. I am known to some members of the Rules Committee as a client, or as a litigant, or as a correspondent and I trust that such prior knowledge will neither add weight to, nor subtract weight from, these submissions. I have been involved with three substantive court proceedings and numerous related interlocutory applications and appeals as both an applicant / appellant and respondent. I have at times been represented by counsel and at other times, mostly because I could no longer afford counsel, I have been a self-represented litigant. My court experience is limited to civil matters in the fields of public law and tort and is further limited to proceedings in Senior Courts and only ever as a plaintiff. In one of the three substantive proceedings I was a successful as a litigant-in-person in winning a judicial review application and the other two proceedings are still in train. My experiences as a self-represented litigant are probably more extensive than most and have led me to taking a considerable interest in issues around access to civil justice. Although my experiences of New Zealand's judicial system will undoubtedly be much less than other submitters from the legal professions, I humbly suggest that these submissions be given earnest consideration for two reasons. Firstly, I to at least some extent can represent the views of those who are currently denied access to civil justice and for whom this initiative is designed to help. Secondly, I can bring a moderately well-informed perspective that is not tainted by any vested interests, nor foreshortened by looking at the system from within the system.

## Setting the scene

2) Perhaps because I lack facility in legal academic writing, I would like to position these submissions such that they can be seen through the lens of two germane but otherwise entirely

fictitious stories. Both stories have the same two main characters. Robert Jane who is a very wealthy property magnate and Jane Roberts, who is a homeless person of above average intelligence but is for other reasons essentially illiterate. Jane sleeps under a bridge, is feed by the Compassion Soup Kitchen, and augments her Job Seeker Benefit by begging at her favourite spot outside one of Robert Jane's office towers to the end of feeding her addiction to alcohol.

3) In the first story both Robert and Jane suffer a heart attack. They are rushed by ambulance to Wellington Hospital. At hospital they are both treated with kindness and respect. Presenting with identical symptoms they are both given the same battery of tests and both diagnosed as needing urgent by-pass surgery. After providing consent they are both operated on by surgeons with equivalent skill and dedication. Post operation they are both given equal care. In this story Robert and Jane are provided with equal access to health.

4) In the second story the clients of Robert's tenants complain about Jane's vociferous begging. The tenants, whose leases are coming to an end, suggest they may not be renewing their leases on account of the annoyingly persistent Jane. This will leave a considerable hole in Robert's revenues. Robert exhausts criminal and regulatory mechanisms and engages Jane in mediation. Jane maintains that her spot is a great one for her revenues and refuses to move on account of Robert's potential loss of revenues. Exasperated, Robert engages a QC who assures him that civil action will be effective in moving Jane along and saving Robert from considerable losses. A Notice of Proceeding and Statement of Claim are served on Jane at the soup kitchen and the staff there read those documents to Jane. For the purposes of the story let's say Jane has just more than $3,600 in her bank account and therefore doesn't qualify for civil legal aid. The Community Law Centre says that the nature of the proceeding is not one they are mandated to help with and no pro-bono lawyers are offering their services. To defend these proceedings Jane must go it alone as a litigant-in-person.

5) Will Jane as a homeless, illiterate, alcoholic and self-represented litigant be given equal access to justice when squaring-off against a very wealthy opponent represented by a QC? The answer to that question will to a significant degree depend on the actions of the Rules Committee in response to this initiative to improve access to civil justice. It will also depend on how much our society values justice, that might in turn put pressure on the other branches of government to provide the resources necessary for equal access to civil justice. And it will, I suggest, depend on the good will of the legal profession and the judiciary in accepting uncomfortable change. Of course, the actions of Parliament and the Executive, along with the attitudes of lawyers and the judiciary are beyond the control of the Rules Committee, but that is not to say the members of the Rules Committee can have no influence in these areas.

6) By way of clarity it is accepted that litigants exist along, and beyond, a continuum between Jane and Robert. I posit that the Rules of the High and District Courts must to the greatest practicable extent serve everyone equally, no matter where they fall on that continuum.

7) The committee is considering four main proposals as set out at 2 (a to d) of the Discussion Paper that seeks submissions. Relatedly, Justice Kós has reiterated the views of Hayne J, that civil litigation is beyond the purse of any but the wealthiest of enterprises.[1] My overarching submission is that proposals, a, c and d may reduce the cost of litigation but doing so is simply not enough. If civil justice is currently only available to the wealthy and perhaps those who are privileged in other ways, then making it moderately cheaper such that it might now be within the reach of the upper middle class is nothing short of an insult to the rest of the middle class, the working class, the poor and the underprivileged. Whereas, option b and variants on option b, have the potential to bring about more significant change that could breathe life into the currently limp notion that we are all equal before the law.

8) Imagine if our health system was run on the same basis as our civil justice system. Before being seen at a hospital you would need to provide a written statement of claim outlining your symptoms (stomach pains) the ailment you allege (appendicitis) and the relief you seek (an appendicostomy). You would then need to provide evidence proving the alleged appendicitis. If you were wrong about that and it was shown that you in fact did not suffer from appendicitis then you would be denied any relief and have to pay costs. You simply can't afford to pay a private physician $500, or more, per hour to do a thorough diagnosis of what ails you and to represent you at the hospital. But your tummy still hurts like mad and a friend assures you that they had the same thing and it was gallstones. So, you write again to the hospital alleging gallstones and seeking a gallbladder removal. Unfortunately, the evidence doesn't support gallstones, so once again, you get no relief but have to pay costs. You are still in great pain when you receive a letter from the hospital. Having made two unmeritorious claims, the hospital has declared you a vexatious patient and you are not allowed to enter the emergency ward of any hospital without first obtaining the written permission of a senior consultant. It would seem you are going to live with the excruciating pain of your undiagnosed kidney stones for the rest of your life.

9) We would never accept that as our health system in New Zealand and yet we accept that as our civil justice system. We accept it to some extent because that's the way we have always done it, but it cannot be denied that the current system makes many lawyers very rich, and there is therefore a vested interest in maintaining the status quo or something at least very similar.

10) Option b and its variants may well have some profound impacts on the legal industry. Moves towards a more inquisitorial system of justice will open the door to self-represented litigants

[1] Paragraph 7 of Circular 40 of 2019.

such that they may have considerably greater access to justice. As it stands the complexities of legislation and court rules, not to mention the esoteric entanglements of common law, create a de facto trade protection. If a citizen cannot get access to competent counsel, or in the alternative be capable of assiduous auto-didaction, then they are to all intents and purposes locked out from access to civil justice. Implementing option b (and/or variants) may mean a reduction in total revenue available to barristers. That won't be readily accepted by the profession without a lot of complaining, dressed up as is the wont of litigators, in the clothes of robust counter argument. What is more, it most likely won't find favour with many in the Judiciary - with Justice Kós presumably excepted. Deputy Chief Justice Faulks of the Family Court of Australia commenced a speech entitled, "Self-represented Litigants: Tackling the Challenge"[2] with the words:

> "Most judges tend to couple the word (sic) self-represented litigant with an expletive. It is customary to regard them as difficult, time-consuming, unreasonable and ignorant of processes of the law."

A senior QC, from whom I was seeking some unbundled advice, counselled me not to go to court without a lawyer, "*because judges don't like self-represented litigants!"* Should the QC and Justice Faulks be correct, and my anecdotal experiences suggest they are correct about many (but certainly not all) judges, then the judiciary won't exactly be falling over themselves to welcome that difficult, time-consuming, unreasonable and ignorant rabble of litigants into 'their' courtrooms.

11) So there, as Shakespeare so succinctly expressed it, is the rub. Most of the Rules Committee were once lawyers and are now judges. It is but human nature to feel for your peers and your ex-peers and to try to not cause them trouble. On the other hand, should the Rules Committee opt for less significant changes then the vast majority of New Zealanders will remain locked out from accessing civil justice. In Queen Elizabeth's Covid-19 message to New Zealanders she said, "Kia kaha, kia māia, kia manawanui." In dealing with these difficult matters, I similarly implore the Committee to be strong, be bold, and be steadfast.

## How a More Inquisitorial Model Could Afford More Equal Access to Civil Justice

12) The Rules Committee need to completely reject the proposition of Robert Fisher QC, that by having regard to the magnitude of sums at stake, some cases will warrant a procedural Rolls Royce while others will have to make do with a Lada and still others a bicycle.[3] To state what should be obvious, large sums of money are critically important to the wealthy, more modest sums of money are critically important to people of modest means and quite small sums of money are critically important to people who are impoverished. The Rules Committee need to

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[2] At the Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013.

[3] Circular 40 of 2019 at [30]

show leadership by refusing to pander to the concerns of the rich at the expense of the poor. That is not to say that sharing the load between the Disputes Tribunal, the District Court and the High Court cannot be done, as it is now, on the basis of the sums being claimed. But it is to say that fundamental requirements of just process should be available to all New Zealanders regardless of their fiscal worth and regardless of what tribunal or Court determines their grievance. The poor and those of modest means should not be relegated to second-rate processes so that the courts can allocate their very best resources to the concerns of the wealthy. Robert Fisher QC is correct in suggesting that we as a society cannot afford optimum justice any more than we can afford optimum medical care or education.[4] There is, admittedly, only so much 'justice' to go around. That being the case, we should all be provided with a procedurally fit for purpose Toyota Corolla. It is unconscionable to proffer bicycle justice to the poor and Rolls Royce justice to the wealthy. It is therefore incumbent upon the Rules Committee to do away with a system of rules whereby, "you get the justice you pay for."[5]

13) Should the Rules Committee be inclined to adopt the more egalitarian principles espoused in the preceding paragraph, and see benefit in adopting the proposal of Justice Kós for a more inquisitorial approach,[6] then it should not limit the inquisitorial approach to the District Court and to cases of up to $100,000 in value. The inquisitorial approach should be available for all litigants in both the District Court and the High Court. There would, for example, be no principled reason to deny applicants for judicial review, over which the High Court has exclusive jurisdiction, the opportunity of using the more inquisitorial approach. Nor is there any principled reason not to allow cases of up to any value to be heard through a more inquisitorial model. Whatever arbitrary value the Rules Committee might set would simply be seen as a target to be exceeded by the fictitious QC working for the fictitious Robert Jane to the end of obtaining an advantage over the hapless Jane Roberts. The risk of lawyers gaming the rules to maintain their inherent advantages is shown to be likely, based on the research of Dr Bridgette Toy-Cronin and Dr Bridget Irvine that indicated the profession is eschewing the District Court to pursue civil justice in the High Court for sums that are within District Court jurisdiction.[7]

14) I disagree with Justice Kós that an inquisitorial process should begin with filing a statement of claim.[8] The current codified and common law requirements for pleadings are quite beyond the capability of most self-represented litigants. In fact, after reading many authorities on pleadings it would seem that crafting compliant pleadings is even beyond the capability of many lawyers. High Court Rules 5.26 and 5.27 for example requires the plaintiff to show the

[4] Circular 40 of 2019 at [30]
[5] Circular 40 of 2019 at [56]
[6] Circular 40 of 2019 at [48]
[7] Circular 8 of 2019 Access to Justice in the District Court of New Zealand – University of Otago Legal Issues Centre (at page 8)
[8] Circular 40 of 2019 at [48] (a)

nature of the claim, specify the relief sought and if there is more than one cause of action specify the relief sought on each cause of action. After being involved in a few proceedings I would now find it relatively easy to comply with rules 5.26 and 5.27. The members of the Rules Committee would, after their extensive legal experiences, similarly see that as a completely straight forward matter. But it is not. For people who lack access to competent counsel it is virtually impossible. The rules are written with a presumption that parties will be represented by counsel who have an extensive knowledge of the law. That presumption needs to go. We don't expect people who turn up at the emergency department of our hospitals to bring their own personal physician. We don't expect them to set out in writing the nature of their illness, and we don't expect them to set out in writing the remedy they are seeking. We don't expect that should they fail in doing so correctly, they will get no treatment at all. We would laugh at such requirements in a health setting and yet they are normative in a civil justice setting in New Zealand. All we expect from patients is to tell the doctors about their symptoms. We should expect no more from self-represented litigants. I submit that any proceedings should commence with filing either a conventional statement of claim (by counsel or a confident litigant-in-person) or in the alternative a 'statement of allegation' that simply sets out what the plaintiff says happened. Statements of allegation could be filed in writing, or on line, or for those who have difficulties with writing by making an oral statement that is recorded and transcribed by court registry staff.

15) I agree with Justice Kós that there should be something like a court-appointed assessor[9] or amicus, but submit that the assessor/amicus role should be wider in scope. Much like a doctor doing a diagnosis the assessor/amicus should be looking carefully at the allegations to discern whether the allegations, if proven, could amount to a breach of law that would give rise to a legal remedy. The assessor /amicus should draft a brief report, akin to a legal opinion, suggesting what laws if any may have been breached and what court, tribunal or other regulatory authority would be best placed to deal with any potential breach. The assessor/amicus should then meet with the plaintiff and preferably agree on the final version of the report. If agreement can't be reached the assessor/amicus should record as accurately as practicable the plaintiff's objections. Next the statement of allegation and assessor/amicus report (including any of the plaintiff's objections) should be forwarded to a Judge or Associate Judge for orders[10]. If the Judge so orders then the defendant / respondent should be served with a notice of proceeding that includes the statement of allegation and the assessor/amicus report. The defendant should be required to file and serve a statement of defence (by any manner of the means set out in paragraph 14 above) that denies or admits the allegations in the statement of allegations.

[9] Circular 40 of 2019 at [48] (b)

[10] Any such orders must be provided with reasons and be appealable.

16) I agree with the next steps as set out by Justice Kós[11] but with two important exceptions.

a) At (g) Justice Kós suggests that parties or their counsel could only question witnesses with the leave of the Court. That would make the process (save for leave) entirely inquisitorial. I don't see any need to throw the baby out with the bathwater. Mr Hartley recommends a hybrid inquisitorial/adversarial model should be adopted[12] and I agree wholeheartedly. Allowing a Judge to act more inquisitorially will be an antidote to any imbalances of power between the parties, but it should not preclude any party's capacity to present evidence, challenge the other party's evidence and robustly argue their case.

b) At (h) Justice Kós suggests, "a short (compared to the current practice) judgment would then be delivered." That to me is offering a bicycle process when all litigants deserve a Corolla. Then Chief Justice Elias set out the importance of providing reasons in judicial decisions because:[13]

> [76] There are three main reasons why the provision by (sic) reasons by Judges is desirable. Others are identified in *Singh v Department of Labour* (1999) NZAR 258, 262-3. Most importantly, the provision of reasons by a Judge is an important part of openness in the administration of justice.
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> [80] The second main reason why it said Judges must give reasons is that failure to do so means that the lawfulness of what is done cannot be assessed by a court exercising supervisory jurisdiction. Those who exercise power must keep within the limits imposed by law. They must address the right questions and they must correctly apply the law. The assurance that they will do so is provided by the supervisory and appellate courts. It is fundamental to the rule of law. The supervisory jurisdiction is the means by which those affected by judicial orders, but who are not parties to the determination and who have no rights of appeal or rehearing, obtain redress. Their right to seek such review is affirmed by s27 of the New Zealand Bill of Rights 1990. It is important that sufficient reasons are given to enable someone affected to know why the decision was made and to be able to be satisfied that it was lawful. Without such obligation, the right to seek judicial review of a determination will in many cases be undermined.
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> [82] The third main basis for giving reasons is that they provide a discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice. In the present case it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so.

If Judges are given leeway to write shorter judgments than what they currently do, then there is an increased risk that the judge's reasons will be less fulsome and thus less open, less appealable and more likely to be wrong or arbitrary. Going to a more inquisitorial model is for the purpose of providing more equal access to justice. It must not be used as an excuse for second-rate justice.

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[11] Circular 40 of 2019 at [48] (d) to (h)
[12] Circular 40 of 2019 at [87]
[13] *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) at [76] (abridged), [80] and [82]

17) Seemingly strong arguments[14] in favour of the adversarial system over a more inquisitorial system have been put before the Rules Committee. The argument is perhaps best summed up by the quotation of Lord Greene MR, who when discussing judges examining witnesses said, "*He so to speak descends into the arena and is liable to have his vision clouded by the dust of conflict*."[15] I submit that Lord Greene's comment is a tad too poetic to have much pragmatic application. The classic case cited is that of *Jones v National Coal Board*.[16] In an excerpt that is included in Circular 40, Lord Denning says:

> "No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases and have done for centuries."

In *Jones* a retrial was ordered. But it was not on the basis of the judge merely being in the arena but because of how the judge conducted himself whilst there. For example, in the case of one witness the judge:[17]

> "took the examination of the witness out of the hands of leading counsel for the rest of that day and of his junior counsel next morning. Mr Mars-Jones then cross-examined the witness; but during the cross-examination the judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view."

And again:[18]

> "the judge took the examination-in-chief largely out of the hands of Mr Edmund Davies … Mr Mars-Jones cross-examined the witness, but after a while the judge disclosed much impatience with him and he brought it to a close."

Simply put, a retrial was ordered not because the trial judge descended into the arena, but because he demonstrated bias. On this closer examination, *Jones v National Coal Board* does not augur against more inquisitorial models of justice, or in favour of strictly adversarial ones. It augurs in favour of judicial impartiality.

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[14] Circular 40 of 2019 at [21]
[15] Yuill v Yuill [1945] P 15, 20
[16] [1957] 2 All ER 155 at 158-159.
[17] Ibid at page 62
[18] Ibid at page 63

## Some Cautionary Tales

18) In the executive summary of the doctoral thesis[19] of Dr Bridgette Toy-Cronin, who studied litigants in person in New Zealand civil courts and observed their interactions with the judiciary, she says:

> "The fact that LiPs (Litigants in Person) come to court without a lawyer often signals to the judge and to the opposing lawyers that their case is weak (i.e., they are unrepresented because no lawyer will take their case). This lack of credibility before the court can be hard to overcome and might only be remedied by instructing a lawyer."

In her concluding comments she says:

> "A cultural change is needed in the way LiPs are perceived. The stereotypes of the "vexatious" litigant or the "fool for a client" are pervasive and inaccurate. LiPs have many different motives and experiences, the costs of litigation are a critical contributor, and more awareness of this would allow other participants to interact with LiPs in a more nuanced fashion."

There is considerable risk that any assessor/amicus proposed in paragraph 15 above might fall into the trap observed by Dr Toy-Cronin and be inclined towards dismissiveness should a self-represented litigant elect to provide a statement of allegation as opposed to a statement of claim.

19) That risk is not insignificant as borne out by my, albeit anecdotal, experiences:

a) Before I commenced my successful judicial review, I sought the advice of a senior barrister who shortly thereafter became a QC. The written advice was that there was a very low chance of being successful in the judicial review and her legal fees alone would cost me in the vicinity of $60,000. My gut-feeling was that the barrister was wrong about that. I couldn't afford the $60,000, so I borrowed a text-book on Judicial Review from my solicitor, sought unbundled procedural advice from the barrister, studied the High Court Rules, and obtained authorities (that weren't available from the NZLII) through my solicitor's Law Society account. I eventually prevailed.

b) Because I won, I was awarded disbursements. Opposing counsel suggested that the quantum of, and legal basis for, the disbursements I was seeking was wrong and requested a Registrar's review. It took 17 months before a Registrar eventually awarded my claimed disbursements in full. A Ministry of Justice senior manager advised me that part of reason for the delay was because it was "extraordinary" that a litigant-in-person should prevail against a party represented by counsel.

c) In another case a judge, prior to seeing any evidence or hearing any legal argument, advised me to drop several of my causes of action to avoid facing (and presumably loosing) strike out applications and advised me to go and see a lawyer. In the event I

[19] Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person. A thesis submitted for the degree of Doctor of Philosophy, University of Otago, Faculty of Law, 31 July 2015.

slightly amended my pleadings and the opposing party didn't even attempt to strike out those causes of action.

20) What those experiences have taught me is that 'first blush' opinions of even senior lawyers or judges do not necessarily provide an accurate view of the ultimate merits of a cause of action. Those experiences and other personal experiences along with academic works have regrettably led me to conclude that there is widespread bias against self-represented litigants in the legal and judicial professions. No matter what changes the Rules Committee implement, they won't succeed unless work is done on changing attitudes and tackling both conscious and unconscious bias against litigants-in-person in the legal profession, among court staff and in the judiciary. As a minimum any court staff, assessor/amicus practitioners and judges involved in more inquisitorial models of justice should undergo training that includes tackling unconscious biases. An initiative to that effect could for example be undertaken as a joint venture between the New Zealand Bar Association and the Institute of Judicial Studies. Of course, even suggesting that there could be such bias in the judiciary will likely be met with judicial umbrage. But such 'in-group biases' are commonplace in all human beings and training for judges to overcome these biases are the norm in some other jurisdictions.[20]

## Some More General Submissions

### On Discovery

21) I'm surprised that changes to discovery obligations even made the cut in terms of issues to be considered by the Rules Committee in their efforts to afford greater access to civil justice. I thought that the impetus for any such improvements would be for the benefit of the "Have-nots" more so than the "Haves".[21] As Sir Rupert Jackson noted:[22]

> "The Circuit Judges were of the view that disclosure[23] was a problem only in respect of large commercial cases and complex clinical negligence and employer's liability litigation, but that the current system was functioning appropriately in "run of the mill county court litigation."

22) The Commercial Litigation Association strongly refuted that suggestion,[24] but that refutation must be taken with a grain of salt considering that the Association's patrons will most likely be affluent identities. I submit that the poor and those of modest means will, for the most part, not have any difficulty locating the documents that are relevant to their proceedings because these are generally limited in quantum and well known to those litigants.

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[20] Handling Cases Involving Self-Represented Litigants – A Benchguide for Judicial Officers – January 2077 – Judicial Council of California (at Chapter 10 – Avoiding Unintended Bias)
[21] Civil Justice: Haves, Have-nots and What to Do About Them – An address by Justice Kós to the Arbitrators' and Mediator's Institute of New Zealand – Queenstown - March 2016
[22] Circular 41 of 2019 at [14] (a) citing Sir Rupert Jackson's December 2009 Litigation Costs: Final Report.
[23] The UK term for discovery as opposed to New Zealand rules on initial disclosure.
[24] Circular 41 of 2019 at [14] (b)

23) Prior to 1 February 2012 there would have been strong grounds for insisting on a change to discovery rules but those grounds fell away when the Peruvian Guano test[25] was abandoned by the 2011 amendments to the rules.[26] I submit that the current standard discovery rules[27] are not remotely onerous for most litigants and where they are onerous, in say complex litigation, the Court can order tailored discovery. In order for justice to be done the relevant facts[28] must be known. All the "*cards must be face up on the table*".[29] There is always a risk that parties and/or their counsel might seek to "*hide the ball*".[30] This risk is heightened when less scrupulous counsel push the boundaries of discovery in the hope that a naïve self-represented opponent will lack the wherewithal to uphold their lawful rights. If members of the Rules Committee doubt that Officers of the Court would stoop to such dirty tricks, then I must advise that I have personal experiences of facing opposing counsel of the utmost integrity, but regrettably also those for whom upholding the rule of law and facilitating the administration of justice[31] is deemed a mere suggestion rather than a legal obligation. If it 'ain't broke, don't fix it'. I submit that the current rules on discovery are well balanced between Courts needing to know the facts and the costs of discovering those facts. The rules on discovery should not be amended.

24) Having said that, I agree with Sir Rupert Jackson's suggestion that there be "*More rigorous case management by the court, including greater use of sanctions against parties who provide disclosure in a haphazard manner or late*".[32] It would seem that some solicitors make a rod for their own backs, and the backs of others, by not adjusting to the current discovery requirements and reverting to the old *Peruvian Guano* test.[33]

25) I also agree with Russell McVeagh's 2003 submission to the Rules Committee[34] that there is little benefit to be gained by the overly laborious listing requirements pertaining to discovered documents.

## On Written Briefs of Evidence

26) I concur with Dr Farmer QC's pithy observation that written briefs of evidence. "*are in fact one long leading question."*[35] However, I'm not convinced that a radical change in rules is required. Every brief must be in the words of the witness and not in the words of the lawyer

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[25] *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55
[26] High Court Amendment Rules (No2) 2011 - Explanatory Note - " standard discovery will be narrower in scope than the current Peruvian Guano test (documents that are or may be relevant to issues in the proceeding or may lead to a chain of inquiry)"
[27] High Court Rules 2016 rule 8.7
[28] Save for confidential or privileged matters
[29] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 at page 945.
[30] Circular 41 of 2019 at [63]
[31] Lawyers and Conveyancers Act 2006 s 4 (a)
[32] Circular 41 of 2019 at [63] (12) (vi) and see also [135] (j)
[33] Circular 41 of 2019 at [25] and [128]
[34] Circular 41 of 2019 at [129] (f)
[35] Circular 37 of 2019 at [23]

involved in drafting the brief:[36] It would seem that the problem in that regard is a lack of compliance rather than some lacuna in the existing rules.

27) My wider concern is that the rules are written with an underlying assumption that parties will be represented by learned counsel, or at a push, by learned litigants-in person. As noted earlier, the members of our society exist along continuums and one of those is capability with reading and writing. Our criminal courts are probably well aware of defendants' wide-ranging capacities but our civil courts persist with a de facto hegemony of the well-educated or those who can afford the services of the well-educated. A move towards a wider acceptance of oral evidence will go some considerable way towards allowing litigants who have difficulty with writing coherently, succinctly, cogently or intelligibly, to still be able to tell their story.

28) Of course, there will often be times when, in the interests of natural justice, parties need to be apprised of what their opponents will say. Simple "will say" documents should be more than adequate for that purpose. Those who have difficulty with writing should be provided with assistance in transcribing their "will say" statements and that assistance might extend to helping order the contents of the statement to be logical and cohesive.

### On Short Form Trial Procedure

29) As noted earlier, although initiatives such as having options for litigants to chose shorter form trail procedures will likely make the cost of litigation slightly cheaper, they will still not make them sufficiently affordable for the vast majority of ordinary New Zealanders. As Dr Toy-Cronin noted in the executive summary of her thesis, "*You can't pay $500 per hour, when you earn $500 per week*."

30) That aside, there are some flaws in the proposals put forward by the New Zealand Bar Association.[37]

a) Doing away with standard discovery is a bad idea. Although I wouldn't support going back to the Peruvian Guano test, I agree wholeheartedly with the submission received by Sir Rupert Jackson:[38] Justice as we know it is really very simple. It involves establishing the relevant facts and then determining if the law as it applies to those facts warrants the granting of a legal remedy. Without discovery orders parties can hide relevant facts that are adverse to their case, and do so with impunity, such that the facts are not known and as a result justice cannot be done.

b) The tailored discovery[39] proposed by the New Zealand Bar Association (NZBA) would have parties identifying particular documents, or classes of documents sought. The glaring question is how would litigants know what documents or classes of document to seek?

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[36] High Court Rules 2016 r 9.7 (4) (b).
[37] Circular 39 of 2019.
[38] Circular 41 at [13] (a)
[39] Circular 39 of 2019 – NZBA proposed Short Causes Procedure at 5.4

Without being able to know what documents were held by the opposing party, or understand the intricate nuance of the other party's document management systems, the only "*class*" of document that could reasonably be asked for are those that adversely affect that party's case and those that support the other party's case. That simple and fair classification system is, of course, already codified in the High Court Rules.[40]

c) The NZBA further suggest that all interlocutory applications be resolved on the papers unless otherwise ordered. The risk here is that interlocutory skirmishes will be relegated to the battlefield of erudition. That's fine if you subscribe to what Dean Roscoe Pound described as "*the sporting theory of justice*".[41] However if interlocutory matters are to be determined on grounds wider than counsel's capacity for writing cogently, then parties need to be able to reserve the right to be heard in person.

## On Other Proposals for Reform

31) It is perhaps pedantic, but I would like to see a jettisoning of the term "unrepresented". When I act as a litigant-in-person I work exceptionally hard at understanding germane law and court procedures. I also hold myself to account in maintaining the same, or higher, standards of integrity that are expected of Officers of the Court. And yet, when I make applications or submissions to Courts, I all too frequently find these to be discounted or even worse completely ignored in ways that don't happen to opposing parties represented by counsel. It is as if I am indeed unrepresented and as such any representations I make are deemed to be of light or no weight. I am not "unrepresented". I am self-represented. In fairness, I've observed this apparent judicial bias only in some judges while others are appropriately respectful and entirely fair. Sadly, the former category, to lesser and greater extents, makes up the majority in my albeit anecdotal experience. What is more, my observations of this bias are not correlated with my success or failure. Although it is widely held that, "a self-represented has a fool for a client," I am not so silly as to think that judges who find in my favour are fair, and those who find against me are not.

32) I have at times challenged these biases when I have encountered them but to date these challenges have been met with what looks like a concerted effort to sweep evidence of any such judicial bias under the carpet. These concerted efforts take the form of blithely ignoring the concerns I raise. I could take some degree of comfort were I to be told that I was wrong, that my allegations of bias are unfounded because of some legal reason, but to date that is not what has happened. I'm just ignored! I don't bring these matters to the attention of the Rules Committee in a misguided attempt to express rancour or seek succour but because the Rules Committee can, in light of this information, make changes that will harvest some of the low-hanging fruit of improving access to civil justice. I have some sympathy with sweeping

[40] High Court Rules 2016 r 8.7 (b) and (d)
[41] Circular 40 of 2019 at [60]

evidence of what could be wide-spread judicial bias against litigants-in-person under the carpet. It is absolutely essential that public confidence in the judiciary is maintained. Without that, we as a society descend into anarchy. My proposal is that public confidence in the judiciary will be better maintained and perhaps even enhanced with greater accountability through increased transparency. Increased transparency results in increased accountability, which results in less opportunity for bias, which results in more equal access to justice. That is a sustainable approach to maintaining public confidence in the judiciary. The Covid19 crisis has put enormous pressure on conventional media in a time when a public hungry for information are turning to digital media outlets. My proposals are simply to go back to times, now long gone, when media could afford to have reporters sitting in courtrooms, but to do so digitally. Specifically, I propose:

a) Interlocutory applications should by default be heard in open court for chambers, not in chambers.

b) Decisions on the papers should (unless suppressed or parties seek redactions on grounds of confidence or privilege) be published digitally by the Courts complete with the papers on which the decision was based.

c) All judgements should (unless suppressed or parties seek redactions on grounds of confidence or privilege) be published digitally by the courts complete with -

    i) A transcript of the hearing; and

    ii) Written submissions from the parties; and

    iii) Bundles of authorities; and

    iv) Any written evidence; and

    v) Notices by the parties; and

    vi) The pleadings.

The digital publishing of these documents would not put courts to considerable expense if litigants were required to file these documents electronically. I don't doubt that the majority of this information will never be looked at, but for those legal commentators who do take an interest in such matters, they will be as (or better) informed as court reporters in days gone by. As with those olden-days reporters, commentators will be able to see for themselves the full scope of information before a judge, and will not have to solely rely on the, by necessity brief (or in my experience inappropriately truncated) summary of the matters put before a court that are provided in any judgment.

## On Areas of Influence

33) The Rules Committee quite correctly notes that its role is limited to that of making Court rules and it has no role outside that remit. However, Mr Hartley suggests that it is nonetheless incumbent on the Rules Committee to exercise leadership in areas outside of its remit.[42]

34) I suggest that Mr Hartley is only partially correct. It would seem obvious that a coordinated effort is required to make the changes necessary to improve access to civil justice. But no matter how much "leadership" the Rules Committee shows it can only change the things it has control over. The same is not quite so true for individual members of the Rules Committee. Although no one on the Committee wields power as such, several members of the Committee are in positions to wield considerable influence in organisations that will need to cooperate should the Committee hope to bring about effective change to the end of closing the justice gap. My remaining submissions then fall into a category of suggestions for members of the Committee, who with the backing of the Committee, might use their influence in other organisations to try to bring about change that will support the initiatives of the Rules Committee to effect greater access to civil justice:

a) A more inquisitorial model of civil justice is going to come at a cost. Our Scandinavian cousins have significantly more judges per head of population[43] and although we will probably not need to reach Denmark's giddy ratios, more access to justice will mean more people accessing justice and that will require more judges. The role of assessor/amicus as proposed by Justice Kós, and slightly adapted by these submissions, will likewise come at a cost. The executive branch of Government will need to be convinced that these increased costs are worth it.

b) Sections 50 (1) and (2) of the Dispute Tribunal Act 1988 (along with any other similar statutory requirements) need to be amended. The Disputes Tribunal hears disputes of up to $30,000 in value. As noted earlier in these submissions, such sums of money are of critical importance to the poor and those of modest means. Yet, if the Disputes Tribunal gets it wrong, applicants are only allowed to appeal on grounds of unfairness. Such restrictions don't apply to more wealthy litigants in the District or High Courts. Any such class-based statutory discrimination needs to be repealed. Every single New Zealander needs to be equal before the law.

c) Fears about losing income that may arise from the bar should be assuaged by noting increased revenue from new assessor/amicus opportunities and the reality that existing wealthy clients will in all likelihood still prefer to engage counsel rather than take their chances with a court appointed assessor/amicus.

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[42] Circular 40 of 2019 at [89]
[43] Circular 40 of 2019 at [45]

d) Putting aside the "private benefit" arguments that could underpin a user-pays public policy, it is clear that there are even stronger public-good imperatives that underpin wide public access to public justice through the courts as opposed to through alternative dispute resolution.[44] If a more inquisitorial model is adopted, that includes a screening-out of unmeritorious claims as proposed by these submissions, then court fees should be waived for proceedings under that model. To do otherwise would exclude an entire class of New Zealanders on the basis of being part of that class (i.e. the impoverished) and make a mockery out of the judicial oath to do right to all manner of people.

e) Judicial bias against litigants-in-person needs to be tackled. This is not because I've alleged such bias, but because my concerns are corroborated by the work of Dr Toy-Cronin and Justice Faulks, along with, for example, the surprise resignation of US Seventh Circuit Judge Richard Posner citing wide-spread judicial bias against pro-se litigants. The organisation best-placed to deal with this is the Institute of Judicial Studies (IJS). My initial correspondence with the Board of the Institute to the end of making the Institute's work more transparent was politely and appropriately responded to by the Chair. My subsequent correspondence about the need for the IJS to be more transparent to the end of improving access to justice seems to have been buried by IJS staff and not passed on to the Board.

f) The common law rule that self-represented litigants are not to be awarded costs needs to go. It is in everybody's interests if parties can resolve their disputes without going to court. One of the reasons then for only partial costs recovery is to disincentivise parties from going to court. As it stands that disincentive is not applied equally. Rich people who can afford to engage lawyers are less disincentivised as the poor who cannot. The rule has been rescinded in the UK (by legislation) and in Canada (by judicial decision) whereas New Zealand and Australia are laggards in not overruling this glaring inequity. The Supreme Court has passed the ball to Parliament[45] but Parliament won't address the issue without a champion.

Thanks for listening.

Nāku iti noa, nā

Peter Stockman

[44] Circular 40 of 2019 at [9] and [10]
[45] *McGuire v Secretary for Justice* [2018] NZSC 116 at [87] (d)