Memorandum for Rules Committee on Proposals for Improving Access to Justice

1. I refer to the Committee's paper issued on 14 May 2021 outlining its proposals for rule changes in all first instance civil jurisdictions for the purpose of improving access to justice.

2. I write with a degree of diffidence as a retired judicial officer whose views may have suffered from an extended absence from direct participation in the litigation process. However, the views I wish to express are long held and have been repeatedly reinforced by my experience since returning to private practice, principally as a mediator but to a more limited extent as an arbitrator. I have frequently encountered cases where the aggregate (and largely unnecessary) legal costs and disbursements for all parties have presented a significant obstacle to resolving a dispute to which there was otherwise a commercially sensible and acceptable solution that was identifiable at a very much earlier stage.

3. I wish to congratulate the Committee on its proposals. If implemented, and enforced, they should have a positive effect in reducing the wasted time, cost and resources which have increasingly bedeviled litigation over the past 20 to 30 years. I am confining my comments to the proposals for reforming the High Court Rules.

4. The root cause of the current procedural problems seems to be an ingrained failure or inability within the legal profession to understand either (a) the laws of evidence and the touchstone of relevance as the guide to admissibility or (b) the fundamental legal principles which govern the determination of a particular set of disputed facts. The result in procedural terms, summarized in what the Committee refers to as the maximalist approach, is the proliferation of lawyers briefs in substitution for a witness's evidence, the production of vast numbers of irrelevant documents, and the citation of volumes of tangential authorities and related material - these practices have been progressively allowed to become the norm. The result in terms of access to justice is exorbitant, often prohibitive, costs for the litigants and the wastage of publicly funded resources with all the consequences of delay and disruption.

5. The Committee's proposals are well structured to address these problems. But they are only one, much needed, side of the coin. The other side, without which the proposals will be largely ineffective , is securing a uniform judicial commitment to enforcement of whatever new rules are formulated. The Committee notes the current concern about a perceived judicial inability or unwillingness to exercise sufficient control over litigation to ensure the necessary degree of proportionality between procedural obligations and the needs of the case. The convention of judicial restraint and inadequate resources are given as possible reasons. There are likely to be others such as experience, confidence and familiarity with the issues.

6. Whatever are the reasons, it is essential that the reforms are a truly joint initiative with an equal judicial commitment backed by summary powers of enforcement where appropriate. The Committee's expectation that judges will have to police compliance with the new rules more strictly than is presently the case is not enough. An institutional revision or reorientation of judicial attitudes towards performing what will be an essentially case management function and the express provision of more targeted resources are essential. If effectively introduced, this approach would certainly pay dividends in the form of streamlined processes, reduction of waiting times to a substantive trial, and focused argument and evidence at trial, free of voluminous and largely inadmissible briefs, common bundles and lists of authorities.

7.The initial issues conference will be decisive to the success of the new rules. It should, if done properly, constructively shape the future course of the litigation. The companion provision introduced in the previous reforms of the rules failed. The issues conference became a routine or mechanical event where lip service was paid to judicial participation. Its only result was to add an extra layer of cost for the parties ad associated delay without any real proactive judicial engagement with the issues. I cannot recall hearing a case where the first issues conference ever served a productive purpose.

8. I am not suggesting that achieving effective judicial participation will be an easy task. Some judges will be better able and equipped than others. Doubtless the Committee will seek the High Court's informed input into the final form of the new rules. One mechanism for assisting judges will be prescriptive procedural rules for the initial issues conference governing all projected steps for preparation of the trial or hearing. The purpose of the conference should be for each party to present its case - the essential evidence and legal cause or causes of action of defence (in ranking order) – in a form as close as possible to trial. The procedure should operate to generate counsels' early and timely concentration on what is truly in dispute, and encourage mutual dialogue designed to settle the real issues.

9. Some suggestions for the initial issues conference, additional to those outlined in the Committee's report, are :

(1) Provision of a one- page memorandum by each party stating its theory of the case, however complex it is claimed to be. This document, as much as any other, should define the true areas of difference between the parties and assist in identifying the future shape of the litigation;

(2) Provision of will say statements of prospective witnesses of a limited length (say five pages) accompanied by a solicitor's certification that each statement is in the witness's own words;

(3) A statement of those facts upon which it is proposed to obtain an expert's opinion: identifying the extent to which (a) there is agreement and disagreement and (b) the expert's opinion will be of substantial assistance to the Court in understanding other evidence relevant to a specific issue in the case. By way of brief explanation, the provision of so-called experts' briefs has become an abuse of he rules. Frequently an expert is an advocate. Independence is an elusive attribute. The test for admissibility of substantial helpfulness in understanding other evidence is ignored. An expert's elaborate opinion is often undone at trial because it is based on one or more factual error or errors. I agree with the Committee's suggestion of greater use of a court appointed expert but reserving to the parties leave to obtain separate or additional opinion evidence on a specific area of disagreement with the court appointed expert.

10. I repeat my appreciation for the Committee's innovative work and wish it all the very for the journey ahead.

Rhys Harrison
2 July 2021