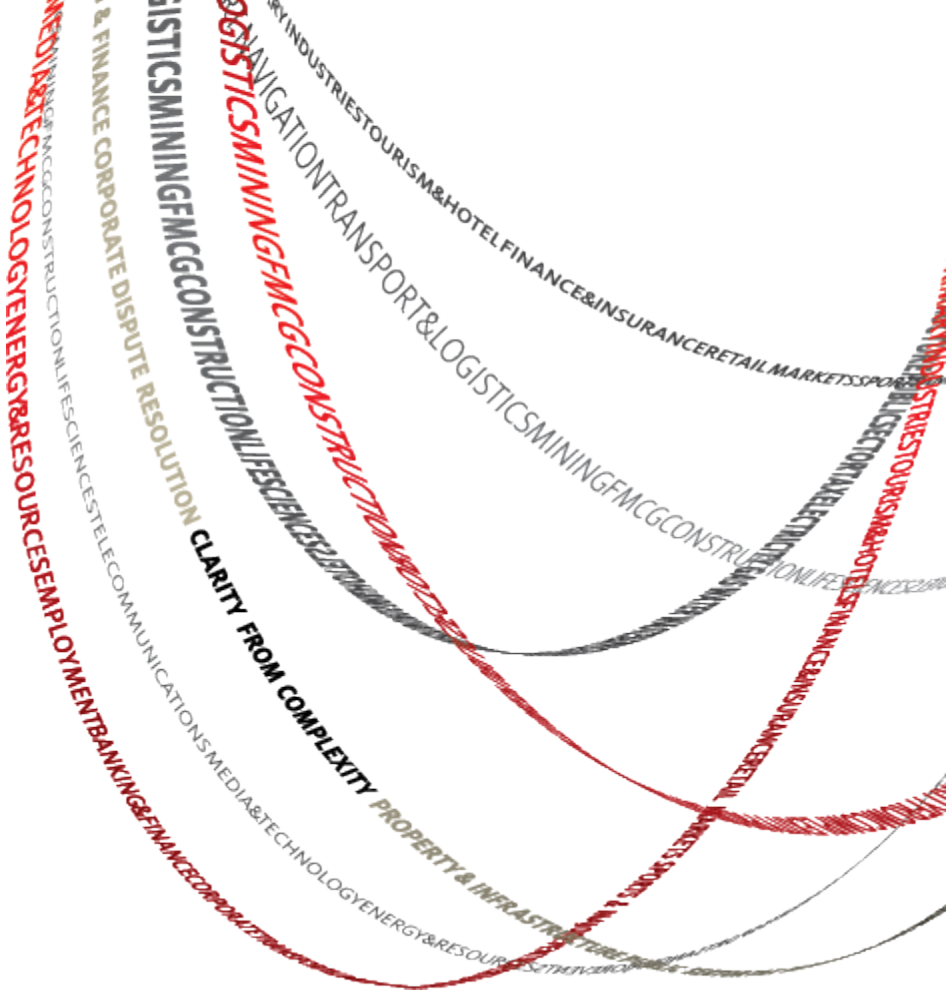


# The Rules Committee | Te Komiti mō ngā Tikanga Kooti

# Improving Access to Civil Justice

Submission by Simpson Grierson on Further Consultation with the Legal Profession and Wider Community

2 July 2021

Simpson Grierson

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# Contents

# Introduction

Simpson Grierson welcomes the opportunity to make a submission on the Further Consultation Paper released by The Rules Committee | Te Komiti mō ngā Tikanga Kooti (**Rules Committee**) on 14 May 2021 in relation to Improving Access to Civil Justice (**Consultation Paper**).

We are one of New Zealand's leading commercial law firms. We have a broad national litigation practice and act for clients on a wide range of disputes, including those involving breach of contract, company law, competition and regulatory, financial services, public law, insurance, construction, property, insolvency, media law and defamation, intellectual property, class actions and litigation funding, resource management and environment, product liability, securities enforcement and banking, privacy, trust law and tax. Our clients are a mix of corporate, government, charitable and international entities, as well as private individuals.

The matters on which we act are predominantly in the High Court, Court of Appeal and Supreme Court, and often involve complex commercial litigation. We also act on other matters in the District Court and Family Court, and in specialist tribunals.

This submission represents the views of Simpson Grierson, and not those of any of our clients.

Please contact either of the people below in respect of this submission:

# Executive summary

**1.** We fully support improving access to civil justice within New Zealand. The ability of parties to enforce or defend their legal rights in our court system is fundamental, and inherently requires the system to be accessible to them.

**2.** Our current rules have as their objective the "just, speedy, and inexpensive determination of any proceeding or interlocutory application".[1] We agree that "proportionate" should be added as a further criterion.

**3.** We have responded to the reforms proposed by the Rules Committee in its Consultation Paper with these objectives in mind, while recognising it is important to balance each of these objectives carefully.

**Proposed changes in the High Court**

**4.** We agree there is scope for streamlining procedures in the High Court, particularly for less complex cases to ensure the process is proportionate. However, given the High Court's broad jurisdiction, we believe there is no "one size fits all" approach that enables all proceedings to be determined in a just, speedy, inexpensive and proportionate way.

**5.** Instead we are of the view that some aspects of the High Court Rules should contemplate alternative procedures depending on the nature and complexity of the proceeding.

**6.** Our submission sets out the extent of the changes we think could appropriately be made, bearing in mind that proceedings must still be determined in a just way. In particular, we do not consider that discovery should be replaced with an adapted form of initial disclosure. Instead, in our view access to justice can be better achieved through a more targeted approach to making discovery orders with increased judicial involvement in the scope of such orders taking place at the issues conference.

**7.** We support a greater use of issues conferences by the Court although, given the matters we have raised in relation to timing and discovery and the overarching risk of (a perception of) pre-determination, we do not believe the scope of issues conferences should be as expansive as is proposed.

**8.** Further, we have reservations that presumptively deciding interlocutory applications on the papers would increase access to justice, but we are supportive of the majority of the proposed trial and expert witness reforms.

**Proposed changes in the District Court**

**9.** We are largely supportive of the changes proposed in the District Court. We agree that at this stage the most benefit can be gained from "strengthening the institutional competency of the District Court's civil jurisdiction"[2] rather than through changes to the District Court Rules.

**10.** However, we do not consider that introducing more inquisitorial aspects to the District Court to enable a more flexible process for determining substantive claims is justified.

1 High Court Rules 2016, r 1.2; District Court Rules 2014, r 1.3.
2 Consultation Paper at [57].

**Proposed changes in the Disputes Tribunal**

**11.** We also support the majority of the changes proposed in the Disputes Tribunal.

**12.** In terms of jurisdiction, we suggest this is increased to $50,000 but can only be extended beyond this with the agreement of all parties. In our view increasing jurisdiction beyond $50,000 as of right with additional or graduated appeal rights would introduce unnecessary complexities to the Disputes Tribunal process.

**13.** In particular, we consider that beyond $50,000 it is more appropriate for referees to be required to give effect to the law and to enforce legal rights and obligations. However, affording parties a right of appeal based on errors of law is contrary to the basis on which disputes are currently determined and the absence of legal representation before the Tribunal, and should be avoided.

**14.** The success of the Tribunal in hearing and determining disputes in an efficient and cost-effective way is, in our view, based on the relative simplicity of the current model.

# Proposed changes in the High Court

**15.** The Rules Committee is proposing that "the High Court's procedures should be considerably streamlined in most cases, being of the preliminary view that less onerous forms of proceeding are consistent with the requirements of justice in most cases".[3]

**16.** It has noted the "more onerous obligations in the existing rules would attach only where the Court is satisfied that is proportionate to the value, complexity, and importance of the dispute to the parties or wider community and/or necessary in the interests of justice".[4]

**17.** The High Court has a broad general civil jurisdiction, hearing claims where the relief sought exceeds $350,000 (with no upper limit) as well as other claims for which lower courts do not have jurisdiction e.g. judicial review, bankruptcy and liquidation. It also hears appeals from other courts and tribunals, including the District Court and the Family Court.

**18.** As the High Court hears and determines a wide variety of civil matters, we consider that improving access to justice necessarily involves recognising that what is proportionate across that spectrum will vary.

**Discovery**

**Proposal**

The rules of discovery will be replaced by disclosure rules that operate when the statements of claim and statements of defence are filed, adapting the current rule for initial disclosure. In summary:

- parties will disclose all of the key documents they seek to rely upon in support of their claim/defence;
- parties will also be obliged to disclose adverse documents in accordance with a duty of candour; and
- additional disclosure can be directed by a Judge where justice requires, including at [an issues conference].

**19.** We agree the current discovery process can be cumbersome, time-consuming and expensive, and that it needs to be improved. However, we oppose the proposal to abrogate discovery and replace it with an adapted form of initial disclosure.

**20.** Discovery is a crucial process in High Court litigation. It allows parties to have fair access to documents that are relevant to the issues in dispute in the case. However, the current discovery rules do not adequately take account of the enormous digital footprint most commercial entities now occupy, and the significant number of documents that need to be searched during the discovery process.

*Concerns about replacing discovery with adapted initial disclosure*

**21.** The proposal seeks to bring the substantive document exchange to a much earlier stage in proceedings than is currently the case, and would see parties disclosing the "key documents" on which they seek to rely as well as adverse documents at the time they file their pleadings.

3 At [64].
4 Ibid.

**22.** We have identified a number of concerns in relation to this 'up-fronting' of document exchange, which highlight in particular the difficulties associated with the timing of such a step:

(a) We foresee difficulties with an approach that requires disclosure of documents before all parties have filed their pleadings. In particular, plaintiffs would be required to search for and identify disclosable documents without knowing what defences will be raised in response to their claim (including any affirmative defences). We expect that, as the parties' pleadings are filed and the key issues in dispute emerge, further documents would need to be disclosed through an iterative process. This iterative process would cause the parties to incur further expense as they would need to undertake another review (often of the same documents) in order to identify any additional responsive documents.

(b) Moving document exchange to an earlier stage has the effect of 'up-fronting' a significant cost for the parties. Rather than enhancing access to justice, this has the potential to create a barrier as it would make the initial costs associated with filing a proceeding disproportionately high.

(c) It will create difficulties for plaintiffs needing to file a proceeding when faced with time constraints such as a limitation period. Not only would they need to prepare their statement of claim, but they would also need to undertake searches of their files, review responsive documents, and provide their disclosure at the same time.

(d) It imposes a significant burden on defendants, who in most situations currently have 25 working days to file a statement of defence. Within that time period they would now need to investigate their position in order to plead their defence, review the plaintiff's disclosure, and embark on their own document review and disclosure process. This could create an imbalance between plaintiffs and defendants, unless a significantly extended period is granted for defendants to undertake these steps.

(e) The proposal does not appear to address the position where a defendant may seek summary judgment or to strike out the plaintiff's claim. In those instances, it is our view that the defendant should not be obliged to go through an early disclosure process until such applications can be made and determined.

(f) The "duty of candour" requirement potentially lacks the rigour of the current discovery regime. Parties are currently required to undertake diligent searches and swear or affirm an affidavit that outlines the steps taken to satisfy the terms of the discovery order. Parties can also test and negotiate discovery categories through the tailored discovery process. The requirement that parties disclose adverse documents in accordance with a duty of candour may be open to abuse absent a requirement to undertake searches or file an affidavit of documents.

(g) The affidavit of documents also requires parties to identify documents over which they claim privilege, which provides transparency in the discovery process and allows these decisions to be challenged and tested. It appears privileged documents would not need to be identified in the proposed adapted disclosure.

**23.** In short, we do not believe it is appropriate for the principal document exchange to occur at the same time as the exchange of pleadings. It should, in our view, still follow pleadings being filed – but subject to the potential efficiencies identified below.

*Alternative proposal for improving discovery process*

**24.** In our view, given the broad jurisdiction of the High Court, the difficulty is that what is a proportionate discovery process for a straightforward breach of contract claim seeking damages of $500,000 will be quite different to what is proportionate in a complex multi-million dollar securities claim.

**25.** On that basis, in order to improve access to justice we consider it would be preferable to provide for more than one discovery "track" depending on the nature of the proceeding. This recognises that there is no "one size fits all" approach for discovery in the High Court.

**26.** We note the Rules Committee's review of discovery regimes in other jurisdictions in its Initial Consultation paper of 11 December 2019.[5] We also note the Rules Committee's reluctance to propose a forms-based approach to disclosure, based on the English experience of its ongoing Disclosure Pilot. We agree that a forms-based approach should be avoided, particularly in light of the 2009 District Court reforms.

**27.** However, despite potentially appearing overly bureaucratic, the English pilot scheme has some commendable features, including:

(a) Initial disclosure of key documents on which the party has relied, and key documents necessary for the other party to understand the case it has to meet;

(b) Extended disclosure instead of, or in addition to, initial disclosure on the basis of five "disclosure models" which define the extent of the parties' disclosure and/or searching obligations. Parties are expected to identify, discuss and seek to agree the scope of any extended disclosure.

(c) The scope of extended disclosure is determined at the first case management conference "having regard to the overriding objective [of enabling the court to deal with cases justly and at proportionate cost] and the need to limit disclosure to that which is necessary to deal with the case justly". Criteria used to make this determination include the nature and complexity of the proceeding, the importance of the case, the likely probative value of the documents, the number of documents involved, the ease and expense of searching for documents, the financial position of each party, and the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

(d) Identification by parties of the "issues for disclosure", which are defined in the pilot as being "only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission".[6]

**28.** Further, the principles underpinning the English pilot[7] align with the principles the Rules Committee is seeking to advance. These include:

(a) Recognising that "disclosure is important in achieving the fair resolution of civil proceedings", and that it "involves identifying and making available documents that are relevant to the issues in the proceedings".

5 Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019 at Appendix 2: https://www.courtsofnz.govt.nz/assets/cph1.pdf

6 Civil Procedure Rules, Practice Direction 51U – Disclosure Pilot for the Business and Property Courts at [7.3]: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51u-disclosure-pilot-for-the-business-and-property-courts#7

7 At [2.1]-[2.4].

(b) An expectation by the Court that parties (and their representatives) will "cooperate with each other and [will] assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the Court in the most efficient way possible".

(c) The Court is concerned to "ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate…in order fairly to resolve those issues, and specifically the 'issues for disclosure'".

**29.** We do not consider that in a New Zealand context it would be necessary to have as many as five different disclosure models as this is likely to make the process unnecessarily complicated. However, we consider that having two or three disclosure tracks would ensure a more proportionate process that limits discovery appropriately in the context of the proceeding. At a high level, these might include:

(a) straightforward proceedings where no further document exchange needs to occur beyond initial disclosure;

(b) average proceedings where limited further document exchange needs to occur in relation to key issues in dispute; and

(c) complex or significant proceedings where more detailed document exchange is required.

**30.** Determination of the appropriate disclosure track, and the scope of additional disclosure required, would occur at the issues conference with judicial involvement to ensure the process remains proportionate.

**Issues conference**

**Proposal**

There would be an initial issues conference held with a Judge, counsel and party representatives for each party. The plaintiff would be expected to explain its case and outline the evidence it has for establishing it. The defendant would have to do the same. The merits of the claim would be fully addressed and discussed. At the conference:

- the Judge would participate in identifying the key issues and what would be involved for a party to succeed or otherwise on those issues, and by those means may assist the parties to resolve the claim without further litigation;
- any further interlocutory steps required for the fair disposition of the case would be identified (such as any additional disclosure);
- the requirements of the trial can be identified; and
- the potential for resolution by alternative dispute resolution, or judicial settlement conferences would be addressed.

**31.** We consider there is merit in having a greater level of judicial management at an issues conference following pleadings being filed. However, we consider the proposal for the scope of such an issues conference should be refined as set out below.

**32.** We also note more generally that we anticipate an issues conference will require a greater level of judicial resource than case management conferences currently demand given an

issues conference is likely to take longer and require additional preparation by the Judge. Based on current judicial resourcing, this could potentially delay the scheduling of issues conferences (which would be contrary to the objective of these reforms).

**33.** It may be that more time becomes available as a result of interlocutory applications being presumptively determined on the papers (which we oppose), or in the longer term through a higher rate of earlier resolution of proceedings. However, as part of finalising changes to be made as a result of this consultation process, we consider the adequacy of judicial resource in the High Court should be reviewed to ensure it can adequately meet the needs of the new regime going forward.

*Discovery "track" to be determined*

**34.** In line with our comments on the proposal to replace discovery with a form of adapted initial disclosure, we consider the issues conference should be used as a forum to determine a discovery "track", with the Judge needing to be satisfied that the scope of additional disclosure is proportionate.

**35.** Currently discovery orders are often negotiated and agreed between the parties with a Judge making the final orders by consent. As a result, the scope of the discovery exercise tends to be the product of negotiation rather than a careful exercise undertaken in conjunction with the Judge to ensure discovery is not wider than is reasonable and proportionate in order to fairly resolve the issues in the proceeding (see paragraph 28.(c) above).

**36.** In this respect, we consider that an increased level of judicial engagement in the issues and scope of discovery at this early stage will result in significant time and cost savings by ensuring discovery is more targeted.

*Analysis of key issues and requirements for success*

**37.** We support a more thorough consideration by the parties and the Court at an issues conference of the key issues arising from the pleadings and the elements necessary to successfully establish the claim and defence. This process would necessarily assist the formulation of appropriately targeted discovery orders as noted in paragraphs 24-30 and 34-36 above.

**38.** However, for the reasons outlined in paragraphs 40 to 42 below, we do not support this analysis extending to a consideration of the merits of the parties' respective positions.

*Interlocutory steps and requirements for trial*

**39.** Where it is possible to identify these factors at a first (or subsequent) issues conference, then the Judge and the parties should certainly do so. However, we note that in complex litigation it is often simply too early in the process to meaningfully address these matters. In those circumstances, we suggest they are deferred to a subsequent issues or case management conference.

*Merits of the claim*

**40.** The proposal currently contemplates the Judge and the parties fully addressing and discussing the merits of the claim at the issues conference. We are concerned that this necessarily requires a degree of early determination of the matter when not all of the relevant facts, documents and evidence have been exchanged and are able to be put before the Court. This may be prejudicial in particular to parties that require oral or expert

evidence to prove their case (which is not yet available or is continuing to be developed), or where the merits are finely balanced.

**41.** Although an early indication of merits may assist some parties to reach a speedy resolution or settlement of a matter, this does not necessarily equate to a just outcome and parties may feel unfairly pressured to settle rather than pursue a genuine claim to trial.

**42.** Accordingly, in our view, the merits of the claim should not be a consideration at any issues conference.

*Increased cost at an early stage may create barrier*

**43.** Consistent with our comments on the discovery proposal, we are also concerned that the significantly broader scope of an issues conference (including each party being required to explain its case and outline the evidence it has for establishing it so that the merits can be fully addressed) would result in a "mini-trial" that causes parties to devote significant resources to prepare for the conference.

**44.** More generally, the front-loading of costs brought about by an adapted disclosure regime and the proposed issues conferences could, in our view, create a real barrier to parties accessing civil justice. Many parties do not have the financial resources to be able to incur the costs associated with the proposed new requirements over a relatively short space of time. While there is a general acknowledgement that litigation is expensive, many parties are able to afford and budget for litigation when the cost is spread over a longer period. If the bulk of the costs of litigation are brought to an earlier stage in the proceeding, it may simply be unaffordable for many litigants wishing to bring a claim in the High Court.

*Timing issues*

**45.** The proposal assumes that both disclosure and inspection have been completed by the time the issues conference takes place. For complex cases, parties would need a substantial amount of time to review all documents and assess their respective positions prior to being in a position to present their case to the Court at the conference and outline the evidence they have to establish why they should succeed.

**Proportionality**

**Proposal**

The guiding principle would be proportionality – including when deciding what further interlocutory steps are required, assessing what will be needed for trial, and identifying how the trial should proceed. Reference to the concept of proportionality would be added to the purpose provisions in r 1.2 of the High Court Rules 2016 (and r 1.3 of the District Court Rules 2014).

**46.** We support the use of proportionality as a guiding principle, and the inclusion of it as an objective of the High Court Rules in r 1.2 (and the District Court Rules in r 1.3).

**47.** We agree steps taken in a proceeding should be proportionate to the value or complexity of the issues in dispute, and this is consistent with our submission in relation to the proposed High Court reforms.

**Interlocutories**

**Proposal**

Interlocutory steps would be presumptively disposed of on the papers unless an oral hearing is directed. Oral hearings would occur only where the convening of a hearing is proportionate to the complexity and important of the interlocutory dispute and the proceeding as a whole.

**48.** We consider that interlocutory applications should continue to be heard orally, unless the Court grants leave or all parties agree for a particular application to be determined on the papers.

**49.** While there may be some benefits in having interlocutory steps presumptively disposed of on the papers, such as reducing demands on judicial resource as a result of avoided hearing time and potentially having applications determined more quickly, on balance we consider these are outweighed by the significant benefits of oral hearings which in many cases lead to fairer and more just outcomes.

**50.** Having said that, there are some interlocutory applications that would be more suitable for determination on the papers. The Court should have the power to grant leave for this to occur. Parties should also have the option to agree to forgo an oral hearing.

*Oral hearings allow Judges to test and clarify the application and opposition*

**51.** An oral hearing allows the Judge to question counsel in order to test and clarify the submissions and evidence being advanced, and to raise other matters that may not be covered in the filed documents. This enables the key issues to be distilled and clarified in an efficient manner.

**52.** The Judge does not have the same opportunity to ask questions if interlocutory steps are disposed of on the papers. While counsel may have a view as to the key issues, the Judge may have a different (or more nuanced) perspective.

**53.** Similarly, issues may arise in the course of oral argument that were not apparent to the parties from the outset. An oral hearing allows these matters to be dealt with more flexibly and efficiently without the need to file further memoranda.

*Oral hearings often result in disputed issues being narrowed or refined*

**54.** In our experience, exploring an interlocutory application through oral submissions with the Judge results in the scope of the orders sought and/or grounds of opposition being refined and narrowed.

**55.** It also provides the parties with a valuable opportunity to engage in the case and aspects of the evidence at an early stage.

**56.** Further, we note a material proportion of interlocutory applications are ultimately resolved prior to an oral hearing. We believe a contributing factor to this is that the prospect of the scrutiny associated with an oral hearing deters the parties from maintaining unmeritorious applications and encourages them to reach agreement on as many issues as possible.

**57.** We are concerned that having interlocutory applications presumptively determined on the papers will soften these deterrence factors. This could result in parties making wide-

ranging applications (of varying degrees of merit) and simply leaving the Judge to make a determination. While such conduct could potentially be controlled through adverse costs awards, this may nevertheless lead to an increased demand on judicial resources.

*Applications that finally determine a proceeding should not be determined on the papers*

**58.** In some cases, such as summary judgment and strike out, an interlocutory application has the potential to finally determine the proceeding for the parties.

**59.** We consider it would be contrary to the interests of justice to have such applications determined without an oral hearing and the parties being afforded the opportunity to make oral submissions before the Judge.

*Determination on the papers risks lengthier written submissions*

**60.** Synopses of argument for interlocutory applications are currently limited to 10 pages.[8] If oral hearings are dispensed with, that page limit would be insufficient. This is because parties will no longer be filing a "synopsis" of their arguments to be developed further orally, but rather a comprehensive set of written submissions.

**61.** We are concerned that this would result in very fulsome written submissions. Since the written submissions would be the final opportunity the parties have to put forward their case, they will likely feel the need to identify and argue every potential issue that could arise.

*Oral hearings provide advocacy opportunities to junior counsel*

**62.** Interlocutory hearings often provide opportunities for junior counsel to appear and make oral submissions to the Judge. Determining the majority of interlocutory applications on the papers would remove this opportunity for junior counsel to develop their advocacy skills by advancing part or all of the oral argument.

*Timely media reporting*

**63.** While interlocutory steps are generally heard in chambers, there is discretion for the Judge to direct otherwise[9] and applications for summary judgment are heard in open court.[10] There is also a general rule allowing particulars of a hearing in chambers to be published.[11]

**64.** All of these rules allow timely media reporting of important interlocutory steps to ensure open justice. If interlocutory steps are presumptively disposed of on the papers, this would remove the ability for media to report on these issues until after the judgment is released. There could also be an increase in the number of applications to access the court file in order for the media to provide comprehensive and accurate reporting.

*Conclusion*

**65.** For these reasons we support all interlocutory steps continuing to be heard orally by default, unless the parties unanimously agree that an application could be determined on the papers or leave of the Court is granted to do so.

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8 High Court Rules 2016, r 7.39.
9 Rule 7.34.
10 Rule 7.36.
11 Rule 7.35.

**66.** If the Rules Committee decides that interlocutory steps should nevertheless be presumptively determined on the papers, we suggest this presumption should not apply to interlocutory steps that would finally determine a cause of action or proceeding (that is, summary judgment and strike out applications).

**Common bundle documents admissible as to the truth of their content**

**Proposal**

Documents in the common bundle would be admissible as to the truth of their content subject to a challenge being advanced.

**67.** We support the proposal that documents in the common bundle should presumptively be admissible as to the truth of their content, subject to a challenge being advanced.

**68.** One potential issue we have identified is that there would need to be greater scrutiny of documents by counsel for admissibility during the preparation of the common bundle, particularly in relation to hearsay statements. This should be factored into the timetable for completion of the common bundle with objections by any party being identified either in the index to the common bundle or at the hearing.

**Witnesses not expected to address chronology of events**

**Proposal**

Witnesses would not be expected to address the chronology of events revealed by the documentation, with the facts to be drawn from the documents instead expected to be outlined in a separate memorandum filed with the party's evidence (or perhaps in openings).

**69.** We consider it would be beneficial for each party to prepare a chronology of events by reference to the documents (as is currently contemplated by r 9.9), and for the documents identified in the chronology to be received into evidence automatically without the need for them to otherwise be referred to by a witness or in opening submissions (r 9.5(4)).

**70.** This would avoid the need for a witness (such as a company representative) to give evidence at trial of the chronology of events for the purpose of introducing the documents into evidence when the witness otherwise does not have contemporaneous knowledge of the events.

**71.** It would also reduce to some extent the evidence that a witness with contemporaneous knowledge of the events and documents would need to give, although in practice we anticipate that the witness' evidence will necessarily be framed by the chronology as a means of imparting their recollections.

**72.** Therefore, to the extent the proposal recognises that witness evidence would still be given by reference to and in the context of the chronology – such that there is no bright line between the chronology of events and the witness' evidence – then we support the proposal. Witnesses should not be prevented from addressing the chronology of events as this can be important context to their evidence.

**Trial evidence by way of affidavit**

**Proposal**

The evidence at trial would be given by way of affidavit, with additional *viva voce* evidence in chief only on areas of significant factual contest. Cross-examination would take place on the affidavits and the additional *viva voce* evidence.

**73.** We support the proposed change for evidence to be given by way of affidavit rather than briefs, with additional *viva voce* evidence on areas of significant factual contest.

**74.** While our experience in the Family Court, where evidence is generally given by affidavit,[12] is that this does not necessarily reduce hearing time as cross-examination becomes more extensive, we nevertheless consider the proposal should achieve some efficiencies provided the manner in which cross-examination takes place remains appropriate.

**75.** Similarly, we also agree parties should be required to ensure affidavits are not needlessly argumentative and that they do not include submissions by counsel disguised as evidence.

**Expert evidence**

**Proposal**

The use of expert evidence would be more tightly controlled, including by:

- making greater use of single Court appointed experts, paid for by both parties (the appointment of which would be addressed at the issues conference or conferences);
- imposing, where separate experts are to be called for each side, a presumptive limitation of one expert witness per topic per party; and
- providing that expert evidence is not to be received unless there has been a joint expert conference, except by leave.

**76.** We support the use of expert evidence being more tightly controlled by the Court on the basis outlined below.

*Greater use of single Court-appointed experts*

**77.** It is not clear whether the proposal is to make greater use of the existing process in rr 9.36 to 9.42 for the appointment of a Court expert in circumstances where the parties may still call their own expert on the same issue, or whether the intention is to amend r 9.42 such that the parties are not permitted to call their own experts and the Court will rely solely on the evidence of the Court expert.

**78.** If it is the former, this would appear to risk creating duplication between the Court expert and the parties' experts, requiring the parties to cross-examine each other's experts as well as the Court expert. In our view this process should be limited to those situations where it is appropriate to do so rather than it becoming the norm.

12 Family Court Rules 2002, r 48.

**79.** If it is the latter, we consider that where it is proportionate to do so or where the parties agree, the Court may exercise its power to appoint a single Court expert to give evidence (with the parties not then calling their own expert evidence). This could be suitable in situations where the value of the claim is relatively low and the issues are straightforward, making it more cost-effective to have a single expert. However, we do not believe it would enhance access to justice to encourage greater use of a single Court-appointed expert across the board.

**80.** Our concerns about the use of single Court-appointed experts in larger or more complex civil proceedings include:

(a) In practice, many parties would still engage their own expert to advise them on the issues and to assist in preparation for cross-examination of the Court expert, resulting in a duplication of effort and cost. Our previous experience in the Weathertight Homes Tribunal is that the use of Court-appointed experts did not make the process more efficient, as parties would still instruct their own expert witnesses.

(b) There are likely to be difficulties in parties agreeing on the scope of questions to be considered by the expert, particularly where there are multiple plaintiffs and/or defendants, requiring intervention by the Court to settle the brief.

(c) The parties would not have control over the costs they are required to contribute to the remuneration of the Court expert.

(d) Depending on the level of remuneration paid to the Court expert, this may affect the experience and qualifications of the individuals willing to accept such roles and therefore the quality of the evidence before the Court.

**81.** Our preference would therefore be to maintain the existing processes in rr 9.36 to 9.42, which should be used only in appropriate cases.

*Presumptive limit of one expert per topic per party*

**82.** We agree it would be sensible to impose a presumptive limit of one expert per topic per party where each party is calling its own expert evidence, with leave to seek the calling of more than one expert per topic if that is proportionate.

**83.** In some proceedings parties will call more than one expert witness on a topic to 'hedge their bets' in the event that one of the witnesses is found to be less credible by the Court. This has the effect of materially increasing costs for both parties, and requiring additional hearing time. A presumptive limit of one expert witness per topic per party would avoid this duplication and increase the efficiency of the proceeding.

*Joint expert conference*

**84.** We support the proposal that expert evidence will not be received unless the experts have first attended a joint expert conference. A joint expert conference would assist in refining issues and identifying areas of agreement and disagreement prior to trial. However, we consider that flexibility should be retained such that there is no need for a conference where the Court dispenses with the requirement or all parties agree it is not necessary.

**85.** Rule 9.44 currently contains an ability for the Court to direct a conference of expert witnesses provided all parties agree. We consider this existing rule could be amended to require the Court to direct a conference unless the parties agree otherwise, or the Court so orders.

# Proposed changes in the District Court

**86.** The Rules Committee has identified that enhancing access to justice in the District Court at this point in time "[does] not lie with the rules operated in that Court",[13] but rather by "strengthening the institutional competency of the District Court's civil jurisdiction to allow the fundamentally fit-for-purpose [District Court Rules 2014] to operate as intended".[14]

**Appointment of Principal Civil District Court Judge**

> **Proposal**
>
> The role of Principal Civil Judge for the District Court be created.

**87.** We support the appointment of a Principal Civil District Court Judge to "oversee the strengthening of the expertise of the Court's civil registry and ensuring that best practice in the case management of civil proceedings be applied in all matters".

**88.** Given the volume of claims filed in the District Court, and the comparatively lower jurisdictional limit, effective case management is critical to the timely and cost-effective resolution of such cases. We consider a Principal Civil Judge could greatly assist Judges and registry staff to make the best use of the processes available to them under the Rules.

**Civil registry expertise**

> **Proposal**
>
> There be a focus on improving or restoring the civil registry expertise.

**89.** Similarly, we support a focus on improving or restoring the civil registry expertise in the District Court.

**90.** The registry function is a key component in the judicial process and the support it provides to litigants can have a material effect on their ability to access justice. Registry staff have an important role to play in reducing the informational barriers identified by the Rules Committee at [24]-[27] of the Consultation Paper.

**91.** We also propose that there should be a registry officer in each registry dedicated to dealing with claims filed by litigants in person.

13 Consultation Paper at [53].
14 At [57].

**Part-time Deputy Judges/Recorders**

**Proposal**

Make use of part time Deputy Judges/Recorders for civil cases in the District Court.

**92.** To the extent there is a need for temporary resourcing within the District Court, we support the proposal to introduce part-time Deputy Judges/Recorders. However, in our view such appointments need not be restricted to those holding (or seeking to hold) the rank of Queen's Counsel. Any suitably qualified person should be considered.

**93.** An obvious concern would be the management of both actual and perceived conflicts. Clear and strict professional and ethical guidelines would be required. However, these conflicts appear to be manageable overseas.

**Pre-action protocols**

**Proposal**

The introduction of pre-action protocols for debt collection matters in the District Court, and considering the introduction of other pre-action protocols as already operate in England and Wales.

**94.** There are advantages and disadvantages to the introduction of pre-action protocols. On one hand they may encourage prospective defendants to seek legal advice at an earlier stage, thereby reducing informational barriers, and may positively impact settlement rates prior to the commencement of a proceeding. On the other hand, however, they have the potential to reduce access to justice for plaintiffs by requiring additional steps to be taken before the court process even begins, as well as creating inefficiencies in the event a claim must be stayed while a plaintiff goes back to comply with pre-action requirements.

**95.** On balance we consider a simple pre-action protocol for debt collection matters could be justified, in effect making it mandatory for a detailed letter of demand to be sent to the debtor prior to a proceeding being filed.

**96.** However, we are not in favour of a more onerous protocol that would require the parties to attempt to agree a payment plan as an alternative to seeking judgment. This risks interfering with a party's entitlement to have contractual rights enforced by the District Court, and is disproportionate.

**More flexible process for determining claims based on inquisitorial approach**

**Proposal**

Introduce a more flexible process for determining substantive claims, drawing on the more inquisitorial aspects of the procedure of the Disputes Tribunal.

**97.** We oppose the adoption of a more flexible process for determining claims based on an inquisitorial approach. This would be a fundamental and significant change to the civil justice system in the District Court.

**98.** We also have reservations about the types of inquisitorial aspects proposed at [63] of the Consultation Paper and whether these will in fact increase access to justice:

(a) In our view allowing judges to direct that a case be set down for determination on the basis of initial disclosure alone, and without any further interlocutories, given what is revealed to be in issue at the first judicial conference would create uncertainty for litigants and has the potential to prevent cases from being developed. Judges already have the ability to direct either a short, simplified or full trial and we consider this is a preferable means of ensuring the process is proportionate to the nature and complexity of the claim.

(b) We consider that providing for the substantive determination of disputes using an 'iterative' process whereby the issues in dispute may be narrowed and resolved at successive hearings, with Judges allowing parties to call evidence more than once and in the order the Judge directs, is unlikely to shorten the court process or reduce the costs involved. On the contrary, introducing an iterative process has the potential to create inefficiencies and risks making the proceeding unnecessarily complicated and drawn out.

**99.** The Rules Committee has noted the District Court Rules 2014 are "fundamentally fit-for-purpose",[15] and in our view it is appropriate to implement and assess the effectiveness of the other proposed reforms in the District Court prior to considering a change of this nature.

15 Ibid.

# Proposed changes in the Disputes Tribunal

**100.** The Rules Committee noted general support in previous submissions "for treating the Disputes Tribunal as an exemplar of how an adjudicative body can effectively and justly provide dispute resolution in a streamlined manner featuring early engagement by the decision-maker, and without the costs associated with legal representation, while noting that parties can seek legal advice in preparing to appear before the Tribunal".[16]

**Increase jurisdiction to $50,000 or higher**

> **Proposal**
>
> Increase the jurisdiction of the Disputes Tribunal to $50,000, or possibly higher, subject to the views obtained on further consultation.

**101.** We support increasing the Disputes Tribunal's jurisdiction from $30,000 to $50,000. We agree with the Rules Committee's view that the Tribunal's processes would work equally well for claims at this higher value.

**102.** We do not think that the jurisdiction should be more than $50,000 by default, particularly given there is no legal representation permitted at a Tribunal hearing. Such claims would no longer be considered small relative to the average New Zealand income.[17]

**103.** Further, beyond $50,000 we consider it would be more appropriate for referees to be required to give effect to the law and to enforce legal rights and obligations. This creates complications in terms of s 18(6) of the Disputes Tribunal Act 1988 and would then require referees to be legally qualified and legal representation to be permitted.

**104.** Equally, we appreciate in some circumstances parties may wish to have claims greater than $50,000 but less than $100,000 resolved more economically by the Disputes Tribunal. Therefore, we would support an option for the Disputes Tribunal's jurisdiction to be increased to $100,000 where all parties to the dispute agree (with determination still based on the current Tribunal model).

**Right of appeal**

> **Proposal**
>
> Change the right of appeal from decisions of the Disputes Tribunal, if its jurisdiction is extended beyond $50,000.

**105.** In view of our submission on increasing the jurisdiction of the Tribunal, we do not consider it is necessary to change the right of appeal from decisions of the Disputes Tribunal.

**106.** An appeal can currently only be filed on the grounds that the proceeding was conducted by the referee, or an inquiry was carried out by an investigator, in a manner that was unfair to the appellant and prejudicially affected the result of the proceeding.[18]

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16 At [43].
17 https://www.stats.govt.nz/information-releases/household-income-and-housing-cost-statistics-year-ended-june-2020
18 Disputes Tribunal Act 1988, s 50(1).

**107.** We consider that affording a right of appeal involving errors of law is contrary to the basis on which disputes are currently determined[19] and the absence of legal representation before the Tribunal, and should be avoided.

**108.** Similarly, we consider that graduated rights of appeal in respect of claims of different values risks over-complicating the current process. The success of the Tribunal in hearing and determining disputes in an efficient and cost-effective way is, in our view, based on the relative simplicity of the current model.

**Change names of Disputes Tribunal and Referees**

**Proposal**

Rename the Disputes Tribunal the "Community Court" or "Small Claims Court", and also rename referees as "adjudicators".

**109.** We agree the Disputes Tribunal should be renamed to either the "Small Claims Court" or "Community Court", and note that our preference is for the former as it more accurately and clearly describes the jurisdiction of the court.

**110.** We also agree the title of "referee" should be changed to "adjudicator", and would support increasing the daily fee of referees to ensure the attraction of quality candidates.

**Appointment of investigators as Tribunal appointed experts**

**Proposal**

The Tribunal could be resourced to make greater use of its powers to appoint investigators as Tribunal appointed experts, who would sit with the referee and participate in the hearing and assist in the determination of the dispute (but the decision would remain the referee's alone).

**111.** We support in principle resourcing the Tribunal to enable it to make greater use of investigators as Tribunal appointed experts, provided this is something current referees consider would be of benefit to them.

**112.** However, given the jurisdiction of the Tribunal is limited to small claims, it would be necessary to ensure the cost of using investigators is proportionate to the dispute being determined.

19 Section 18(6): The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

**Amendment of requirement to proceed in private**

**Proposal**

The requirement that the Tribunal proceed in private in s 39 could be amended, so that the Tribunal would conduct public hearings unless the referee considered that it is proper to conduct the hearing in private, having regard to the interests of any party and to the public interest.

**113.** We are not persuaded it is necessary to amend the requirement that the Tribunal proceed in private. While we support the principle of open justice, we do not understand there to be a current concern that there is a lack of transparency or public confidence in the decision making processes of the Tribunal.

**Power to waive filing fees and award costs**

**Proposal**

The Tribunal would be allowed to make decisions to waive filing fees, and could also be granted a limited costs jurisdiction and an express ability to award disbursements (for example, in respect of specialist reports obtained by claimants).

**114.** We agree the Tribunal should have the power to waive filing fees and a limited jurisdiction to award costs, and consider that this would enhance access to justice in that forum.

**Enforcement**

**Proposal**

Consideration could be given to providing for a more effective or straightforward way for successful claimants to enforce a successful award.

**115.** We support any proposal that provides for a more effective or straightforward way for successful claimants to enforce a successful award. This could be achieved by simplifying the process in the District Court for obtaining a sealed order.