



# The Rules Committee

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9 September 2019  
Access to Justice 08/19

Circular 40 of 2019  
**Alternative Models of Civil Justice**

Tēnā koutou,

Please find attached, for your consideration, a memorandum discussing alternative models of civil justice (in particular Justice Kós' "civilian" model) (**C40 of 2019**).

This memorandum was previously circulated to the members of the Access to Justice Working Group on 30 August 2019.

Nāku iti noa, nā;

Sebastian Hartley  
Clerk to the Committee

# Memorandum

**To:** Access to Justice Working Group Members  
**CC:** Rules Committee Chair  
**From:** Clerk to the Rules Committee  
**Date:** 29 August 2019  
**Re:** Alternative Models of Civil Justice



**The Rules  
Committee**

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## Introduction

1. At the Committee's last meeting, I was tasked with reporting to the Access to Justice Working Group on Justice Kós' suggestions to adopt a "Scandinavian" ("civilian") model of justice in certain cases. This to allow the Working Group to discuss these proposals before the Committee's next meeting on 23 September 2019.
2. To that end, below I provide a summary of Justice Kós' suggestions, note further suggestions that his Honour has made in subsequent speeches, and then outline other and similar initiatives that I have located references to elsewhere. First, however, I seek to frame this information – and the Working Group's work more generally – in terms of the policy framework in which our civil justice system resides.

## The Policy Framework

*What is the point of our civil procedure framework?*

3. The objective of our civil procedure, as it is expressed in the High Court Rules 2016 and the District Court Rules 2014, "is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application."<sup>1</sup> As the authors of *McGechan* note,<sup>2</sup> these "three ideals potentially conflict". Any tension is to be resolved so as to ensure that justice is done in the individual case, even at the expense (in both senses of that word) at the other objectives. The authors of *McGechan* rely the explanation of the objectives of civil procedure given by the authors of *Halsbury's Laws of England* to suggest why this must be case:<sup>3</sup>

What the practitioners seek for their clients when they resort to the Courts is to use the machinery of justice to obtain a just result, and what the clients seek to avoid is unnecessary and prejudicial expense, delay, and technicality in the process of attaining that just result.

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<sup>1</sup> High Court Rules 2016, r 1.2; District Court Rules 2014, r 1.3.

<sup>2</sup> A C Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR1.2.02].

<sup>3</sup> At [HR1.2.03], citing *Halsbury's Laws of England* (4th ed, 1998) vol 37 Civil Litigation at [3].

4. This is the approach that predominates in New Zealand. The authors of *McGechan* note Jeffries J's statement in *Schmidt v BNZ Ltd* that:<sup>4</sup>

Procedural rules are the servants of Court proceedings to achieve just, speedy, and at the least cost, expedition of cases. The construction of Court rules should always be approached with care but with a readiness to apply them to meet the justice of the case which is manifest before a Court.

5. Accordingly, acting within that conventional framework, the scope of any reforms to civil procedure intended to make accessing civil justice less expensive and otherwise more expeditious would be limited by the need to ensure that "justice" is still done between the parties. Expedition and 'inexpense' are, on this view, subordinate objectives to the doing of "justice" between the parties. This view emerges, for example, in the discourse surrounding the reforms to disclosure obligations currently underway in England (on which I have reported separately) in the notion of ensuring the proportionality of the costs and scope of discovery to the needs of the case. That view is familiar from the New Zealand experience.

*Do we need to rethink the meaning of "justice"?*

6. However, there are limitations to his perspective. First, there is no necessary conflict between making access to the Courts' civil jurisdiction less expensive and more expeditious and the doing of justice between parties. Indeed, a minimum degree of expedition and cost effectiveness is necessary for the operation of civil procedure to be "just". As the Court of Appeal has recognised, subject to the need for minimal standards of procedural fairness, "justice delayed is justice denied."<sup>5</sup> At the extreme end of the scale, in 2012 an arbitral tribunal held that India had fallen short of its obligations under the India-Kuwait Bilateral Investment Treaty to provide an "effective means of asserting claims and enforcing rights" by operating such a sclerotic court system that foreign parties required to litigate in those courts lacked an effective means to secure their rights.<sup>6</sup>
7. More generally, and closer to home, Justice Kós, speaking extrajudicially, has noted Hayne J's recent extrajudicial criticisms of the position in Australia:<sup>7</sup>

Australia has long since reached the point where contested civil litigation in the superior courts is beyond the purse of any but the wealthiest enterprises, the insured, or those very few who can qualify for some form of legal aid. ... The judicial system is

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<sup>4</sup> At [1.2.01], citing *Schmidt v BNZ Ltd* [1991] 2 NZLR 60 (HC) at 63.

<sup>5</sup> *Doyles Trading Co Ltd v West End Services Ltd* [1989] 1 NZLR 38 at 41-42.

<sup>6</sup> *White Industries Australia Ltd v The Republic of India (Final Award)*, London, 30 November 2011 per Charles N Brower, J William Rowley, and Christopher Lau at [11.4.16] and following.

<sup>7</sup> Stephen Kós "Better Justice" (Address to the Legal Research Foundation Annual General Meeting, Auckland, 20 August 2018) at [41], citing K M Hayne "The Australia Judicial System: Causes for Dissatisfaction" (2018) ALJ 32 at 42-43.

not serving those who cannot, or will not, resort to it for the determination of disputes. ... Cost and delay, together, are important considerations for those who could resort to the court but prefer instead to go to arbitration. To those who cannot or will not submit their disputes to determination by the courts, the judicial system is simply irrelevant.

8. As Hayne J's observations make clear, secondly, the conventional perspective, as expounded by the authors of *Halsbury's Laws of England*, assumes (incorrectly) that practitioners will resort to the Courts. Where, as is increasingly the case, alternative dispute resolution provides for less expensive and more expeditious means of parties accessing a neutral adjudicator or other decision-maker's doing of justice between them, they will simply not come to the Courts. At a high level, the apparent growth in the popularity of alternative dispute resolution (ADR) could be seen to speak to a failure of the State and its judicial organs to provide the most comparatively attractive method of dispute resolution available.<sup>8</sup>
9. Of course, to the extent that one accepts that access to civil justice is a private benefit, and thus that private parties should be able to elect their preferred means of dispute resolution and be supported by the State in making that election,<sup>9</sup> that is not necessarily a cause for concern. On one view of the nature of sovereignty, because those choices are still ultimately vouchsafed by the State's use of its monopoly on coercion,<sup>10</sup> and are thus still ultimately regulated by public policy objectives, the growth of the comparative popularity of ADR, compared to the Courts, does not therefore present as a symptom of the State's failing in an essential function.
10. Of course, other views exist. The now Chief Justice, in her 2014 Ethel Benjamin address, observed that (citations omitted):<sup>11</sup>

Why is access to justice important in the civil sphere? It is because access to justice is the critical underpinning of the rule of law in our society: the notion that all, the good, the bad, the weak, the powerful, exist under and are bound by the law. That condition cannot exist without access to courts.

Courts of law developed as a substitute for self-help remedies. The civil action has been described as "civilisation's substitute for vengeance".

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<sup>8</sup> See David AR Williams and Amokura Kawharu (eds) *On Arbitration* (LexisNexis, Wellington, 2011) at [1.1.5].

<sup>9</sup> See at [1.2] for a brief account of the historical origins and development of the law of arbitration, in which the authors note the emergence, and acceptance, of that policy viewpoint.

<sup>10</sup> See Max Weber *Politics as a Vocation* (Speech to the Free Students Union of Bavaria, Munich, 28 January 1919) for this classic, if limited, view of the nature of sovereignty. See, more critically, RL Hale "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 470 for a classic account of the importance of the State's monopoly on legitimate coercive force as the gravamen of property rights in liberal market economies.

<sup>11</sup> Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13 *Otago LR* 229 at 231.

They are essential to social order. The courts' decisions articulate clearly how the law applies to the citizen, and thereby allow others to order their conduct and affairs so as to comply with the law. Through the independent operation of the courts, society also orders itself in the certain knowledge and belief that all can have a remedy for a wrong, and that no-one, no matter how rich or powerful, is above the law.

[...]

Critical to this belief that underpins civil society is access to courts to challenge the wrongful acts of others. Unless we have this access, we will live in a society where the strong will by any means, including violence, always win out against the weak. This will be a society in which, once binding civil obligations, are recast as voluntary.

There are indications that far from being viewed as a democratic institution, civil courts are, for policy purposes at least, regarded as a luxury service for which users should pay. There is a new language that is used in connection with courts; people who come before the courts are called customers, judges and lawyers are referred to as stakeholders, District Court centres are referred to as franchises. We are now to understand that we are part of a market for justice services and our product is being "marketised".

11. To the extent that rule of law values are a "fundamental",<sup>12</sup> if not *the* fundamental, of the New Zealand Westminster constitution, the increasing attractiveness of private justice compared to State-administered justice does speak to a concerning erosion of certain constitutional values. It tends to indicate that, amongst those with the resources and agency to pursue justice privately, there is a belief that the State is no longer the actor best able to uphold and enforce rights and obligations in accordance with law. One might speculate that this suggests, more widely, that there will also exist a significant number of people who want access to civil justice, cannot afford to achieve that privately, and that, as a result of the same procedural phenomena leading those with the means away from the courts, are frustrated in obtaining access to justice. This burden falls most significantly on those stuck between having the means to fund litigation themselves and being in the (increasingly small) class of people able to access civil legal aid.

12. Speaking in March 2016, Justice Kós framed that issue in these terms:

[19] As mentioned a moment ago, the exemplar "have not" is the unrepresented litigant. Some unrepresented litigants prefer that state of affairs. They distrust lawyers

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<sup>12</sup> See Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164; Sian Elias "Fundamentals: A Constitutional Conversation" (Harkness Henry Lecture 2011, Victoria University of Wellington, 12 September 2011) at 8 and 16.

and will not have one at any cost. That sort of litigant will often enjoy the courtroom forum for its own sake. Querulents fall within that group.

[20] But most unrepresented litigants would prefer that they had a lawyer with them. Dr Bridgette Toy-Cronin's research involved a survey of 35 litigants in person. Of those 35, 29 had initially engaged a lawyer or made attempts to do so. Many of these did not qualify for legal aid, and could not afford legal services. As one put it:

You can't pay \$500 per hour when you earn \$500 per week.

[21] Formal statistics as to the increasing trend of unrepresented litigants are not yet available. There is however clear anecdotal information from the judiciary and registry staff that their numbers are growing. In Justice Winkelmann's 2014 Ethel Benjamin address she referred to a snapshot of 2014's statistics: 32 out of 60 civil applications for leave to appeal to the Supreme Court filed by unrepresented litigants; 56 of the 228 active civil files in the Court of Appeal involving unrepresented litigants; 40 per cent of judicial review cases and 30 per cent of appeals in the Auckland High Court registry having one or more unrepresented litigants.

[22] Party A has a QC. Party B is self-represented. This creates a number of problems. First, is that going to deliver justice? A fair outcome when there is such disparity of resources? Secondly, the Court is not given the assistance it needs from one side of the argument. This skews the balance in favour of the better-represented party. In criminal and public interest cases this problem is sometimes fixed, at public expense, by appointing an *amicus curiae*. Thirdly, if the Court steps into the fray to try and rebalance things, there is a risk of it becoming captured by the side it is trying to help.

[23] Professor Adrian Zuckerman of Oxford, the leading English academic authority on civil procedure, has identified two broad difficulties with the litigants in person. His observations match the New Zealand experience. The first problem, which he calls the "efficiency deficit" results from the unfamiliarity of unrepresented litigants with Court procedure and substantive law. Pleadings are often shambolic, additional case management is required, defaults on Court imposed timetables are rife, and the Court is required to "devote disproportionate time and effort" to their cases. The second (and, as Zuckermann says, more serious) concern is the disadvantage unrepresented litigants suffer in comparison to their represented counterparts. Zuckermann calls this the "justice deficit". As he puts it:

In order to project their rights persons need to know the relevant substantive law and what the rules of procedure require in order to take a dispute to Court. Persons who lack legal knowledge are therefore poorly placed to defend their rights in Court, as well as outside it. If obtaining justice calls for legal expertise, then those who cannot afford to pay for it are in effect denied access to justice.

13. More generally, the Law Commission has noted that:<sup>13</sup>

laws are designed to give guidance to the community, and that if the state has the power to make rules prescribing conduct and relationships and to deprive people of their liberty, it should also have an obligation to ensure people have access to information and a minimum level of advice about the rules and processes that are employed for the enforcement of rights or obligations. Equally, as the New Zealand taxpayer funds the courts and the legislature, it is appropriate that court users, as taxpayers, are given adequate information on how courts and the law work.

14. This leads to the point that, thirdly, to the extent that ADR methods are seen to provide less expensive and quicker, but still tolerably “just”, resolution of disputes by the increasing numbers of parties using those methods, that suggests that the procedural framework in place under the High Court Rules 2016 and the District Court Rules 2014 is striking the wrong balance between the three objectives noted above.

15. Fourthly, furthermore, and/or alternatively, this indicates that the understanding of “justice” on which these Rules are premised may not correspond to the needs, values, and understanding of “justice” of parties to civil litigation.

16. To expand briefly on that observation. Assuming that the content of our rules of civil procedure has been developed in accordance with the stated objective of those Rules, the Rules can be seen as expressing a certain view as to what the doing of “justice” requires in the average case, seeking to promote expedition and cost effectiveness where possible, but ultimately subordinating those objectives to the doing of “justice”. However, given the apparent dissatisfaction with the state of civil justice in New Zealand, as indicated by the growing discussion of a “justice gap”<sup>14</sup> in legal discourse, and the Attorney-General’s reference to the Rules Committee from which this Working Group arose, it would appear either that:

- a. the wrong balance is being struck by those rules between the interests of “justice”; or
- b. the procedural conception of “justice” that the Rules promotes is inapt to the values and beliefs of contemporary New Zealanders; or
- c. more likely in my view, both of these things are true.

17. This suggests that, in reforming our civil procedure to promote access to justice, we must look beyond merely increasing the expediency and cost effectiveness of litigation within the framework of the current idea of “justice”. As Hayne J said, and as Justice

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<sup>13</sup> Law Commission Delivering Justice for All: A Vision for the New Zealand Court System (NZLC R85, 2004) at [4].

<sup>14</sup> Winkelmann, above n 11, at 235.

Kós has echoed, “[t]he Courts must respond by changing the way in which litigation is conducted and judges do their work lest the judicial system become irrelevant”.<sup>15</sup>

*What is our present model of civil justice?*

18. Without meaning to state the obvious, the model of civil justice practiced in New Zealand is predicated on the adversarial system of justice initially developed in England and practiced in the common law, as opposed to the civil law, world. Robert Fisher, speaking extrajudicially, summarised the key features of the model in this manner (citations omitted):<sup>16</sup>

5. An adversarial process is a means of resolving disputes by allowing the parties to present their evidence and argument, and challenge opposing evidence and argument, before a passive judge or jury for decision. The easiest way of identifying its characteristics are to contrast it with its chief western rival, the inquisitorial process. The former is a procedural feature of the common law derived from medieval England; the latter a procedural feature of civil law systems derived more immediately from 19th century France.

6. Essential features of the adversarial process have been helpfully summarised by the Australian Law Reform Commission (ALRC) as follows:

- In the litigation system the trial is the distinct and separate climax to the litigation process.
- Courtroom-room practice may be subject to rigid and technical rules.
- Proceedings are essentially controlled by the parties to the dispute and there is an emphasis on the presentation of oral argument by counsel. The role of the judiciary is more reactive than proactive. Given the parties opportunity and responsibility for mounting their own case the system is more participatory.
- The judiciary possesses an inherent and separate power to adjudicate.
- The expense and effort of determination of disputes through litigation falls largely on the parties.

7. They can be contrasted with the essential features of the inquisitorial process which have been summarised by the ALRC as follows:

- In litigation no rigid separation exists between the stages of the trial and pretrial in court cases. Legal proceedings are viewed as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made.

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<sup>15</sup> Kós, above n 7, at [42], citing Hayne, above n 7, at 32.

<sup>16</sup> Robert Fisher “Whether the Adversarial Process Is Past Its Use-By Date – A New Zealand Perspective” (NZ Bar Association and Legal Research Foundation Civil Litigation Conference, Auckland, 22 February 2008) at [5]-[7].



- Rules relating to court-room practice are intended to be minimal and uncomplicated.
- The role played by lawyers is less conspicuous with an emphasis on written submissions rather than oral argument. The role of the judiciary is both proactive and inquisitive. The greater directorial role of the judiciary allows less room for the parties to direct their own case. In this sense the system is more hierarchical than participatory.
- As officers of the state the judiciary possesses no separate and inherent power to adjudicate.
- A greater proportion of the effort and expense of dispute determination through litigation falls on the state.

19. Our civil procedure is, obviously, shaped by, and seeks to give effect to, New Zealand's English legal heritage as an adversarial jurisdiction. The various "rigid and technical rules" that comprise that procedure are designed to control the parties in their control over their own cases. The civil procedure of our adversarial system recognises that, because of parties' control of litigation and the appropriately passive and adjudicative role of the Judge, there is a need to avoid deceitful, ambush, and other unfair conduct in litigation by parties. Thus, the much more limited need for control of civil procedure in the civilian jurisdiction, in which the judge is, at all stages, more proactively and directorial involved in the conduct and control of proceedings.

20. More widely, it can fairly be said that our notion of "judging", and "justice", is contingent on our historical and cultural circumstances as an adversarial system jurisdiction. Justice Kós has put it that:<sup>17</sup>

[55] The three fundamentals of the adversarial process are these: First, the focus is on determination of rights at a trial. Secondly, the truth is not necessarily the end object. Thirdly, the adversarial system gives greater autonomy to parties to define issues and present the evidence they see fit. The judiciary is less controlling, more passive. I will talk about each briefly.

[56] The focus on the trial is partly a result of common law's former enthusiasm for civil jury trials. While these are still common in the United States, they have fallen away in Anglo-Canadian-Antipodean common law jurisdictions. A jury can be convened only once, for a limited time, and under strict instructions that it is not to engage in fact finding of its own. That encourages an adversarial approach.

[57] The adversarial process is not necessarily concerned with the identification of truth. Certainly it is much less concerned with it than the inquisitorial. If the adversarial system was more concerned with the identification of truth, then why would it permit

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<sup>17</sup> Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016).

limits to pre-trial discovery of documents — for instance, because they are covered by legal professional privilege? Why would it permit imbalance in representation?

[...]

[60] Dean Roscoe Pound described the adversarial system as “the sporting theory of justice”. That is, inequalities of representation are not adjusted by the tribunal, for fear it becomes partisan. If one party turns up with a first division team, and the other party with a third division one, and the first division team wins 36-0, then so be it.

[...]

[67] The inquisitorial system is very different to the adversarial. In civil law countries like France and Germany, for instance, the Judge controls the evidential process. The Judge defines the issues (based on the pleadings), and engages the experts. Sometimes there is simply a single Court-appointed expert. The Judge will decide how much discovery is required to meet the issues. Written briefs of evidence are submitted. The Judge undertakes primary questioning (not cross-examination) of witnesses. Counsel have a very limited role: they may suggest questions and they may, with the Court’s permission, engage in limited cross-examination.

[68] The trial tends to be a staged process, taking place over a number of hearings. Some of them are short. Essentially the Judge is undertaking an inquiry, rather than conducting a climactic trial. The judgment will be briefer and more summary in nature. To that extent it is perhaps less authoritative. There is a greater proportion of appeals brought in inquisitorial rather than adversarial countries. But another reason for that may be that, after an inquisitorial adjudication, parties still have resources left with which to bring an appeal.

[69] Inquisitorial hearings require less engagement and preparation by the lawyers. As a result the hearings are much cheaper. It has been suggested that a typical patents case in Germany will cost half the equivalent United Kingdom cost. But it is a myth that they exclude lawyers altogether. Quite the contrary. In a number of civil jurisdictions legal representation is compulsory.

[70] The inquisitorial process in France is in fact something of a recent invention in that country. The Napoleonic Code made no provision for it. Instead it gave the Court an essentially passive role — consistent with an adversarial approach. The result, by the end of the nineteenth century, was all the problems that infested our system before case management: adjournment, delay, use of delaying tactics, and excessive cost. It took a decree in 1965 to put French Judges firmly in charge of the content of the litigation process. The Code was amended to provide:

Everyone is bound to cooperate with the administration of justice with a view to revelation of the truth.

No such provision exists in our High Court Rules.

21. That much is clearly illustrated by Judge Palmer's comments regarding the appropriate role of the judicial officer in an adversarial system in the Employment Court in *Kelly v Accident Rehabilitation and Compensation Insurance Corporation*,<sup>18</sup> in which the Judge also identified the close relationship between the adversarial system and the prevailing (competing) conceptions of justice in New Zealand (citations selectively omitted):

During his argument Mr Timmins strongly emphasised - wholly acceptably, in principle, to me and also, I am sure, to Ms Cooper - that the purpose of rule 8.06 is systemically within the adversarial system to ensure, as its cornerstone as it were, that evidence proffered by opposing parties is to be thoroughly tested by cross-examination. Such tested evidence will, through the process of the adversarial system, lead to the ultimate ascertainment of truth concerning the contested issues, provided that process is wholly uncontaminated/uninfluenced by any inappropriate assistance whatsoever being rendered to witnesses undergoing cross-examination upon their evidence and then re-examination. I characterise cross-examination as the cornerstone of our adversarial system because truly and plainly this is what it is.

For example - but still relevantly apposite in this setting and fundamentally consonant with my immediate observations - is the situation which most regrettably will occur from time to time when a judicial hearing under the adversarial system is rendered unsatisfactory through the presiding Judge inappropriately descending into the trial "arena" and seemingly, in material aspects, "donning the garb of an advocate". As Lord Justice Denning so admirably put it in his judgment in *Jones v National Coal Board* [1957] 2 All ER 155 at 158-159.

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.

Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to

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<sup>18</sup> *Kelly v Accident Rehabilitation and Compensation Insurance Corporation* WEC20A/97, 31 July 1997.

conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon LC, who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question" and Lord Greene MR, who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses,

"he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."

[...]

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the "nicely calculated less or more" - but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties [...] So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appeared to favour one side or the other [...]. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost [...]. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Bacon spoke right when he said that:

"Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."

Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may out-run our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties - nay, each of

them - has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified.

[...]

I now broadly remark that the adversarial system at its fundamental level may be likened to a mosaic and that the outcome of the system in any particular case should be the ascertainment of truth and thus a just outcome. Inseparably within this system which I have likened to a mosaic, and in my view as the system's driving force, is the testing of the evidence in any particular case. ...

22. The Judge's statements eloquently capture the "justice" that our rules of civil procedure seeks to have done, which is, as Robert Fisher QC's above summary of the adversarial system makes clear, inextricably wedded to this jurisdiction's history as an adversarial jurisdiction. The financially and temporally expensive nature of civil justice in this country is a product of that relationship. Also relevant is the fact that, absent discipline by the judges and counsel engaged in a particular case (which cultural dimension I discuss below), the "full gamut"<sup>19</sup> of civil procedure is applied to all cases. As Fisher, having outlined the nature of the adversarial system, went on to say (citations omitted):

19. How has this problem of proportionality come about? The trouble is that the adversarial system is extraordinarily labour-intensive. To have the facts and the law independently investigated by professional lawyers and experts on behalf of each of the parties, presented in court in an open-ended oral setting, independently assessed by a judge, and then further reviewed in multiple levels of appeal, adds up to a lot of hours by lawyers, experts and judges. Even more professional hours are required if the civil proceedings are duplicated by a similar exercise conducted by the police, prosecution and defence lawyers, jury and/or judge, in a criminal setting. [...] Not surprisingly, the cost of a typical civil case under the adversarial system in the United Kingdom is likely to be more than twice that required under the inquisitorial system in continental Europe.

[...]

20. What we have to do, therefore, is find a way of matching the transactional cost to the sum or issue at stake. Our approach is relatively satisfactory at the extremes. Disputes of up to \$7,500 (\$12,000 by agreement) are handled in the Disputes Tribunal in a summary way without legal representation, with an emphasis on a mediated outcome, and with broad discretions as to procedure and result in the absence of agreement. At the other extreme, civil disputes involving a million dollars or more are usually handled with reasonable cost efficiency. Between those extremes, however, lie

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<sup>19</sup>

Fisher, above n 15, at [18].

the majority of cases in which the legal costs are disproportionate to the sums or issues at stake. As the Chief Justice of New South Wales, James Spigelman, said:

In many areas of litigation, the costs incurred in the process bear no rational relationship, let alone a proportionate relationship, to what is at stake in the proceedings. The principal focus of improvement, now that delays are well on the way to being acceptable, must be the creation of a proportionate relationship between costs and what is at stake. If the legal profession and the courts cannot deliver a more cost efficient service, then we will be bypassed in commercial dispute resolution as, to some degree, we have been bypassed in other areas of dispute resolution. This process requires a collaborative approach by the courts and the profession.

21. No-one involved in commercial mediation could help but be aware of the harm that is currently caused by costs which are disproportionate to the sums or issues at stake. By the time the case comes to mediation, the stakes have often been raised by sunk legal costs which represent a substantial proportion of the claim itself. In extreme cases they can exceed the sum claimed. The parties can be reluctant to forego what they see (however irrationally) as an investment in the recovery or defence of the original claim by settling at a figure based solely on the likely recovery at trial.

#### *The Cultural and Regulatory Dimensions*

23. It has been noted at previous meetings of the Rules Committee that these outcomes can be avoided under the current Rules by judges and lawyers being disciplined and actively invested in ensuring that the costs and procedural requirements attached to each case are proportionate to the needs of that case.

24. Equally however, as has also been acknowledged, the Rules in place provide a 'default' expectation and practice against which lawyers, Judges, and other participants in the court process assess their expectations of and engagement with the court process. The existence of that default expectation has a siloing and co-ordinating effect on the practice and procedure of litigation; removing the need for discussions and negotiation in each case and providing a "path of least resistance" in proceedings, along which procedure will, all other things being equal, trend. Accordingly, rules of civil procedure are reciprocally expressive of our litigation culture, but also modify and regulate that culture. This can have a positive effect on the cost effectiveness and expediency of proceedings. A more flexible approach would necessarily, within an adversarial framework, involve greater discussion and negotiation each case, unless judges – who would then be placed at risk of having stepped too far into the fray – are prepared to exercise a decisive role in case management.

25. It follows that, even while these "soft" aspects of the culture and practice of litigation are arguably a significant aspect of the "justice gap" in New Zealand, that is not a reason not to modify the rules. Modifying those rules is, arguably, necessary to

modifying the features of New Zealand's litigation culture that serve as impediments to the expeditious and cost effective doing of justice in civil proceedings in New Zealand. This could take the form of allowing judges more scope to adopt tailored and active roles in case management, including control over parties' management of their cases. It could also take the form of more closely tying the rules of civil procedure to lawyers' personal professional obligations, as is the case with the express individuated duties of lawyers to advance the overall objective of civil procedure in Victoria's Civil Procedure Act 2010. This will require legislative and regulatory responses beyond the scope of the Rules Committee. Nonetheless, the Committee, or at-least its members, would be able to agitate for these changes.

*What does this mean for the working group and Rules Committee?*

26. It follows that, in seeking to reform civil procedure to improve access to justice, the Rules Committee likely needs to go well beyond improving the cost effectiveness and timeliness of justice in our current model. To the extent that the achieving of "justice", in the sense of that word shaped by New Zealand's culturally and historically contingent experience of the adversarial system, predominates those other considerations under the current model, and that sense of "justice" may be the problem, it is necessary to look to whether our notion of "justice" needs to be changed.
27. Equally, the Rules underpin the culture of litigation in New Zealand. If lawyers and Judges are not using the flexibility in the present Rules, that is an indication that the Rules need to be reformed to promote cultural change, and to make more incumbent upon actors in the court process their individual responsibility for achieving the objectives of our civil procedure. Agitating for related reforms that are beyond the competence of the Rules Committee, such as to may also advance these objectives.
28. The above criticisms of the implications of a commitment to adversarial justice in terms of access to justice being made, it is worth noting that the answer is likely not as simple as abandoning the adversarial framework in terms of the inquisitorial. Rather, as Justice Kós has suggested, the answer is in tailoring a solution in which the best procedure for doing "justice" – in a wider sense of fulfilling parties' desire for the fair hearing and resolution of their dispute – in each particular case is adopted. At the same time, it would be desirable, and necessary, to ensure the reasonable predictability and consistency in civil procedure. This much seems to follow from Lord Neuberger's definition of access to justice as:<sup>20</sup>

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<sup>20</sup> Lord Neuberger "Justice in an Age of Austerity" (Tom Sargent Memorial Lecture, 15 October 2013), as cited in Winkelmann, above n 11, at 230.

First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the courts; sixthly, an effective legal process; seventhly, effective execution; eighthly, affordable justice.

29. This definition of “justice” is wider and, vitally, neutral as between the inquisitorial and adversarial approaches. It speaks to the wider conception of “justice” in the sense of “natural justice” (as familiar from the administrative law, as opposed to the natural law jurisprudential) context. The minimal requirements of “justice” in this sense, which (I note) are consonant with rule of law values and the minimal civic rights guaranteed under the New Zealand Bill of Rights Act 1990, are reducible to the requirements for parties to be heard by an impartial adjudicator. As Glazebrook and Hammond JJ have put it:<sup>21</sup>

The two key principles of natural justice are that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*) and that the decision-maker be disinterested and unbiased (*nemo debet esse iudex in propria sua causa*).

30. In summary, I would suggest the Working Group and Committee should bear in mind the full range of options available to it in considering how to promote access to civil justice in New Zealand. These include a wide range of possible allocations, that is, to either the Courts and Judges themselves or to the parties and their representatives, for responsibility for the doing of justice in the circumstances of individual cases. The Committee should not, and I would argue cannot, see itself as fettered by a conception of “justice” predicated, in a culturally and historically contingent manner, on the adversarial ideal of justice. At a systemic level, the development of a hybridised inquisitorial-adversarial system of justice aimed at ensuring the doing of justice, in the above fundamental sense in each case, might be thought an appropriate aspect of New Zealand’s development of our autochthonous jurisprudence.

31. When couched in these terms, this is a radical suggestion. On this point, Fisher said the following (citations omitted):<sup>22</sup>

25. Could the answer lie in switching to an inquisitorial process? Some commentators think so. The adversarial process is said to be based upon the two false assumptions that proceedings will be resolved by trial and judgment (when in fact the vast majority are resolved by agreement) and that the best way of resolving a dispute is by a contest between competing adversaries (when in fact adversarialism distorts the truth, is unduly labour-intensive, and overlooks frequent inequality in bargaining power between the parties). The call to consider an inquisitorial system has also been made in New Zealand.

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<sup>21</sup> *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11].

<sup>22</sup> At [25]-[27].



26. It is far from clear, however, that our problems would be solved by simply switching to the inquisitorial. For every criticism of the adversarial system, an equal and corresponding one can be found in relation to the inquisitorial. It is true that the adversarial system is labour intensive, expensive, time-consuming and subject to distortions caused by inequality of arms. But the inquisitorial system is paternalistic (the responsibility for investigating and resolving disputes is placed upon the state), is subject to the inefficiencies of all bureaucracies, and is more vulnerable to influence, coercion and corruption. It is questionable whether investigation by a special kind of civil servant will, in the end, be as effective in ascertaining the truth as powerful statements on both sides of the question. In an age of transparency, there is much to be said for a dispute resolution process which is open and participatory. The lack of any finite trial date to which all procedures are directed can cause European proceedings to drift. Participation by private individuals working with an independent judiciary in an open forum may provide a more suitable setting for controlling the executive and for complementing the broadness of generalised legislation with fact specific precedents.

27. The true position is that neither the adversarial nor the inquisitorial has a monopoly on desirable features. The smart thing to do would be to borrow the best of both worlds. But before we could do that we would have to accept that to gain some of the benefits of the inquisitorial process we would have to compromise the thoroughness and purity of our common law system. Could New Zealand citizens, lawyers and judges stomach this?

32. As this makes clear, any conceptually complete and rigorous reforms in this direction would be significantly greater in scope and difficulty than those often contemplated by the Rules Committee. They would also, to a considerable extent, be properly within the province of Parliament, at-least to the extent that the creation of an inquisitorial jurisdiction may well require the constitution of new courts; the appointment of new, and new types, of judges; and, likely, considerable additional expenditure. It would also, understandably, likely be trenchantly opposed by many as inimical to the long-held adversarial values that, as I have argued above, have prompted the need for the current discussion. Fisher, however, offers, a persuasive response to these concerns (citations omitted):

28. At the heart of our present dilemma is the ideal justice fallacy. The fallacy is the touching assumption that ideal justice is both attainable and every persons right. It tends to be assumed that justice is an absolute which justifies the full panoply of court procedures regardless of the magnitude and nature of the dispute. Greeted with indignation are suggestions that certain disputes do not warrant legal representation, formal pleadings, full discovery, the right to join third parties, the right to cross-examine, more time to prepare, endless amendments to pleadings, another adjournment, unlimited witnesses, and submissions unlimited by page or time. Appellate courts, too, can sometimes be guilty of prolonging an endless search for

substantive justice without overt balancing against the competing values of expedition, economy and finality.

29. There are in fact two bitter pills to swallow. One is that ideal justice is unattainable by any system run by humans. The notion that by devoting sufficient resources to the task we could achieve ideal justice is, like Father Christmas, a myth. [...] The best we can hope for in any system of litigation is that it will produce results which most people would say is right most of the time.

30. The other pill is that even if ideal justice were attainable through adequate resources, we could not afford it. We can no more afford optimum justice than we can afford optimum medical care or optimum education. Like doctors and teachers, we have to use a finite resource to best advantage. Selections must be made. A heart operation warrants much time and money. A common cold does not. In the legal world we have to devote to each dispute a sum of money, and an amount of time, that is reasonable having regard to the magnitude of the sums or issues at stake. Some cases warrant a procedural Rolls Royce. Others will have to make do with a Lada, and still others a bicycle.

31. There is nothing new in this. The classic procedural bicycle is the Disputes Tribunal referred to earlier. In the interests of economy it excludes legal representation, pleadings, interlocutory procedures, traditional trial procedures and painstaking research into the law. In varying degrees, this acceptance of a relatively humble level of procedure is repeated in most statutory tribunals and specialist courts. The problem is that there is little or no provision for it when a civil dispute comes before our courts of general jurisdiction. When they go there, everyone rides in a Rolls Royce whether they asked for one or not. And if they can not afford a Rolls Royce, they are left on the roadside. The state offers no alternatives.

32. Nor is legal expense the only thing which must be kept proportionate to the sum or issue at stake. Equally important is expedition. The importance that parties place upon expedition is illustrated by the permanent reliance often placed upon interim decisions. A substantial proportion of intellectual property and commercial disputes go no further an interim injunction. The losing party elects to accept the provisional decision and move on. To an even greater extent the same is true of provisional adjudications under the Construction Contracts Act 2002. What this tells us is that in a surprisingly high proportion of cases a relatively cursory examination of the merits will be sufficient for the parties purposes.

33. Many will object that curtailing procedures and truncating trials would be contrary to natural justice. Natural justice is a core element in common law systems. We would never want to turn our back on it. But the full bells and whistles of traditional court procedure are not a dictate of natural justice. The fundamentals of natural justice are absence of bias, opportunity to present ones case, and opportunity to respond to adverse material. So long as these are observed, the form which natural justice takes in any particular case is responsive to the context and requirements of that case. Natural

justice does not demand the Rolls Royce we presently provide in our courts of general jurisdiction.

34. Everything comes at a price. Where cost and speed is not an issue, full civil litigation in the High Court, with its unqualified access to interlocutory procedures, an open-ended trial, and rights of appeal, will continue to provide the most thorough and skilled examination of a dispute. But in many cases probably the vast majority it would be in the interests of the parties to accept a less thorough means of resolving their dispute.

35. So in making changes the most pressing need is for supervised proportionality. We need a process for ensuring that the nature and sophistication of the procedures to be applied to any given dispute will be commensurate with the issues and sums at stake. We need cost/stake proportionality.

33. Also, as Justice Kós has identified:

[59] But we are kidding ourselves if we think civil justice is not significantly inquisitorial already. First, there is the revolution caused by intrusive case management. Secondly, there is the quite different degree of judicial intervention at trial. In criminal trials, Judges tend to ask very few questions because the adversarial nature of the process is respected. It is the prosecution's job to prove its case, and wrong for the Judge to blunder prominently into that process. In civil trials, however, judicial questioning can be extensive. Here the Judge is the tribunal of fact and focused directly upon identifying the truth.

[...]

[61] But not all Judges see it that way. Some gently try to adjust the process to make it fairer. This is the question of "imbalance" that I referred to before. But in adjusting the process, necessarily the Judge intrudes on the playing field. Let me give you an example.

[62] Many years ago I was instructed in a civil trial. It raised issues of fraud, and I was briefed by the defendant, an American corporation. The plaintiff was an individual. He worked as a boiler attendant in a university. There was no doubt he had been defrauded. The person who defrauded him had been sent to prison. But there the plaintiff was, now suing the fraudulent franchisee's franchisor, my client, the American corporation, on the basis of vicarious liability. The plaintiff went to a general practitioner in the provinces. He issued proceedings. He probably hoped we would settle, but we didn't. So we went to trial. The trial took a very unusual course, and at the time I didn't understand why. Subsequently I found out. It turned out that the provincial solicitor, realising he was badly out-gunned in the contest, and having little litigation experience, managed to nab the Judge as he was walking to the courthouse in

the morning. Somehow he managed to blurt out that he was completely out of his depth. The Judge told him not to worry and to do his best.

[63] The case began. I cross-examined the plaintiff. He made some useful admissions. He had very little knowledge of the American corporation. His dealings had been with the man now in jail.

[64] I had two witnesses. I called the first. He gave evidence convincingly. By the end of it we had two victims — the plaintiff and the American corporation. The plaintiff's solicitor stood up to cross-examine the first witness. He asked a couple of rather faltering questions, and then looked stricken. Cross-examination was not a skill he had acquired. But then the Judge took over. He briskly cross-examined my witness. The same thing happened with my second witness.

[65] At the end of it the Judge gave an oral judgment in favour of my client. As a matter of law, that was right. As a matter of adversarial process, what the Judge did was wrong. As a matter of civil justice, it was quite right. The plaintiff could not say, at the end of that process, that his case had not been properly presented, and that mine had not been properly tested.

[66] What had the Judge done? He had conducted a sort of inquisitorial trial.

34. Turning to the specific matter at hand, at the Committee's last meeting, the Working Group was tasked with discussing four initiatives before the Committee's 23 September 2019 meeting:
- a. removing or reducing the requirements for written witness briefs;
  - b. Justice Kós' "civilian" model;
  - c. the simplification of discovery obligations; and
  - d. the possibilities presented by Sir Graham Panckhurst's Christchurch Model.
35. In terms of the foregoing policy framework considerations, matters (a) and (c) are tangible and immediately (comparatively) realisable steps that can be taken by the Rules Committee, within its existing competence, to increase access to our current model of justice. Properly implemented, reforms in these subject matter areas should make accessing adversarial adjudication less expensive without compromising on the doing of "justice" in the individual case.
36. In contrast, matters (b) (to which the rest of this paper is addressed) and (d) involve changing the definition of "justice", in respect of certain cases at-least, to one less wedded to an adversarial and adjudicative model. These engage the wider institutional and regulatory concerns to a much greater extent than matters (a) and (c), requiring, potentially, considerable changes to our understanding, and regulation, of the proper

role of lawyers and judges. Work in these areas is, I have argued above, no less vital than in areas (a) and (c), but will require a significantly different approach.

### Justice Kós' "Civilian" Model

37. Justice Kós, in his address to the AMINZ and International Academy of Mediators Conference in Queenstown in March 2016, noted that seven of the eight countries ranked ahead of New Zealand on the World Justice Project Rule of Law index for civil justice were civil law countries.
38. Turning to look at both and new ideas as to how to close the "justice gap", the Judge therefore considered the potential merits of civilian, that is inquisitorial, approaches. In saying this, the Judge noted that "a strong conviction that something must be done is the parent of many bad measures."<sup>23</sup> Equally, however, given that "the problem of access to justice is an acute one", he considered that "it is time for some new things to be done."
39. In doing so, his Honour took the view that compulsory mediation, such as is possible in the Federal Court of Australia,<sup>24</sup> does not tend to resolve problems with imbalance in access to legal representation. Also, at the level of constitutional principle, he noted that "the short point is that the Courts are there for all to come to and to have their disputes resolved. The courtroom door is not a revolving one."
40. Similarly, while noting that the Disputes Tribunal also has an inquisitorial fashion, and that the maximum jurisdictional limit could and should be lifted (as has indeed happened since), the Judge thought that "so long as the referees are not lawyers, there is a limit to how high one may and should go."<sup>25</sup> Given the above observations noting that "justice" may well still arguably be done, in the natural justice sense, without the trappings of adversarial procedure – in which lawyers are specialised – one might query this rationale. The Judge has recently added to this idea by saying:<sup>26</sup>

That is not necessarily a bad thing if we are concerned about cases where routinely one side or the other or both cannot secure representation because of cost. In that respect this solution has echoes of my earlier suggestion about a civilian approach being taken to unrepresented litigant claims. That is what the Disputes Tribunal does. Tribunal hearings proceed very much on a combination of papers filed and a brief hearing of the principal protagonists. It is not as suitable for cases where there are other witnesses to be called. Cases of that kind could be sent back to the District Court for hearing if

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<sup>23</sup> Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016) at [5].

<sup>24</sup> At [35], citing the Federal Court Rules, r 28.02 (Cth).

<sup>25</sup> At [36].

<sup>26</sup> Stephen Kós "Better Justice" (Address to the Legal Research Foundation Annual General Meeting, Auckland, 20 August 2018) at [66].

necessary. My suggestion would allow for referral of that kind.

41. Justice Kós has suggested, on the basis of the conventional wisdom that litigating in the District Court is uneconomical for cases worth less than \$100,000, that the Disputes Tribunal's jurisdiction could be increased to around that point to "provide greater recourse to more evenly balanced independent decision-making for lower-end civil litigation where District Court litigation costs remain prohibitive."<sup>27</sup>
42. Considering how new thinking, inspired by the civilian experience, might be applied, Justice Kós first noted the greater use of case management in New Zealand in recent years in the Christchurch Earthquake List between 2013 and 2015, and in the Weathertight Buildings List. The Judge described the purpose of case management in this context as being the early and clear identification of issues, the immediate exchange of evidence, and the rapid disposition of interlocutory issues. As part of this, an issues conference is held within a month of the statement of defence being filed to allow the evidence needed to address issues, and the issues themselves, to be identified, and interlocutory matters timetabled. After expert evidence (particularly relevant in each of these lists) is exchanged, typically within three to five months of the first conference, a second conference is held. At that stage directions are made as to the use of evidence.
43. Justice Kós considered this an important innovation in cases in which all parties are represented and, broadly, there is equality of arms. However:<sup>28</sup>

It is, however, of relatively limited use where a party is unrepresented. As things run now (with an adversarial system), the Judge simply cannot descend into the well of the Court and provide enough assistance to the unrepresented litigant to make up for the efficiency and justice deficits Professor Zuckermann identified.

44. Conversely, in Denmark and Sweden, in which jurisdictions civil proceedings are largely conducted on an adversarial basis (even though the criminal justice system proceeds inquisitorially),<sup>29</sup> there is greater acceptance of Judges being actively involved in case management. Justice Kós noted that:

[43] Chapter 42 of the Swedish Code of Judicial Procedure (1998) provides for civil proceedings being initiated by an application for summons. The application is required to state a distinct claim, an account of the circumstances invoked as the basis for claim, an outline of the essential evidence to be offered, why the Court has jurisdiction and what relief is sought. The application is then processed by the Court to see if it meets

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<sup>27</sup> At [65].

<sup>28</sup> Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016) at [41].

<sup>29</sup> At [42].

that requirement. This is generally undertaken by a legally trained Court clerk, but in some more complex cases by a Judge. If the application fails to comply with the requirements just outlined, or is otherwise incomplete, the Court directs the plaintiff to cure the defect. If the plaintiff fails to obey that direction, the application is dismissed “if it is so incomplete that it cannot be used as a basis for legal proceedings without considerable inconvenience”. In that case it is simply never referred to the intended defendants.

45. The Judge noted that the efficacy of this scheme may well not translate into New Zealand because of our much lower levels of judicial resource (a manifestation, arguably, of the purely adversarial nature of our courts of general jurisdictions). In March 2016, when the Judge was speaking, while the Danish population was only 1.22 times that of New Zealand’s, Denmark had three times as many judges. Similarly, while the Swedish population was twice that of New Zealand’s, Sweden had over eight times as many Judges, some 450 of whom (twice the number then present in New Zealand), Justice Kós described as being “Associate and Junior Judges who undertake judicial functions including case management.” Also, because of the nature of the judiciary in these countries as a (specialised and independent) branch of the civil service offering a distinct career path, “legally trained clerks working for the Swedish court system also take a prominent role assisting with case management.”
46. Justice Kós has also suggested that pleadings should be certified by a lawyer, with civil legal aid to be provided to remove any impediment to justice this creates.<sup>30</sup> This would aid in ensuring that the pleading discloses an arguable cause of action and that the issues (and relevant evidence) are capable of early and clearly definition.
47. This would allow, Justice Kós suggests, for the early screening of unviable claims, the recasting of claims brought by meritorious but unrepresented or poorly advised defendants into more viable causes of action, and the more efficient (and less expensive) management of court time and preparation. “It is”, the Judge contends “a false economy for cases to begin and proceed with the pleadings mispremised.”<sup>31</sup>
48. Moving beyond the potential importation of case management concepts from the civil law world to New Zealand, Justice Kós outlined the potential of adopting a limited inquisitorial approach in the District Court in all cases where one party is not represented and cannot be reasonably expected to obtain representation, and for all cases of up to \$100,000 in value. This is aimed at making the process in such proceeding cheaper and, potentially, fairer, by encouraging the adoption of a more inquisitorial approach. The process would be as follows:

- a. the plaintiff would file a short statement of claim;

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<sup>30</sup> At [49].

<sup>31</sup> At [49].

- b. this would be reviewed by a court-appointed assessor;
- c. if the pleading is satisfactory, the claim will proceed – otherwise pleading aid will be arranged to aid in remedying deficient pleadings or, if the deficiency is irremediable, the case would not be allowed to proceed (a decision subject to judicial review);
- d. the assessor would meet the parties and determine the substantive points of clash and potential defences and devise a list of issues;
- e. parties would be required to produce any documents adverse to their case on those issues, with short affidavit evidence to be supplied where necessary;
- f. the Court, acting inquisitorially, would confer with the parties in a case management conference to consider convening a judicial settlement conference or, if not appropriate, a trial, with a decision also made as to which witnesses would need to be questioned, whether the Court should appoint an expert, and whether witnesses would be required to confer for common ground;
- g. a merits hearing would then take place, with relevant witnesses being examined by the Court on their evidence and documents, with additional questions from the parties or their counsel able to be asked only with leave; and
- h. finally, a short (compared to the current practice) judgment would then be delivered.

49. It is to be noted that many of these ideas are also contained in the NZBA Short Causes Working Group's recent proposals (which I have reported on separately), and these ideas have been discussed in other contexts by the Committee and elsewhere previously. As Justice Kós noted, these ideas are not dangerously radical. However, the number of consequential and related changes to the institutional and professional demands placed on lawyers and judges in such a system, together with required changes to other aspects of procedure (such as discovery) and substantive law such as evidence, does reinforce the need for any reform of this type to be conducted in a substantive, wide-reaching, and integrated manner.

50. For instance, more recently, Justice Kós has noted the incapability of the current practices surrounding witness statements with this notion of streamlined and inquisitorial procedure. More generally, his Honour observed that all these recommended steps are aimed, like these inquisitorial suggestions, at removing the costs of pre-trial preparation as "a critical obstacle to access to justice".<sup>32</sup>

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<sup>32</sup> Stephen Kós "Better Justice" (Address to the Legal Research Foundation Annual General Meeting, Auckland, 20 August 2018) at [62].



## Justice Kós' Further Suggestions on Control of Pleadings

51. Further developing these ideas in a speech to the Legal Research Foundation Annual General Meeting last August, Justice Kós suggested other areas in which the “justice gap” might be closed by decreasing parties’ control over the initial presentation of their cases.
52. One of these was to return, to an extent, to a writ system in the High Court,<sup>33</sup> such that all pleadings (by being required to be plead in an appropriate form) would disclose, in tolerably clear terms, an arguable cause of action and all material particulars. This would be supported by the pleadings assistance and civil legal aid measures noted above, together, following the Chief Justice’s 2014 suggestions, with a greater pro bono ethic from the legal profession. “The net cost of this proposal”, the Judge again suggested, “would be far less than the transaction costs of bad litigation processes that arise in its absence.”

## Robert Fisher QC's Suggestions

53. Speaking in 2008, Robert Fisher QC made several broadly similar suggestions, grouped under the general headings of “more convergence with inquisitorial systems” and “more diversity in the available forms of dispute resolution”. These were:<sup>34</sup>
- a. furthering the trend seen towards stronger judicial case management seen in England, Australia, and New Zealand to increasingly blend traditional party-controlled adversarial elements with non-adversarial elements such as the judge taking a more active role in defining issues and having responsibility for case progression (together with commensurate personalised obligations for lawyers and parties towards the same end);<sup>35</sup>
  - b. considering greater judicial “ownership” of individual case files than is seen in the currently limited movements in that direction as part of encouraging greater judicial case management, and also ensuring judges have adequate scope to take a more active role in managing parties’ presentation of their cases to avoid unnecessary expense and delay in the progression to, and conduct of, trials,<sup>36</sup> as part of what he termed “supervised proportionality”;<sup>37</sup>

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<sup>33</sup> At [51].

<sup>34</sup> Robert Fisher “Whether the Adversarial Process Is Past Its Use-By Date – A New Zealand Perspective” (NZ Bar Association and Legal Research Foundation Civil Litigation Conference, Auckland, 22 February 2008).

<sup>35</sup> At [37]-[40].

<sup>36</sup> At [41].

<sup>37</sup> At [46].

- c. relatedly, and similarly to Justice Kós’ suggestion, adopting procedural changes supportive of a cultural change such that, for example, “it might become unacceptable for a judge to remain silent where the plaintiff should be applying for summary judgment based on an unpleaded cause of action or where the defendant does not realise that there is an unanswerable limitation defence”;<sup>38</sup>
- d. relatedly again, giving judges personalised responsibility for ensuring that the dispute is resolved in addition to the obligation to give judgment and reasons following the hearing of the case as a particular, and extreme, form of case management, meaning that Judges have a sense of responsibility for ensuring the resolution of the parties’ overall dispute, as opposed to merely being responsible for “the particular phase of the proceeding that happens to come before that judge”<sup>39</sup>, thereby departing from the current view of the passive and limited role of the judge (to a greater extent than has been seen with the Commercial List) towards a docketed system similar to that now in place in England and Wales;<sup>40</sup>
- e. moving from a position in which summary judgment, strike-out, interim injunction, and judicial settlement conference applications go from being party-initiated “optional extras” that divert proceedings from the default progression to trial, with the associated pre-hearing expenses and (generally) unlimited production and presentation of evidence, to a framework in which the court is empowered to direct parties to use formal procedures other than awaiting the progression to trial, where the interests of justice and the need for economic access to justice align in that direction, either mandatorily or at-least as part of a pro-active channelling role;<sup>41</sup>
- f. relatedly, allowing Judges to order parties to submit to mediation or other non-curial processes, and to allow recourse to alternative dispute resolution procedures even after a trial has begun, expanding on procedures like those in Queensland that made mediation or case appraisal at the expense of the parties compulsory in certain circumstances;<sup>42</sup> and
- g. awarding judges greater abilities to “consider limiting the length of documents, limiting or dispensing with discovery, written briefs, cross-examination and/or

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<sup>38</sup> At [43].

<sup>39</sup> At [48].

<sup>40</sup> At [49]-[52].

<sup>41</sup> At [53].

<sup>42</sup> At [56].

an oral hearing, limiting the nature and number of witnesses and exhibits, and limiting the time which may be devoted to specified phases of the trial”.<sup>43</sup>

### The Law Commission’s March 2004 Recommendations

54. Even longer ago, in March 2004 the Law Commission (then lead by Robertson J) released R85 *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*. R85 was released following a reference from the government to review the structure and operation of all State operated adjudicative bodies in New Zealand except the Supreme Court (the creation of which was then in train). As part of determining how best to reform the structure of courts and tribunals to ensure a coherent and comprehensive range of proportionate responses were available, the Commission considered several proposals and policy concerns like those engaged by Justice Kós’ and Robert Fisher QC’s proposals.

55. Reinforcing the concerns expressed at [10]-[12], the Commission framed its proposals against its understanding that, under the rule of law:<sup>44</sup>

Courts uphold the rule of law. They act as a bulwark against that arbitrary abuse of power....

[...]

Courts are the ‘backstop’ available to resolve disputes between citizens, and between citizens and the state. Courts do not initiate action themselves. Courts decide cases. They resolve controversies. They can only respond to disputes which litigants place before them. The function of all judges – despite variations of hierarchy or process – is fundamentally the same: to deliver justice by determining the factual or legal issues relating to the particular cases in front of them. Their decisions have influence beyond the individuals and groups who come before them: they underpin the way the economy and society functions and citizens interact. In this way, courts make a vital contribution to a stable and civil society.

Saying that courts perform a backstop role in our society is not to suggest they can be passive in the way they carry out their role. Courts must be responsible for their own effectiveness. They should be constantly vigilant to ensure they operate for citizens and they must take it upon themselves to deliver justice through procedures that are relevant and responsive to the needs and expectations of the people who use the courts. In this way public confidence in the courts will be maintained.

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<sup>43</sup> At [54].

<sup>44</sup> Law Commission *Delivering Justice for All: A Vision for the New Zealand Court System* (NZLC R85, 2004) at 3.

The degree of confidence people have in the court system will influence their belief in the rule of law. If people cease to see courts as relevant, effective and accessible, they are less likely to believe that the rule of law means everyone is entitled to the benefit and protection of the law, including them and people like them. They are less likely to believe that courts will fairly and impartially resolve disputes between citizens and the state.

At another level, the rule of law provides certainty as to the law and confidence that it will be properly applied to all. This certainty and confidence assists social and economic development. Courts not only have to work well – but must be seen to do so – for our democracy to work well.

56. Vitally important to achieving access to the courts, and to justice, in order to achieve these objectives, the Commission accepted, was to minimise the costs of going to Court, and to combat the view, said to be widespread in those consulted by the Commission, that “you get the justice you pay for.” In pursuing these objectives, the Commission was of the view that:<sup>45</sup>

We consider that the most important way to reduce the cost of taking court proceedings or of defending a criminal charge is for court processes to be streamlined and simplified so that there are no unnecessary steps or obscure technicalities.

57. Relatedly, summarising the products of their consultation with the judiciary, profession, users of court systems, and the community at large, the Commission reported that, commonly, people identified “the high legal costs and filing fees, coupled with the economic consequences of the distraction from other productive activities which inevitably arises” as a key problem with being involved in the Courts. This together with “the time and delay involved and the exhaustion of being caught in the system”.<sup>46</sup> Relevantly to the present topic, the Commission reported that “people frequently expressed the belief that delay and disadvantage could be swept away if we moved from an adversarial system to an inquisitorial system.”<sup>47</sup>

58. However, the Commission disagreed with that proposal. Rather, in keeping with the views noted above and those I have expressed in this paper, the Commission considered that:<sup>48</sup>

there is, in fact, a continuum both internationally and in New Zealand as to how disputes are determined in courts. In different places at different times and at different levels of courts, there is more or less emphasis on so-called adversarial or inquisitorial approaches, but neither is totally exclusive of the other. The mix needs to

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<sup>45</sup> At [1.108].

<sup>46</sup> At 6.

<sup>47</sup> At 6.

<sup>48</sup> At 6.

be constantly reviewed. We do propose that judges in the Community Court take a more active role – as the judges in the Family and Youth Courts do now – but find no justification for a wholesale shift in emphasis across the system.

59. The creation of the Community Court referred to in the above extract was one of the Commission’s several recommendations as to how the New Zealand courts and tribunals system should be restructured. The Community Court would be one of the nine Primary Courts,<sup>49</sup> all of which (except the Māori Land Court) would be first instance courts with general and automatic rights of appeal on fact and law to the High Court. Further appeals would be on matters of law only to the Court of Appeal, and then only subject to leave to be granted by the Court of Appeal. This would have been at the expense of the abolition of the District Court, which structure was seen, primarily, as an omnibus vehicle for the various specialist jurisdictions and competencies that were already, by 2004, well established in that court. The common characteristic of these courts was identified as being that they were:<sup>50</sup>

the primary arenas in which the evidence is tested, and where cross-examination takes place as a matter of course. They are the courts where most people encounter the formal court system and which deal with most of the work. Whatever other processes may have taken place to try to resolve the dispute prior to that adjudication (such as mediation or investigation) this is the first judicial determination that authoritatively declares an outcome to a legal situation.

60. The High Court, under this model, would have retained responsibility for the first hearing of judicial review applications, but would have assumed greater (express) responsibility in its appellate function as an appellate court maintaining consistency in the operation of the Primary Courts. The High Court would have maintained an original jurisdiction in relation to serious offences (analogous, largely, to category 3 and 4 offences today) , an original jurisdiction in civil matters coterminous with that of the new Primary Civil Court in cases of up to \$500,000 in value (\$681,977.53 in Q2 2019 on the basis of CPI adjustment), and exclusive original jurisdiction in other civil matters.

61. The High Court’s appellate role would have been more expressly linked with the High Court’s judicial review function and “duty to maintain legality”.<sup>51</sup> This would have been exercised in respect of all primary court jurisdictions, including (subject to the dissenting view of one Commissioner) the Employment and Environment Courts.

62. The Court of Appeal would have been maintained as a strong, intermediate appellate court with sufficient time to give adequate consideration to the complex and significant cases that come before it” as, de facto, the final appellate court on many issues.

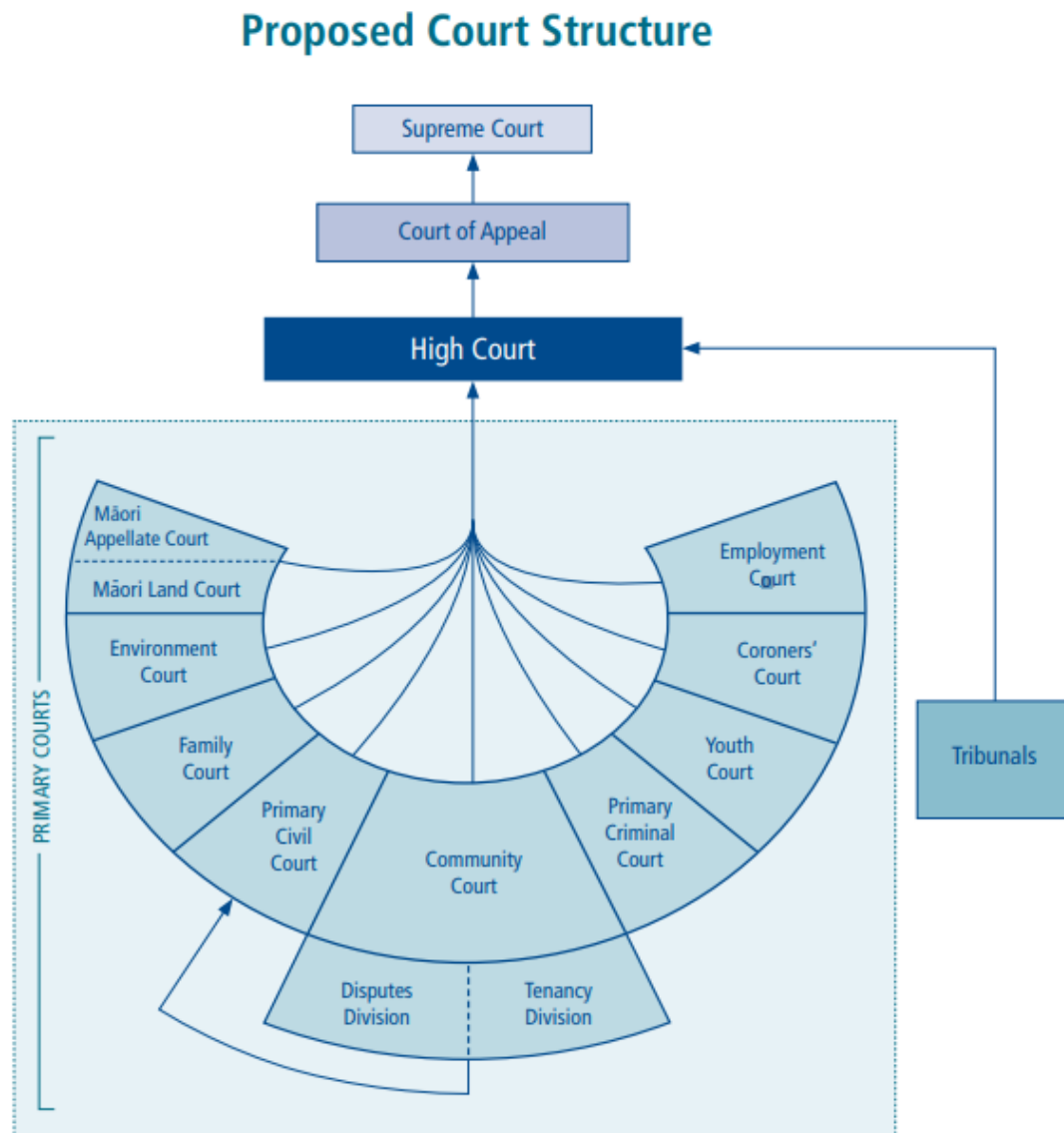
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<sup>49</sup> Being the Community Court, the Primary Civil Court, the Primary Criminal Court, and the Family, Youth, Employment, Environment, Māori Land, and Coroners’ Courts.

<sup>50</sup> At [3.7].

<sup>51</sup> At [3.32].

63. The structure proposed by the Law Commission is reproduced below.



64. Stating their case for the establishment of a Community Court, the Commissioners reported, in comments remarkably like those collated by Dr Toy-Cronin in her contemporary work in the District Court, that:<sup>52</sup>

There is widespread agreement among court users and legal professionals that there are considerable shortcomings in the way the court deals with the greatest part of its workload, which we will refer to as the court’s “high volume work” and which comprises the less serious civil and criminal cases. It would be accurate to describe this part of the District Court as “the undervalued workhorse of the court system”.

This view was one of the clearest messages to the Law Commission. As we set

<sup>52</sup>

At [4.2]-[4.7].

out in Seeking Solutions, people consider taking lower value civil cases to court to be costly and disproportionate. ...  
[...]

The unavoidable impression at present is that these sort of high volume cases are seen as less important than other cases and receive lower quality legal attention. The Law Commission considers the reverse should be true. High volume cases have just as great a need for judges with sufficient practical legal experience to deliver appropriate decisions. The increasing level of unrepresented or inadequately represented parties, noted in Part 1.4, demands judicial officers with robust knowledge of the law and the confidence and experience to be flexible within the law.

We are firmly of the view that these concerns must be addressed by the creation of a new court. The District Court judges have submitted that the problems experienced at the high-volume end of the District Court could be tackled by changes in process, increased funding and the introduction of legally qualified Community Magistrates to undertake some of the work.

The Law Commission agrees that process changes are essential and will go a long way to achieving the desired improvements. Our proposals include detailed suggestions for change to high volume criminal and civil processes. volume cases if they retain their ‘Cinderella’ status at the bottom of the District Court’s jurisdiction. Process change alone is not sufficient to bring about a change in the way the District Court operates, which we are convinced is needed to address all of our concerns. A fresh start is a prerequisite to making a fundamental change in culture and philosophy.

When the Royal Commission on the Courts recommended the Magistrates’ Court become the District Court in 1980, it was adamant that there was a need for it to remain the “People’s Court”. In reality, the “People’s Court” notion has eroded with the expansion of the District Court’s jurisdiction. With our recommendation for a Community Court we reissue the call for a People’s Court.

65. Relatedly, the Commission noted:<sup>53</sup>

The cost of going to court and finding representation has also been criticised. People feel that the cost is disproportionate for low value civil cases, and that as a result they are often forced to represent themselves. The problems surrounding the lack of information and help given are compounded for the unrepresented.

[...]

At present the same basic processes and rules apply to all civil cases heard in the District Court – a case will be treated in more or less the same way whether it is for

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At [4.11], [4.14]

\$20,000 or \$200,000. This can be disproportionate. Also, the complex nature of the processes are not easy for unrepresented people to understand.

66. Accordingly, the Commissioners recommended the creation of the Community Court, at the same level as the other Primary Courts, to deal with high volume, less serious, criminal and civil cases that would have otherwise been heard in the District Court. Its civil jurisdiction was to extend up to \$50,000 (\$68,197.75 in quarter 2 2019 on the basis of CPI adjustment), was to be a specialist court with its own practice and procedure (analogously to the distinctive “style” of the Family and Youth Courts within the District Court that developed in accordance with the statutory principles articulated for those Courts)<sup>54</sup> and was to be focused on providing early clarification of issues.<sup>55</sup>
67. The maximum jurisdiction was based on the Commission’s assessment of the range of “most cases that ordinary citizens or small businesses need to pursue in the normal run of activities”<sup>56</sup>, and that parties seeking streamlined resolution should be able to transfer their matter to the Community Court by mutual agreement.<sup>57</sup> The Court was not to have the jurisdiction to grant injunctive relief.<sup>58</sup>
68. The Commission considered it manifest that the District Court Rules 1992, which were then in force “are unduly complicated for simple debt recovery and for the lower value civil cases that will be heard in the Community Court” and it inappropriate that:<sup>59</sup>
- claims below \$50,000 are subject to the same processes as claims up to \$200,000. A significant amount of preparation goes on before a trial and sometimes too many appearances are required at the courthouse. For many claims under \$50,000, the cost of pursuing litigation is disproportionate to the value of the claim. This is highly problematic for the parties, and means that more time and money may be spent on the cases than is appropriate or economic.
69. The goal, in simplifying procedural requirements for Community Court civil matters, was to ensure that civil claims under \$50,000 could be dealt with within two hearings before a Judge. The first of these was a case assessment conference, the second, if required, a full hearing. The Judge was to play an active role in assisting the parties to identify contentious issues, and to identify possibilities for settlement.<sup>60</sup>
70. Claims would be brought by way of the plaintiff completing, and serving on the defendant, a pre-printed “claim form” seeking to elucidate precise information, facts, and issues related to the dispute, with parties required to identify no more than five

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<sup>54</sup> At [4.31] and [4.58].

<sup>55</sup> At [R54]-[R58].

<sup>56</sup> At [4.53].

<sup>57</sup> At [4.53].

<sup>58</sup> At [4.53].

<sup>59</sup> At [4.134].

<sup>60</sup> At [4.140].



important documents evidencing the claim (to be served together with the form), and a list of up to five possible witnesses.<sup>61</sup> As well as serving this on the defendant, the plaintiff would be required to (similarly to the Family Court today) serve on the defendant an information pack and a pre-printed “defence form”.<sup>62</sup>

71. The defendant would have 21 days to complete, serve, and file the defence form after service. That form would require the defendant to admit or deny allegations, identify the main issues, and, similarly to the plaintiff, identify and provide copies of up to five salient documents and up to five key witnesses.<sup>63</sup> The pre-printed forms would be signed by the parties as a statement of truth, and the making of a false statement would be punishable as contempt of court.<sup>64</sup>
72. A time and date for an initial hearing would then be allocated to occur within 30 days of the forms being filed. Not exceeding one hour in length, the parties would be expected to attend with relevant documents. The Judge would adopt a facilitative role in identifying the main factual and legal issues, and would have the power to seal a binding settlement between the parties. Any settlement offers or related statements made during the hearing, however, would be without prejudice in regards any subsequent merits hearing.<sup>65</sup> If matters had to proceed to that stage, the Judge would complete a pre-printed “directions summary” form for distribution, outlining any facts and issues agreed at the conference, any steps to be taken by the parties before the next hearing, and an estimated timeframe for the trial.<sup>66</sup> Trials should, as noted, take place within 90 days of the issues conference.
73. Interlocutory applications would be dealt with at the time of the initial hearing, and further applications not allowed except by leave of the Court.<sup>67</sup> Parties to proceedings in the Court would not have a right to general discovery. Further discovery, in addition to the forms supplied on filing, would be limited to that ordered by the Judge and recorded in the “directions summary”. Any claim in which further discovery was essential to doing justice would have to be transferred to the Primary Civil Court.<sup>68</sup> Similarly, any case could be transferred to the Primary Civil Court at any time between preliminary hearing and the trial, either by application of a party or on the Judge’s own initiative, where desired and considered warranted because complexity.<sup>69</sup>

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<sup>61</sup> At [4.144].

<sup>62</sup> At [4.145].

<sup>63</sup> At [4.145]-[4.146].

<sup>64</sup> At [4.148].

<sup>65</sup> At [4.151].

<sup>66</sup> At [4.152].

<sup>67</sup> At [4.154].

<sup>68</sup> At [4.157]-[4.158].

<sup>69</sup> At [4.159].

74. A different Judge would preside at the trial. The Judge would be free to be actively involved, especially where unrepresented or under-represented parties were involved, in order to ensure all relevant evidence is available and all pertinent questions asked. The Judge would, similar to Disputes Tribunal referees, be empowered to seek and receive all evidence they see fit. Any reserved judgment would be produced within 30 days of trial, ensuring the entire process – from claim to trial – was complete within around six months.<sup>70</sup>
75. Considering debt recovery proceedings brought by way of summary judgment applications, as a distinct and significant area of work in the District Court, the Commission expressed the view that procedure was too complicated for the Community Court.<sup>71</sup> Accordingly, the summary judgment procedure would be retained in the Primary Civil Court and High Court, and even where the amount claimed was under \$50,000, claimants would be able to go to those courts in the first instance.
76. However, it was anticipated that the Community Court process would prove sufficiently attractive that, in many cases, debt recovery would be carried out in the Community Court. A special summary-type procedure would be available in cases in which no defence form was completed within the relevant time limit, allowing default judgment to be entered for liquidated claims and a summary hearing for unliquidated demands.<sup>72</sup> Additionally, disputed claims within the jurisdiction of the Disputes Tribunal would be able to be transferred to that jurisdiction.<sup>73</sup>
77. The Disputes Tribunal (and the Tenancy Tribunal) would operate as divisions of the Community Court, so as to ensure that, over time, their jurisdictions remained proportionate and aligned to that of the Community Court. The Commission considering that the Tribunals were operating effectively, their procedures and jurisdiction were not to be reformed.<sup>74</sup> Of this, the Commissioners said:<sup>75</sup>

On balance, our impression is that the two tribunals, and their attendant services, operate as efficient and cost-effective mechanisms for resolving disputes. Most submitters commenting on the tribunals felt they were successful in achieving their aims, and liked their tailored processes. Lawyers were less impressed with their operation.

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<sup>70</sup> At [4.155]-[4.156].

<sup>71</sup> At [4.176]-[4.177].

<sup>72</sup> At [4.180]-[4.181].

<sup>73</sup> At [4.182].

<sup>74</sup> At [4.186].

<sup>75</sup> At [4.195] and [4.197]-[4.202].

Although there are few applications for re-hearings or appeals, some submitters complained about the fairness of the Disputes Tribunal process and the capacity of the referees to identify and resolve legal issues adequately. There were 56 referees sitting in Disputes Tribunals in 2002, of whom approximately one quarter were legally qualified. Referees deal with a wide range of disputes at differing levels of legal complexity. Some submitters considered that the lack of legally qualified referees was a weakness in the system.

This problem is compounded by the lack of a general appeal right – and therefore error correction – from decisions of the tribunal. We raised two possibilities in *Seeking Solutions*. First that Disputes Tribunal referees should be required to have more qualifications or, secondly, that there should be a general right of appeal from the tribunal.

We do not favour the latter. It is a characteristic of the Disputes Tribunal process that costs and delay are kept to a minimum, and parties have consistently put a high value on finality of process. An appeal right would reduce this attribute. Also, normal appeal rights are inconsistent with decisions based on the merits and justice. A wider appeal right than at present could only be by way of rehearing. Parties with more time or resources to wear down the other side could abuse the appeal process.

However, we do consider that all proceedings in the Disputes Tribunal should be recorded so that a transcript is available if a complaint is made or an appeal is sought. This would have other benefits. In similar jurisdictions overseas, recording informal proceedings has been found to have a salutary effect on behaviour in ensuring that ‘informal’ does not translate into ‘anything goes’.

We consider that Disputes Tribunal referees should normally be required to be legally qualified. This would protect the interests of the parties more effectively and reduce the likelihood of aberrant decisions being made that are contrary to established law. The fact that, in the Disputes Tribunal, people do not have access to legal representation is a reason to put measures in place that will help protect their interests and reduce inconsistencies.

78. Moving in the other direction, a Primary Civil Court would be established to have concurrent jurisdiction with the High Court for civil cases where amounts of up to \$500,000 were in dispute (\$681,977.53 in Q2 2019 based on CPI adjustment). The High Court would have exclusive jurisdiction over matters where greater amounts were in dispute.<sup>76</sup> At-least initially, parties were to have considerable autonomy in transferring proceedings between the two bodies within that range of concurrent jurisdiction.<sup>77</sup>

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<sup>76</sup> At [5.103]-[5.104].

<sup>77</sup> At [5.105]-[5.106].

79. Reflecting the approach that eventually lead to the close coherence between the High Court Rules and the District Court Rules, the Commission recommended that the same procedure and processes should apply in both jurisdictions. This was because, despite acknowledgement that procedures contributed to the cost of going to Court, the Commission was of the view that, as of that time, the civil justice system was functioning tolerably well.<sup>78</sup> “Key” to this, the Commissioners said, was parties accepting their duties to try and resolve disputes early, and “that where cases do come to court the issues need to be clearly identified as early as possible.”<sup>79</sup>

80. At the same time, the Commission was of the view that as matters of practice and procedure arguably engage “fundamental issues about the nature and cost of litigation”<sup>80</sup>. Accordingly, the Commission recommended that any restructuring of the courts system would provide an opportune moment at which to “tackle the seriously overdue reform of our court rules as a whole”<sup>81</sup>. The significant policy content of those choices meant that the Commission expressed doubts as whether the Rules Committee was the appropriate body to execute those reforms, given the considerable expense involved,<sup>82</sup> and the fact that a judicial body undertaking such reform is:<sup>83</sup>

thoroughly appropriate when dealing with practice and procedure in court. However, the rules can impinge on a much wider area and have a substantial effect on the nature of litigation and general issues of accessibility to justice.

Contributing to that perspective, it appears, was the Commissions’ experience of having submitted to the Committee for adoption its recommendations in its 2003 *General Discovery*. The Committee accepted these in principle, only to retreat from the initiative following what the Commission termed “sustained opposition from practitioners.”<sup>84</sup>

81. Within that wider review, issues that the Commission considered required particular attention included the same areas noted above, namely:

- a. **Case Management:** Noting that case management had somewhat diluted parties’ historically complete control over the pace of litigation, the Law Commission took the view that case management is an “essential part of an effective and efficient civil justice system.”<sup>85</sup> In order to fully realise the potential benefits of case management, the Commissioners considered it

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<sup>78</sup> At [5.107]-[5.109].

<sup>79</sup> At [5.111].

<sup>80</sup> At [5.122].

<sup>81</sup> At [5.118].

<sup>82</sup> At [5.116].

<sup>83</sup> At [5.120].

<sup>84</sup> At [5.121].

<sup>85</sup> At [5.125].

essential that the “local legal culture” of New Zealand included a commitment by judges, practitioners, administrators, and parties to supporting the system through fulfilling their duties to co-operate in achieving the goals of civil procedure.<sup>86</sup> Relatedly, it was considered important that parties be forced to focus on the relevant issues in disputes at an early stage in proceedings, and that the completion of these steps be made a pre-requisite to obtaining a hearing,<sup>87</sup> and that Courts be alert to the need to take meaningful steps to enforce compliance with timetables.<sup>88</sup> Above all, however, it was emphasized that Judges and parties must be prepared to adopt a flexible and tailored approach to case management in order to achieve the just and efficient disposition of each case, as part of the cultural commitment noted above; including the need to adopt novel approaches where prudent.<sup>89</sup>

- b. **Discovery:** While noting the importance of discovery, the Commission noted the considerable additional costs associated with over-broad rights to discovery and briefly reiterated the contents of its 2002 report on *General Discovery* (on which I have reported separately) aimed at mitigating the costs associated with discovery,<sup>90</sup> noting that “the wider community” found the approach then in force “oppressive, expensive and generally unhelpful”.<sup>91</sup>
- c. **Pre-Action Protocols:** The Commission noted evidence suggesting that the introduction of pre-action protocols requiring parties to obtain and provide information about prospective claims, with an eye to encouraging “the exchange of early and full information, to enable parties to avoid litigation by settling where possible” and the expediting of unavoidable litigation.<sup>92</sup> While considering that this may be a matter of good practice, noting that the United Kingdom had reported an improved culture of co-operation, the Commission noted evidence that the reforms had also caused the “front-loading” of expenses.<sup>93</sup> The Commission therefore recommended not imposing any formal procedural obligations of this sort “until there is clear evidence that the additional costs involved are not an impediment in themselves.”<sup>94</sup>
- d. **Wasted Costs and Promoting Settlement:** The Commission considered that a potent wasted costs rule be introduced as a means of deterring legal

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<sup>86</sup> At [5.128]-[5.130].

<sup>87</sup> At [5.143]-[5.145].

<sup>88</sup> At [5.158]-[5.161].

<sup>89</sup> At [5.152]-[5.157].

<sup>90</sup> At [5.170]-[5.174].

<sup>91</sup> At [5.175].

<sup>92</sup> At [5.176]-[5.177].

<sup>93</sup> At [5.177].

<sup>94</sup> At [5.178].

representatives from putting opposing parties to greater expense.<sup>95</sup> Similarly, building on the *Calderbank* offer regime, the Commission recommended adopting the United Kingdom approach of having rules setting out explicit consequences for failing to settle and creating a presumption – as opposed to a potential – costs consequence for parties failing to beat an offer.<sup>96</sup> That proposal found favour with submitters.<sup>97</sup>

82. The Commission also contemplated a number of reforms in the proposed exclusive original jurisdiction of the High Court in matters in which over \$500,000 were in dispute, and in cases considered too important or complex for the Primary Civil Court.<sup>98</sup> The High Court was to have the power to order cases within the concurrent jurisdiction of the Primary Civil and High Courts to be transferred to it for hearing on its own motion or at the application of any party, and vice versa.<sup>99</sup>

83. Matters that the Commission considered most appropriately heard in the High Court – which might matters worth exempting from any streamlined proposal – included “judicial review, arbitration, trusts and administration”, these being matters of complex and/or constitutional significance and, in the case of probate, areas in which the High Court was seen to be doing an exemplary job in any case.<sup>100</sup> Similarly, insolvency work (which has of course changed radically in the interim in some respects), was seen to be being managed very well within the [Associate Judges’] jurisdiction,<sup>101</sup> subject to wider questions about whether judicial officers needed to be involved in some of these matters at all.

84. The reforms were seen by the Commission as offering an opportunity to revisit the question of judicial specialisation within the High Court. The profession’s impression, as reported to the Commission, was that:<sup>102</sup>

the commercial community felt generally that High Court judges were of high calibre, and could come up to speed relatively quickly with the issues involved in a case. An exception to this was in the area of intellectual property, which was described by some as a complex area requiring specialist knowledge and procedure.

85. On the one hand, it was noted that the greater emphasis on appellate work in a reformed High Court would mean that the particular expertise required at first hearing

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<sup>95</sup> At [5.162]-[5.164].

<sup>96</sup> At [5.167].

<sup>97</sup> At [5.169].

<sup>98</sup> At [6.11].

<sup>99</sup> At [6.11].

<sup>100</sup> At [6.12]-[6.16].

<sup>101</sup> At [6.18].

<sup>102</sup> At [6.22].

may not be required on appeal, given that appellants tended to concern areas of law.<sup>103</sup> Similarly, there was real concern expressed by submitters as to the practicability of specialisation on a bench the size of the High Court. The High Court judges themselves were of the view that “case volumes in New Zealand do not require streaming, and that streaming for specialisation is difficult to achieve administratively.”<sup>104</sup> The Commission agreed with that view, while noting the contrary – and widespread – view that “capturing the use of specialist expertise within the court would enhance the system, increase efficiency, and make better use of judicial resources.”<sup>105</sup>

86. Correspondingly, the Commission did not accept the views of submitters that a dedicated specialist commercial court or division should be established, “bearing in mind the need for judicial resources to be managed as flexibly as possible, the need to retain a viable commercial caseload within the High Court and the Primary Civil Court, and the relatively low numbers of cases presently being entered on the Commercial List.”<sup>106</sup> The Commission recommended the discontinuation of the Commercial List to the extent that it related to the allocation of judges to hearing, but recommended it be maintained – and the concept expanded – in respect of case management. Building on the English model of docketed Judges, the Commission recommended that “case management of all complex litigation should be on an individual listing basis”.

## Conclusions

87. As the wide-reaching nature of the above discussion reflects, closing the “justice gap” requires departing, to an extent, from New Zealand’s traditional commitment to adversarial justice on the common law model. A hybrid inquisitorial/adversarial model should be adopted. The first priority of civil procedure in this system ought to be the doing of the “justice” – in the natural justice sense – demanded by parties, who will otherwise continue to turn away from the State’s institutions in increasing numbers.
88. Whether the procedure applicable to a particular case is more inquisitorial or adversarial in nature ought to be tailored to the demands of “justice” in that broad sense. A culturally and historically contingent commitment to “justice” on the passive, adversarial, model – which growing dissatisfaction indicates is no longer relevant to the needs and values of parties – should not be allowed to detract from the realisation of this goal.
89. This will require considerable civil procedure reform, and consultation with other decision-making bodies able to enact reforms beyond the Committee’s competence; particularly the Executive, Parliament, and the Law Society as the legal professional

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<sup>103</sup> At [6.25].

<sup>104</sup> At [6.27].

<sup>105</sup> At [6.28].

<sup>106</sup> At [6.59].

regulator, given the inter-related and co-dependent need for cultural and regulatory changes and, in all likelihood, additional resourcing. However, given the dire need for reform in promoting access to civil justice, and the judiciary's obligations to the administration of justice and the upholding of the rule of law, I would suggest it is nonetheless incumbent on the Rules Committee to exercise leadership in this area.

Yours most sincerely,

Sebastian Hartley  
Clerk to the Rules Committee