



The Rules Committee

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Access to Justice 05/19

Circular 37 of 2019
Hearing Fees Regulations

Tēnā koutou,

Please find attached, for your consideration, a memorandum on the question of written briefs of evidence (**C 37 of 2019**).

This memorandum was previously circulated to the members of the Access to Justice Working Group on 13 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: 13 August 2019
Re: Written Briefs of Evidence and 'Will-Say' Statements



The Rules Committee

Introduction

1. Justice Dobson has informed me that he and the Chief Justice are interested in considering rules changes that would, hopefully, reduce the expense presently associated with this aspect of preparations for civil procedures. He notes that, in Western Australia, the requirement for formal written statements (**written briefs**) has been abandoned in many cases, replacing these instead with **will-say statements**.
2. At the Committee's last meeting, I was tasked with reporting to the Access to Justice Working Group (**the working group**) on the Western Australian model, and any other similar initiatives. This to support the working group's having an initial discussion of potential initiatives in this space that may aid in increasing access to justice by reducing the cost of litigation.
3. Accordingly, I below note the findings of research and consultation that the Rules Committee has previously undertaken in this area, describe the Western Australian model, and examine the state of play in other foreign jurisdictions. I interlace these with commentary on the broader policy considerations that will likely be engaged by any reforms undertaken in this area. I also note the practice, such as that in the Federal Court of Australia, of most evidence being given in affidavit form, given its obvious similarities (as a matter of practice) to witness' evidence in chief being led using, and often confined to, the contents of their written brief.
4. My impression, based on discussions with judges at the Auckland High Court and a collection of practitioners at various events since June, is that there is a perception that the preparation of written briefs of evidence is a major contributor to the costs of taking a civil matter to trial in New Zealand at present.
5. To the extent that increasing access to the current system of adjudicative justice by reducing the costs associated with that access is the Committee's preferred means of addressing access to justice, reducing the use of these briefs may therefore be a valuable initiative in promoting access to justice. This is assuming, of course, that doing so does not result in the need for additional expenditure on other aspects of trial preparation to ensure that "justice", in the sense of adjudication of parties' legal rights with regard being had to all pertinent matters of fact and law, can still be done.

Relatedly, I have noted below where reforms in this area intersect with wider questions of litigation culture and practice.

Previous Rules Committee Research and Initiatives

6. This topic has previously been visited by the Rules Committee. This took place between, it appears from the Committee's records, between 2008 and 2012, with the proposals for reform ultimately not progressing to an amendment rule. The below summary of the proposals and their history is offered for two reasons:
 - a. first, to identify a number of still pertinent policy and principled concerns; and
 - b. secondly, to identify some of the difficulties and contrary views that any proposal for reform in this area may well encounter.
7. On 30 October 2008, Dr Heather McKenzie, then clerk to the Rules Committee, provided a memorandum on witness statements in England and Australia to the members of a sub-committee considering witness briefs. Similarly, her immediate successor, Ms Sophie Klinger, provided a similar memorandum on witness statements and oral evidence to Justice Asher on 30 June 2009. I have had regard to their memoranda in preparing this advice. I have independently researched the various jurisdictions noted in those memoranda, and it appears that none of the common law jurisdictions surveyed (Australia, Canada, and England and Wales) had enacted any significant reforms in this area in the last decade.
8. Building on the research provided by my predecessors, and by the work of that group (which I am able to provide to any interested members of the Committee if desired), a consultation paper on case management and written briefs was released on 10 December 2008, and again, with revisions, on 26 February 2009. That consultation paper stated the problem in the following terms:¹

It is a particular concern of the High Court Judges that almost all evidence in civil trials is adduced by written briefs. This practice does no more than reflect the way in which the relevant High Court Rules are presently drafted. The rules state that written briefs of all evidence "must" be prepared ... and set out in detail the limited circumstances in which oral evidence-in-chief might be allowed (rr 441F – 441G; new rr 9.6-9.7). Given the directory nature of these rules, it is not surprising that it is stated in *McGechan on Procedure* at para HR 441G.01:

[t]he rules make it clear that the opportunities for oral evidence-in-chief are now severely limited.

¹ At [5]-[10].

While r 441A(2)/new r 9.1(2) reserves to the Court a general discretion to modify or exclude the operation of these rules, this discretion is seldom utilised.

The problems with written briefs were set out in Lord Woolf's report to the Lord Chancellor on the civil justice system in England and Wales in June 1995. Three matters in particular were referred to and can be applied to the New Zealand context.

First, the practice of lawyers reducing evidence to written briefs adds to costs. Lawyers treat witness statements as documents which must be as precise as pleadings and consequently go through many drafts. The perception is that far more time is spent on preparing written briefs than would be spent on preparing a witness for examination in chief. While it was once thought that written briefs would save trial time and hence costs, this assessment must now be revisited with the advent of FTR (real time recording and transcribing of Court proceedings), which will considerably reduce the time taken by oral evidence-in-chief.

Secondly, written briefs generally contain the words of the lawyer rather than the witness. Oral evidence-in-chief was always an important device for ascertaining the truth. A written brief may help a dishonest witness, who can hide behind another's words. A written brief may equally hurt an honest witness, who might be cross-examined on written evidence not recorded in the witness's own words.

Thirdly, written briefs can lead to opposing lawyers spending hours preparing and then cross-examining at length on the words used in the statements. The fact that every 't' is crossed and 'i' dotted in the brief without judicial culling potentially exposes more material to challenge. This can add to costs which probably would not arise if counsel were cross-examining on the spoken words as they unfolded in Court. Further, the witness is thrust immediately into a hostile cross-examination without having had time to adjust to giving evidence in evidence-in-chief.

The High Court Judges consider these problems are evident in High Court litigation in New Zealand.

9. As becomes apparent in my below exploration of the position in other jurisdictions, these concerns remain as prescient in 2019 and in 2009 and are far from unique to New Zealand.

10. In 2009, the working group's relevant proposals were as follows:²

It is suggested that the issue of whether written briefs are desirable in whole or in part in a particular case may be best considered:

- a. only after the parties and their counsel appreciate fully the issues, usually after a failed settlement conference;

² At [11], [14]-[17], [20], and [23]-[24].

- b. by counsel and a Judge; and
- c. as part of a general pre-trial case management conference within 20 working days of an unsuccessful settlement conference, or if there is no settlement conference, within 20 working days of setting down.

[...]

It is suggested that instead of this pre-trial conference taking place 10 working days after service of the written briefs, consideration be given to holding it within 20 working days of any unsuccessful settlement conference, or if there is no settlement conference, within 20 days of setting down. The conference could therefore be held before directions have been given as to the mode of evidence. It would be compulsory and it is suggested that senior counsel should appear.

The conference could be presided over by a Judge rather than by an Associate Judge. The Court could consider afresh the issues and assess the adequacy of the pleadings. It could determine the way in which the evidence is to be placed before it. There might be no presumption that written briefs are to be provided. The power to order a chronology could be specified to require the chronology to be detailed and cross-referenced to the bundle.

Further, it is envisaged that guidelines as to whether evidence-in-chief be written or oral could be developed. Thus uncontroversial evidence, such as evidence as to an exchange of correspondence or accepted factual background, could be by written brief. However, evidence strongly in contention and involving issues of credibility, at the discretion of the presiding judge, could be presented orally. The possibility of a witness's evidence being partly written and partly oral could be available. It is suggested expert evidence should normally be by written brief as at present.

There could be the ability to direct that "will say" statements rather than written briefs be filed. If "will say" briefs are to be presented at trial, there would need to be directions as to what they would cover, and their treatment at trial.

[...]

It would be desirable that the evidence directions be tailored to the issues and the type of evidence required to resolve them. Where necessary, a further pre-trial conference could be directed closer to trial.

[...]

Any provision in the High Court Rules for "will say" briefs would be new. It is suggested that the new rules could give an indication of the nature of such statements. They would be relatively short and would summarise the key elements

of the evidence. Thus, if there were an issue as to whether at a meeting two people had agreed on a contract, the “will say” statement would not set out the full details of their meeting or chronologically outline who said what. Rather, the statement would give a summary of what the witness will say happened, e.g. “I met with X on 10 July 2008 at 10 am for half an hour at Y and at the end of our discussion he offered ABC. I accepted that offer and we shook hands.”

It is envisaged that the existing rules as to directions, adjournments and costs would be sufficient to deal with the issues that could arise in relation to such statements.

11. Given the points that emerge from the comparative survey below, it is significant that the 2008-2009 sub-committee understood there to be a close relationship between the issue of will-say statements and witness statements and other, wider, aspects of case management. The proposal above bears, I note, a number of similarity to subsequent proposals, both from the Rules Committee and elsewhere (for example, the New Zealand Bar Association’s Short Causes Working Group’s recent proposal, on which I have reported separately) for judges to take a more active role in case management at an early stage, including aiding in the narrowing of issues, which was seen to be a primary benefit of requiring early consideration of whether evidence should be given in a particular form.
12. Ms Klinger provided memoranda to the wider Rules Committee on 5 June 2009 and 22 December 2009 outlining the feedback that was received from the profession based on the original and amended proposals (the amended proposal being that set out above). Submitters on the original proposals were sufficiently opposed to the proposals that the more limited reforms noted above were circulated. That being said, support for the proposals was received. A Chair’s memo of September 2012 records that:

The two most senior and leading silks of the NZBA, Alan Galbraith QC and James Farmer QC, filed separate submissions. Both supported the Rules Committee proposals. Mr Galbraith criticised written briefs as having been “a principal factor” in adding unnecessary and unsustainable costs to litigation, and that they obscured evidence by substituting for the witnesses’ own words and recollections the words that the drafting lawyers usually derive from documents. He believed that they do not encourage a focus on the core facts “as oral evidence necessarily must” and that they invite unnecessary cross-examination as well as add time to proceedings.

Dr Farmer was of the view that while there should be a discretion as to whether to make some use of written briefs to deal with matters of formal proof, it should be clear that the norm at trial will be oral evidence on crucial factual issues and contentious matters.

13. The executive summary of the 22 December 2009 memorandum reporting on the feedback to the amended proposal states that:

There is some support for the Rules Committee's proposals. They are supported by the [NZLS]. Many submitters agree that a more flexible process is desirable. There is generally agreement that oral evidence is useful for resolving disputed facts and credibility issues. Several submitters suggest some amendments to the proposed rules. Several consider that if evidence is to be given orally, such a direction should occur in advance of the hearing rather than at its commencement. Submitters made suggestions as to the timing of written briefs ... There were concerns about the admissibility of evidence in written briefs and the difficulties in excluding this.

14. Of those who expressed support for the reforms, which comprised a majority of the (modest number, specifically, eight) submitters, there was a concern to ensure that the primary objective of any reform be that the court be empowered with sufficient flexibility under the rules to ensure that the most cost-effective, efficient, and just course of action in regards the mode of the giving of evidence in each case. It was noted that in matters in which the credibility or reliability of a witness is in issue, the giving of evidence viva voce may well be most appropriate, whereas in other matters the cost-and-time savings potentially available from the use of affidavit forms of evidence, or witness statements as a half-way step, would be better overall.
15. A significant minority of submitters, particularly those representing members of the profession, considered that the exchanging of written briefs before the trial should remain the "norm", with doubts being expressed that dispensing with written briefs would do much to reduce costs of litigation. Nor did many submitters in this category consider that the issue of briefs containing the words of lawyers rather than witnesses warrant a significant change in approach, given the efficacy of cross-examination in testing accuracy and credibility. Nor were any concerns that counsel were becoming less competent in examining a witness because they no longer lead evidence-in-chief accepted by submitters from the profession. Rather than identifying, as those who supported the scheme, the benefits of flexibility in approach, submitters in this category tended to identify the risks of imposing a one-size-fits-all approach across the huge range of cases potentially before the Courts.
16. In a memo of September 2012, the then-Chair noted that, both within and outside the formal consultation process "the proposed reform of making written briefs in the discretion of the Judge was met with responses between the profession and the Judges which broadly divided along generational lines. The ensuing discussion reflected acknowledgment that there was a division of opinion amongst the profession, though not necessarily between the younger and the older members."
17. Justice Fogarty, reporting back to the full Committee on behalf of the sub-committee on 15 February 2010, began by addressing concerns raised by submitters around the presence of inadmissible evidence in witness statements. These specific concerns are

beyond the preliminary and general scope of this paper but are worth mentioning as an attendant consideration in considering reforms in this area.

18. As to the core issue, the proposals for reform recommended for adoption by Fogarty J in that report were those in the draft proposal described above, with particular consideration to further amendments as follows:

- a. the removal of the presumption of written briefs in favour of two “neutral” rules allowing for a pre-trial direction, or a direction prior to the giving of evidence, to direct that evidence be given orally and for a witness to be cross-examined on any portion of the written brief that the Judge has directed to give orally;
- b. the introduction of a more express requirement that witness briefs be honest and in the words of the witness themselves, with costs consequences to arise if that requirement was not complied with;
- c. in order to respond to practitioners’ concern that they cannot be fairly expected to identify with perfect foresight all relevant issues at trial, a provision to the effect that “where after the exchange of written briefs it is apparent that there are conflicts between witnesses of meetings or events which took place, but which were not recorded at the time, the parties and the witnesses should then be ready to give evidence orally on their recall without the aid of their witness brief”.

19. The Committee was, like the submitters, also not unanimous. By 20 May 2010, a further memo of Fogarty J to the Committee reflects Committee members’ concerns that “one size does not fit all”, that it was thus important to ensure that the rules were not overly prescriptive, and that it was more important, overall, to emphasise a flexible approach allowing judges to manage each particular case in accordance with its own facts in light of the objective of the rules. This was the view expressed by many of those present at the Committee’s meeting of 31 May 2010 but was not unanimous held. The following passage from the minutes of that meeting, at item 3, illuminates one such division of opinion:

[Chief Justice Elias] observed that improvement in this area may be better effected by judges invoking the powers available, rather than by adding a rule. Any rule would have to allow them substantial discretion, but there was then the problem of consistency. Justice Winkelmann considered that an advantage of having the rule was that counsel will know to be prepared to lead oral evidence in certain situations. Judges also needed to be educated about the availability of directing oral evidence to be given. It was necessary to try to change the culture.

20. Justice Chambers, in a memo to the Committee dated 28 May 2010, expressed the view that:

The dinosaurs in the profession have long been advocating that we return to a purely oral trial, as existed up to the 1980s. That is to say, all evidence is given orally (with the possible exception of expert reports). Documents are produced as exhibits, one by one. We have moved well beyond that, but I would have to say, if given the choice between what is now proposed and the dinosaurs' preferred position, I would be with the dinosaurs.

Compared with the old fashioned trial, we already require:

- Written statements of evidence in advance
- A common bundle of documents prepared in advance
- A synopsis of the plaintiff's opening

These already add significantly to pre-hearing costs, but the general consensus has been that this cost is warranted because prior swapping of evidence improves the chances of settlement and trials can be disposed of more quickly. What is now envisaged is no fewer than four more pre-trial steps.

[...]

I can understand why all these reforms are being suggested. In an ideal world, they would make trials run more smoothly and they would certainly make the Judges' lot easier. In my view, however, they come at too high a cost. They will render litigation even less affordable; they will make arbitration (with its huge flexibility) and mediation all the more desirable.

21. While Fogarty J appears to have continued to earnestly pursue reforms in this area to tip the balance of support, owing to the lack of support for any particular reform within the Committee, or across the profession more generally, the proposals for reform faltered. The decision was taken to defer further actions on the proposal awaiting the results of the wider review of case management procedure underway at the time.
22. The issues does not appear to have resurfaced before September 2012, when, at the New Zealand Bar Association conference, an almost unanimous show of hands of members presented indicated a strong desire that the Rules Committee revisit the issue of written briefs of evidence at once. At that conference, Jan McCartney SC gave a presentation on *The Future of the Written Brief in Civil Litigation*, expressing favour in support of the written brief as the retention of the primary means by which evidence-in-chief is presented at trial. It is useful to set out the contents of this presentation at length, as it both accounts for the overall course of the 2008-2012 reforms experience and eloquently identifies a number of the relevant concerns:

I favour, in the pre-trial phase, better consultation amongst counsel and the judge to resolve if and to what extent the issues at trial may be assisted by oral evidence-in-chief. In the event of impasse, I would give the trial judge an overriding discretion.

The 1996 High Court Rules established a regime by which the witness testimony-in-chief in civil cases was to be by reading from prepared witness briefs. The new

Rules made provision for oral evidence – but available only by court direction. The plain intention of the Rules involved the imposition of a system, rather than a recognition and making available of, a case management technique where after consultation, appropriate directions would be given as to when and where oral evidence was considered appropriate. At the time, commentators criticised the inflexibility of the new Rules.

Thirteen years on, the Rules Committee, noting the inflexibility of the Rules, produced the Consultation Paper of March 2009. By that Paper, the Rules Committee recorded concern that civil cases often come before the court without adequate attention being given to the way in which evidence is to be provided at the trial. The Committee referred to Rule 9.1(2) which reserves to the court the discretion to modify or exclude the operation of the Rule by which evidence is given by written brief, and observed that the discretion is seldom utilised.

I took from that Consultation Paper that consideration was being given to inviting counsel and the court to recognise a need for greater flexibility when addressing the mode by which evidence is to be given at trial. Such proposition seemed unobjectionable.

But what then followed were proposed Rules by which the default position of written briefs was abandoned and new “principles” emerged as follows:

- the principle that evidence by way of brief was not normally appropriate for matters of disputed fact;
- the principle that oral evidence should normally be required where questions of credibility or reliability of the witness arise.

Rather than reflecting the perceived need for greater exercise of the discretion to direct viva voce evidence on particular issues, by the proposed Rules a new and different regime was imposed where, in areas of dispute and credibility, oral evidence-in-chief was to be the norm.

There then followed a further Consultation Paper of 1 September 2009 by which the Rules Committee recorded that having heard submissions it now does not favour proceeding with the proposed Rules. The Paper recorded the Committee’s ongoing concern that it is unsatisfactory to receive evidence-in-chief in relation to disputes of fact and credibility issues by way of written brief. The reasons for the concern are:

- contested evidence is given by what is effectively a response to leading questions;
- the briefs are not the words of the witness;
- the task of determining the truth is made more difficult;
- a written brief assists a dishonest witness who hides behind another’s words;

- a written brief may equally hurt an honest witness – because the words may not be the witnesses’ own words;
- lack of spontaneity and immediacy of response.

Accompanying the Paper were new Rules confirming that evidence is by written brief unless and to the extent that the trial judge otherwise directs and providing that at a pre-trial conference or if there is no pre-trial conference at the commencement of the trial counsel must identify any disputes and credibility issues and the trial judge may direct that the evidence be given orally.

My understanding of these proposed new Rules is that the written brief is confirmed as the primary means of giving evidence in civil trials but with the discretion given to the judge to direct oral evidence-in-chief having to be addressed before the trial.

[...]

The purist approach by which evidence-in-chief must be by open non-leading questions was abandoned in many areas of the law a very long time ago for reasons of time and cost efficiency. The abandonment involved the recognition that a well-rehearsed and skilled witness will be adept in giving viva voce evidence, and the requirement that the rule of evidence be observed may well be to the disadvantage of other less skilled witnesses.

[...]

As to the first concern, that the words are not the words of the witness - this is a valid concern. The lawyer drafting the brief ends up in fact “crafting” a brief which is prolix, contains largely irrelevant, unnecessary evidence and sometimes, most of counsel’s submissions. Lawyers have an ethical obligation to ensure that the evidence is the evidence of the witness and does not contain such material. To the extent that counsel are not complying with their ethical obligations, this is a matter for court intervention and the sanction of costs – but is not a reason to abandon the written brief and the great advantages that come with the brief.

As to the concerns that the dishonest witness is helped and the honest witness is not – this is not my experience. In the area of equity which includes proceedings for undue influence and unconscionability where the plaintiff is before the court because he/she is operating under a manifest disadvantage due to age, mental impairment or other apparent weakness, in my experience the witness is invariably assisted by being able to read his/her evidence. They are so intimidated by the court experience that were their evidence-in-chief to be given orally they could well freeze and forget relevant parts of the chronology. They are greatly comforted by the knowledge that they can read their evidence.

As to the dishonest witness, we under-estimate the skills of the judge. Justice Heron addressed this aspect in his paper to the Queenstown conference in July 1996. The judge agreed that the spontaneity of evidence when given verbally has a particular quality and character which cannot be replaced simply by reading something that other people have written for the witness. The judge said that with skilful drafting of a witness statement an interpretation or slant is subtly put across. The judge's prescription was that a judge needs in those cases every now and then to intervene, to have the witness explain what he/she means by a certain proposition, to capture the true position and to understand more properly what the witness is saying.

Most judges take the opportunity to ask questions pertinent to the issue. A witness then has the opportunity, having got through the written brief and becoming acclimatised to the court conditions, to respond to questions from an experienced trial judge. There is no problem with this intervention where it assists the judge, so long as it is fairly exercised in the context of evidence-in-chief and not as an extension of the role of counsel in cross-examination.

But there is a further aspect to this debate and it is that in civil proceedings the documentary chronology is what is important, often crucial, to final determinations. Either the witness' evidence fits with the documentary record, or it does not. If it does not, that party is unlikely to be successful.

There is no doubt that it is important to see the witness – I am not promoting trial by reliance on documents. But I rather think that the need to hear the evidence viva voce in order to make correct credibility findings, is overstated. The age, the worldliness or otherwise of a witness, a hesitation, or a confidence even an arrogance – still comes across when a witness is reading from a brief of evidence. It is cross-examination that is directed to revealing dishonesty in a witness.

Lack of spontaneity and immediacy

This concern is more directed to the quality of the brief. There is no doubt that a long and tedious brief is a very dull experience for everyone in court, often including the witness.

If the process becomes dull because the brief is too long, irrelevant, unnecessary, that is a matter in the hands of the lawyer. As already stated, the lawyer has ethical duties. While this does not extend to raising the quality of the brief of evidence to that of a good drama – it certainly extends to ensuring that the brief is not full of lengthy, irrelevant, tedious rubbish. Again, the court has sanctions. In my experience, the sanctions are rarely invoked.

[...]

The hybrid nature of the new proposed Rules i.e. retaining the written brief and the exchange before trial but providing expressly for the issue as to the mode of evidence to be addressed pre-trial, means that the advantages of the written briefs as identified at the time the 1996 Rules were introduced, are retained. Those advantages are:

- briefs of evidence/affidavits in advance enable the pre-trial identification of and focus on the relevant issues;
- inducement of settlement;
- savings of time in delivery of evidence-in-chief at trial;
- better coherency of the evidence;
- judge assisted in identifying the issues and accessing the evidence.
-

Other matters - lawyer “crafting” brief of evidence – incurring unnecessary cost

The first Consultation Paper of the Rules Committee recorded costs as one of the major reasons for addressing the written brief regime. The concern was that lawyers spend too much time “crafting” and “re-crafting” the brief of evidence with the result that not only does the content not reflect the evidence of the witness, but the cost of putting (what is criticised as being the lawyer’s words) before the court becomes grossly excessive.

This is a serious problem. However, to an extent a number of drafts may be expected, especially where the matter is complex. And, litigation is expensive. There is no denying it.

Many of the larger law firms adopt a “team” approach, with drafting of briefs beginning at a junior level and with two or more lawyers involved in each layer of the drafting. I do not assume that the client is always aware of the added cost of the “team” approach, and this is one of a number of aspects where a barrister sole should be able to introduce significant time and cost efficiencies to a proceeding.

But the new proposed Rules, by which the evidence is in any event prepared in written form and the only issue is where and to what extent oral evidence may be directed, will not in any way lead to a reduction in the time taken to prepare the evidence for the trial, once that stage of intensive preparation is embarked upon.

As this is the aspect of the debate which I consider to be the best point for those advocating oral evidence, I will proceed to offer up my antidote.

The concern as to the cost of preparation of an extensive brief of evidence can be largely met by ensuring that the timetable provides for a settlement conference prior to intensive preparation and exchange of briefs of evidence. In my view, the “will-say” statement is properly the place of the settlement conference. If a settlement conference is allocated some weeks before the date for exchange of the briefs of evidence then, by that time all interlocutory processes will be completed,

the issues will be identified, the position of the other side will be understood and the parties' evidence on critical documents and exchanges will have been tested with reference to the overall chronology.

There has been debate as to whether the "will-say" statement should be admissible at the trial. While I have not given close consideration to the arguments, my view is that a major benefit of the settlement conference is that it throws up those aspects where your client's case is weak – including where a critical witness is able to be challenged.

The preparation for the purpose of the settlement conference is not expected to be as intensive and focused as for the trial. The prospect of some relevant matter being overlooked is real. When this happens, any settlement takes into account the weakness that has been exposed.

If a settlement conference can be allocated before significant cost is put into trial preparation – it goes without saying that there will be more in the "pot" available for settlement.

We need to be able to trust that lawyers engaged in trial preparation sufficiently understand that the cost of a trial, and all aspects up to the hearing must be in proportion to what is in issue. In this regard, at the New Zealand Bar Association Conference of 2008 an excellent paper was delivered addressing proportionality of cost in a civil trial. To the extent that the New Zealand Bar is falling into the bad habits of the New South Wales Bar, as addressed in the paper, it is in the hands of the court to apply the sanction of costs, including making no award of costs following the hearing.

[...]

It would be a welcome help to the overall process, if the courts were more prepared to intervene where counsel have not complied with ethical and evidential requirements in the preparation of the briefs of evidence.

23. Reporting on developments at the Conference to the Committee, the Chair said in September 2012, while acknowledging their own personal misgivings as to the reforms:

On one very important topic there is unanimity across the profession, barristers and litigators in firms and the judiciary: it is that there is a serious problem with written briefs. All too frequently they are the witnesses' evidence written by the lawyers. As Dr Farmer once put it eloquently, they are in fact one long leading question. It is ironic that s 89 of the Evidence Act prohibits leading questions being put to a witness in examination in chief unless the question relates to introductory or undisputed matters or there is the consent of all the other parties or the Judge allows it. That is subs (1). It reflects longstanding common law wisdom. It is then

qualified by subs (2) which says “subsection (1) does not prevent a Judge, if permitted by rules of court, from allowing a written statement or report of a witness to be tendered or treated as the evidence in chief of that person”.

That is also reflected in s 83(1)(c). On a close reading of both documents it is apparent that Parliament does not regard such written statements in themselves as evidence in chief but as evidence that, rules of court providing, can be treated as evidence in chief. Certainly it does not comply with the normal strictures circumscribing the giving of evidence in chief.

24. However, the records of the Committee, such as are available to me, suggest that no further action was taken. This is despite the occasion correspondence having been received from members of the profession urging reform in relation to written briefs; often for the same reasons as outlined in the Chair’s memo of September 2012.

Western Australia³

26. The Western Australian approach to civil procedure is quite different to that in New Zealand insofar as a significant proportion of that jurisdiction’s procedure is contained in practice directions. In the Supreme Court of Western Australia (which is positioned at the same level as the New Zealand High Court in that jurisdiction’s court hierarchy), those practice directions have contained, since 2009, in a single *Consolidated Practice Directions* document. These are to be read in conjunction with the relevant procedural legislation and regulatory statements.⁴

27. The starting point, for the purposes of that scheme, is Order (O) 36 of the Rules of the Supreme Court 1971, which provides (in part):

1. Facts to be proved usually by oral evidence in open court

Subject to these rules and to the provisions of the *Evidence Act 1906*, and any other Act relating to evidence, any fact required to be proved at the trial of any action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

2. Evidence by affidavit

³ I am grateful to Nicole Morrall, Justice Dobson’s clerk, for the work that she did for his Honour in February 2019 undertaking initial research on this topic. Her work, which Justice Dobson supplied to me, is incorporated into this section of the memorandum.

⁴ In particular, for present purposes, the Rules of the Supreme Court 1971 (WA), O 36. See generally the Consolidated Practice Directions for the Supreme Court of Western Australia 2009 (WA) at Preface for a description of the nature and relationship to other instruments of the consolidation.

- (1) The Court may, before or at the trial or hearing of an action, order that all or any of the evidence therein shall be given by affidavit if the Court thinks that in the circumstances of the case it is reasonable so to order.
- (2) An order under subrule (1) may be made on such conditions as the Court may think reasonable and in particular may give directions as to the filing and serving of the affidavits and the production of the deponents for cross-examination, but subject to such directions and any subsequent order of the Court, the deponents shall not be subject to cross-examination.
- (3) Subject to these rules, evidence may be given by affidavit upon any originating summons, originating motion or petition, and on any application made by motions or summons, but the Court may order the attendance for cross-examination of the person making any such affidavit, and if such person fails to attend his affidavit shall not be used in evidence without the leave of the Court.

28. Supplementing this provision is Practice Direction (PD) 4.5 of the Consolidated Practice Directions, in force as of 1 February 2019, which provides :

[General]

1. Evidence in chief at trial may be led orally or in writing, at the direction of the case [managing judge] (and subject to any further order at trial). Those directions will be made before a matter is entered for trial.
2. Ordinarily, evidence of chief will be given orally, without the use of witness statements. In those circumstances, ordinarily, the case [managing judge] will order that the parties exchange witness outlines (witness outline orders).
3. Orders for the exchange of witness statements and for witness statements to stand as evidence in chief (witness statement orders) will only be made where a party satisfies the case [managing judge] that this course will better achieve the objects of efficiency, just determination of litigation and proportionality than if evidence were to be given orally in the usual way.
4. Ordinarily, the use of a witness statement will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged on the topic.
5. The case [managing judge] may order that witness statements be provided by only some witnesses, or that only part of the evidence in chief of a witness be provided by way of witness statement.

Witness Outlines

6. Where witness statement orders have not been made, the case [managing judge] will ordinarily order the provision of a witness outline (witness outline orders).
7. A witness outline must be directed only to matters in issue.
8. A witness outline must clearly identify all the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation.
9. Where a witness refers to a document in a witness outline, they must identify the document by its description and its discovery number or, if an order has been made for a trial bundle to be filed, by a description of the document and by the page number in the trial bundle. If an order has been made for an electronic trial bundle to be filed, the document must be referred to by the document number assigned to it and the page number within that document.
10. Where a witness outline is ordered, the case [managing judge] will ordinarily order that no party may use any part of the contents of that document for the purpose of cross-examination of the witness without leave of the trial Judge.

Witness Statements

11. Where witness statement orders have been made, each witness statement is, in written form, the evidence that a witness would otherwise give orally and, subject to any contrary order, will, when adopted, stand as the evidence in chief of the witness.
12. The evidence contained in a witness statement must:
 - a. (a) be directed only to matters in issue;
 - b. (b) be in admissible form, in accordance with the rules of evidence and the Evidence Act 1906 (WA); and
 - c. (c) include at the end of the statement the following verification: 'I have read the contents of this my witness statement and the documents referred to in it and I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.'
13. Where a witness refers to a document in their witness statement, they must identify the document by its description and its discovery number or, if an order has been made for a trial bundle to be filed, by a description of the document and by the page number in the trial bundle. If an order has been made for an electronic trial bundle to be filed, the document must be referred

to by the document number assigned to it and the page number within that document.

14. Where witness statement orders have been made, every attempt should be made by practitioners to draft the statements in admissible form and to resolve questions relating to admissibility of evidence prior to seeking to enter the matter for trial.
15. Ordinarily, orders will be made requiring witness statements to be signed, but where the case manager concerned is satisfied that it is not practicable for a party to obtain a witness' signature to a statement, an order may be made that the witness statement be exchanged unsigned....
16. Ordinarily orders will be made requiring witness statements to be prepared having regard to the Best Practice Guide 01/2009 issued by the Western Australian Bar Association entitled 'Preparing witness statements for use in civil cases' and will contain a certificate to that effect signed by the practitioner most responsible for the preparation of the statement.

Practice at trial

17. Where witness statement orders have been made, the practice at the trial will ordinarily be as follows:
 - a. The witness will be called and asked to identify himself or herself, and also the witness statement concerned. The Judge will then ask the opposing counsel whether there are any objections to any parts of the witness statement.
 - b. All objections will be dealt with, and where an objection is successful, the witness will be requested to delete the inadmissible material from the statement.
 - c. The witness statement will then be tendered and admitted as an exhibit.
 18. Where witness outline orders have been made, the practice at the trial will ordinarily be that the witness' evidence in chief is given orally, in the usual way. Objections will be dealt with in the course of the witness' evidence.
 19. Where a witness statement order or witness outline order is made, a party may not, without leave, adduce from the witness evidence in chief other than evidence included in the witness statement, or in relation to a topic referred to in the witness outline, as the case may be.
29. In summary then, the default position in Western Australia, as of 1 February this year, is that orders will ordinarily be made only for the production of witness outlines (most

similar in nature to will-say statements) rather than for witness statements (more similar in nature to written briefs of evidence).

30. The Western Australian Bar Association's *Best Practice Guide on Preparing Witness Statements for Use in Civil Cases* dates from 2009-2011. While now nearly a decade old, and significantly predating the present rules, it confirms that, before PD 4.5 was promulgated, like in New Zealand at present, it was "the usual practice in civil cases for an order to be made requiring witness statements."⁵
31. Accordingly, and significantly, the Bar Association's advice at that time was that a "case should be prepared from the outset in the expectation that witness statements will be required",⁶ forming a continuous expectation and process from the beginning of proceedings until it became clear that no such order would be required. All interactions with clients and other witnesses were, accordingly, to be treated as an aspect of the exercise in preparing a written brief of evidence (subject to the fact that many instructions will, of course, touch on matters that a client cannot testify about personally).⁷ This suggests that the preparation, and more broadly the anticipated need to prepare, a witness statement was a salient aspect of Western Australian practitioners' mentality in relation to trial preparation and working on cases prior to PD 4.5.
32. The Western Australian Bar Association identified the benefits of this approach as being:
- a. it causes the lawyer with the conduct of the matter to continually consider whether there is evidence to support the claims being made in the proceedings;
 - b. it results in recollections being recorded sooner rather than later (it is not in the interests of the parties for the collection of the evidence of witnesses to be deferred until just before trial);
 - c. it enables counsel to be briefed at any stage with notes as to the evidence that it is expected will be given at trial by copying the notes relating to each witness and including them in the brief;
 - d. it improves the communication of information when the conduct of a particular matter passes from one lawyer to another;
 - e. in more complex cases, it enables a record of information collected by different lawyers from different witnesses at different times to be marshalled in a meaningful way;

⁵ *Best Practice Guide on Preparing Witness Statements for Use in Civil Cases* (Western Australian Bar Association, Best Practice Guide 01/2009-2011) at [2.1].

⁶ At [2.2].

⁷ At [2.4].

- f. it reduces the prospect of speaking to the same witness about the same issues on numerous occasions; and
- g. it provides a valuable record to assist in preparing witness statements when required.

33. In principle, these are desirable qualities of a trial preparation process that, if implemented in practice, could well have the effect of reducing the expense of trial preparation by allowing for more focused and efficient use of counsel's time. Certainly, it would be desirable for any reform to trial preparation processes to encourage lawyers to identify relevant issues, focus preparation on only plausible/tenable avenues of inquiry and potential argument, avoid duplication of work, and give advice and receive instructions in the most efficient and structured manner possible.

34. Whether this happens in practice, of course, is as much a question of practice culture, and the quality of counsel and their commitment to paradigms of best practice as under any other system. The WA Bar Association notes in their practice guide the High Court of Australia's comment, on appeal, at the deficiencies that often appear in witness statements:⁸

A striking feature of the evidence at trial, and of the reasoning of the learned primary judge, is the attention that was given to largely irrelevant information...Written statements of evidence, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence, often in written form and prepared in advance of the hearing is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance.

35. Interestingly, while emphasising that "the "author" of the content of a witness statement is the witness, not the lawyer",⁹ and that the statement ought therefore to be "expressed in the language of the witness",¹⁰ the largest section of the best practice guide (extending to 40 paragraphs) address how the lawyer should draft the statement, and 21 of the guide's 41 pages advise lawyers as to how best "assist" a witness in drafting their statement. All this advice, in general, is aimed at ensuring that the lawyer does not draft the statement in conclusory terms or in the nature of submissions.

Victoria

⁸ At [8.2], citing *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [35].

⁹ At [19.1].

¹⁰ At [19.1].

36. Regulation 40.02 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) provides that:

Evidence of witnesses

Except where otherwise provided by any Act or these Rules, and subject to any agreement between the parties, evidence shall be given-

- (a) on an interlocutory or other application in any proceeding, by affidavit;
- (b) at the trial of a proceeding commenced by writ, orally;
- (c) at the trial of a proceeding commenced by originating motion, by affidavit.

37. In the Commercial Court of the Supreme Court of Victoria, the Chief Justice of Victoria authorised, with effect from 30 January 2017, the adoption of Practice Note SC CC 1 in relation to all proceedings in the Commercial Court. That Court is a specialist and separate division of the Supreme Court of Victoria, which applies the expertise and experience of its Judges to the continuous and intensive case management of proceedings. It is, to that extent, similar to the commercial division of the High Court of New Zealand envisaged in more radical versions of the commercial list and other similar past proposals.

38. This practice note, which is to be read in conjunction with the General Civil Procedure Rules, provides (relevantly, emphasis added):

Witness Statements and Witness Outlines

15.12 Evidence in chief at trial may be led orally or in writing, at the direction of the List Judge (and subject to any further order at trial).

15.13 *A party seeking to utilise a Witness Statement for the purpose of leading evidence in chief will be required to satisfy the List Judge that this course will better achieve the Overarching Purpose than if evidence were to be given orally in the usual way. Generally, the use of a Witness Statement will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged on the topic. The List Judge may order that Witness Statements be provided by only some witnesses, or that only part of the evidence in chief of a witness be provided by way of Witness Statement.*

15.14 A Witness Statement is, in written form, the evidence that a witness would otherwise give orally and, subject to any contrary order, will, when adopted, stand as the evidence in chief of the witness.

15.15 The evidence contained in a Witness Statement must:

- (a) be directed only to matters in issue;

- (b) be in admissible form, in accordance with the rules of evidence, including the rules with respect to hearsay evidence, in accordance with the Evidence Act 2008 (Vic);
 - (c) include at the end of the statement the following verification: “I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.”
- 15.16 Where a party has not been permitted to provide evidence in chief by Witness Statement, in whole or in part, the List Judge may order the provision of a Witness Outline.
- 15.17 A Witness Outline must be directed only to matters in issue.
- 15.18 A Witness Outline must clearly identify the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation.
- 15.19 Where a Witness Outline is ordered, the List Judge may also order that no party may use any part of the contents of that document for the purpose of cross-examining the witness without leave of the List Judge.
- 15.20 Each Witness Statement and Witness Outline must be provided to all parties and to the List Judge in electronic format.
- 15.21 *Practitioners who draft a Witness Statement or a Witness Outline should bear in mind that, unless it is written in the witness’s own words, such a document is unlikely to assist either the Court or the witness.*
- 15.22 A party will be taken to have waived, for the purpose of the proceeding, client legal privilege to the content of a Witness Statement or Witness Outline which has been served in that proceeding. Client legal privilege attaching to the content of an unserved draft Witness Statement, including an expert's Witness Statement, or Witness Outline is not taken to be waived merely by the filing or service of the final form of such Witness Statement or Witness Outline.
- 15.23 Subject to paragraph 15.19 above, a party may refer to or use the contents of a Witness Statement or Witness Outline served by another party before it is adopted by the intended witness, but only for the purposes of the proceeding.
- 15.24 A party receiving a Witness Statement or Witness Outline is taken to have done so subject to an implied undertaking to the Court that the Witness Statement or Witness Outline, and its contents, will not be used for any purpose other than for the legitimate purposes of the proceeding.
- 15.25 Where a witness will prove or refer to a document in a Witness Statement or a Witness Outline it must identify each such document by description and either by

page number in the Court Book or, in the absence of a Court Book, by document discovery number.

- 15.26 Where an order for Witness Statements or Witness Outlines is made, a party may not, without leave, adduce from the witness evidence in chief other than evidence included in the Witness Statement or referred to in a Witness Outline of the witness.

39. As is apparent, the Victorian framework is very similar to that of the Western Australian practice direction, which it predates. There is a clear, and even more strongly worded, presumption against the preparation of witness statements without prior leave of the Court having been obtained. As the emphasised sections indicate, that prohibition is linked more clearly to the “overarching purpose” of civil procedure in Victoria, which is provided by s 7(1) of the Civil Procedure Act 2010 (Vic) to be facilitating the “just, efficient, timely, and cost-effective resolution of the real issues in dispute”. That is similar, but subtly different in emphasis, to the New Zealand objective.

40. Interestingly in terms of broader notions of promoting a cultural commitment to access to justice in litigation, this is complemented by the “paramount duty” of practitioners involved in civil proceedings to “further the administration of justice” in relation to that proceeding under s 16 of that Act. This is in addition to their obligations to:

- a. act honestly;¹¹
- b. not make any claim that is frivolous, vexatious, an abuse of process, or that lacks a proper basis;¹²
- c. to avoid undue delay and expense by not taking any steps not reasonably believed to be necessary to facilitating the resolution or determination of the proceeding;¹³
- d. to co-operate with the other parties and Court in connection with the conduct of that proceeding;¹⁴
- e. to not engage in misleading or deceptive conduct;¹⁵
- f. to use reasonably endeavours to resolve a dispute by agreement or alternative dispute resolution where doing so is in the interests or justice or is not a matter of which only judicial determination is appropriate;¹⁶

¹¹ Civil Procedure Act 2010 (Vic), s 17

¹² Section 18.

¹³ Section 19.

¹⁴ Section 20.

¹⁵ Section 21.

¹⁶ Section 22.

- g. to use reasonable endeavours to resolve by agreement any issues in dispute that can be resolved by settlement or alternative dispute resolution even if not all issues can be so resolved, and to narrow the scope of the remaining issues in dispute as far as is possible;¹⁷
- h. to ensure that the legal and other costs incurred in connection with the civil proceeding are reasonable and proportionate to the complexity or importance of the issues and the amount in dispute;¹⁸
- i. to use reasonable endeavours in connection with the civil proceeding to act promptly and minimise delay;¹⁹ and
- j. to comply with disclosure obligations as provided for by s 26 of that Act, which are broadly similar to those in place in New Zealand at present.

41. In New Zealand, these obligations are all paralleled by present provisions of parties and/or their representatives as officers of the Court, under the Client Care and Conduct Rules, or by provisions regarding entitlement to costs under the High Court Rules 2016 and the District Court Rules 2016. The Victorian approach is interesting in identifying that these aspects of litigation culture and practice, which are often viewed as discrete (if aligned) ethical issues in New Zealand are in fact practically inter-related with Court's goal of achieving the (in the Victorian expression) the "just, efficient, timely, and cost-effective resolution of the real issues in dispute". The Victorian model, and the very clear relating back to this Overarching Objective of the expected conduct of judges, parties, and counsel in relation to witness statements and briefs, suggests the potential value of exploring whether New Zealand should more clearly inter-relate professional ethical and civil procedural obligations. The framing of these obligation as positive statutory or regulatory obligations, rather than the current "negative" framing of such obligations (such as in the form of inimical costs consequences) would clearly communicate these expectations.

42. In other words, it may be time to consider whether a person required to practice as a competent lawyer ought perhaps to be more expressly required to observe of not only the letter of civil procedure but also demonstrate a practical commitment to its spirit (as expressed by the objectives underpinning the Rules).

New South Wales

43. The default position in New South Wales is that the evidence in chief of any witness at any hearing, including a trial, must be given by way of affidavit unless the Court provides otherwise.²⁰

¹⁷ Section 23.

¹⁸ Section 24.

¹⁹ Section 25.

44. The Uniform Civil Procedure Rules 2005 (NSW) allow the Court to direct that any or all of a witness' evidence may be given by way of witness statement and may make such directions with regard to each different question of fact or witness.²¹ Where such a direction is made, a party is prohibited from adducing further evidence in chief from the witness beyond what is in the statement except with the permission of the Court (r 31.4(5)(b)). Rule 31.4 provides that:

31.4 Court may direct party to furnish witness statement

- (1) The court may direct any party to serve on each other active party a written statement of the oral evidence that the party intends to adduce in chief on any questions of fact to be decided at any hearing (a witness statement).
- (2) A direction under subrule (1):
 - (a) may make different provision with regard to different questions of fact or different witnesses, and
 - (b) may require that notice be given of any objection to any of the evidence in a witness statement and of the grounds of any such objection.
- (3) Each witness statement must be signed by the intended witness unless the signature of the witness cannot be procured or the court orders otherwise.
- (4) If an intended witness to whose evidence a witness statement relates does not give evidence, no party may put the statement in evidence at the hearing except by leave of the court.
- (5) If the party serving the statement calls as a witness at the hearing any person whose witness statement has been served pursuant to a direction under subrule (1):
 - (a) that person's witness statement is to stand as the whole of his or her evidence in chief, so long as that person testifies to the truth of the statement, and
 - (b) except by leave of the court, the party may not adduce from that person any further evidence in chief.
- (6) A party who fails to comply with a direction given under this rule may not adduce evidence to which the direction relates, except by leave of the court.
- (7) This rule does not deprive any party of the right to treat any communication as privileged and does not make admissible any evidence that is otherwise inadmissible.
- (8) An application by a party for an order that the party not be required to comply with a direction under this rule in respect of any proposed witness or witnesses (whether or not such a direction has been given) may be made without serving notice of motion.

²⁰

Uniform Civil Procedure Rules 2005 (NSW), r 31.1(3).
Rule 31.4(2).

²¹

45.

Federal Court of Australia

46. Chapter 1, pt 5, div 5.1, r 5.04 of the Federal Court Rules 2011 (Cth) provides for the case management framework for proceedings in the Federal Court of Australia. Item 20 of that rule prosaically provides that one of the matters for which case management directions may be made at any hearing related to a proceeding is “the giving of evidence at the hearing, including whether the evidence in chief of witnesses is to be given orally or by affidavit or both”.

47. Justice Alan Robertson of the Federal Court of Australia presented, extrajudicially, to the College of Law 2014 Judges’ Series on the topic of affidavit evidence. In his Honour’s paper,²² he noted that “the bulk of the evidence given in the Federal Court is given on paper.”²³ While his Honour was speaking to practitioners, and much of his advice was aimed at how lawyers could most effectively put their case within the affidavit evidence form and context, he made a number of questions indicating the pitfalls of reliance on written evidence in chief. These, in summary, are the same concerns that are often expressed about the use of witness statements/briefs of evidence, and are captured by his Honour’s summary that:²⁴

A second important theme is to let a deponent speak for himself or herself. Too many times a deponent is asked in cross examination what they meant by particular words and the implicit or explicit answer is “I don’t know, my lawyer drafted it”. This does not instil confidence in the reliability of the evidence of that witness. Even worse is where the affidavit, for example, has frequent reference to the XYZ trust and the deponent has either never heard of it or does not know it by that description or title.

48. As to the potential benefits of evidence in chief being led in written form, his Honour had this to say:²⁵

Efficiency, convenience and economy are the three touchstones. No talk by a Federal Court judge is complete without reference to s 37M of the Federal Court of Australia Act so here it is. The section provides that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible.

As Alan Sullivan QC observed in his very useful paper “Preparing Affidavits & Evidentiary Statements”, New South Wales Bar Association Bar Practice Course,

²² Alan Robertson *Affidavit Evidence* (Paper Presented as Part of the College of Law 2014 Judges’ Series, Sydney, 26 February 2014).

²³ At 1.

²⁴ At 1.

²⁵ At 3.

May 2011, one argument for affidavit evidence is that it saves valuable court time and thus saves costs and reduces inconvenience. It also has a procedural fairness aspect to it in that the other side gets early notice of the detail of the case, and this may promote settlement: affidavit evidence should avoid trial by ambush, or its cousin being taken by surprise, and a consequent request for an adjournment.

49. And as to disadvantages (touching, again, on the pitfalls and policy challenges):²⁶

Some of the disadvantages were referred to by Callinan J in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577, especially at [175]:

[174] The Federal Court has adopted a docket system. In that system a number of cases are assigned to a particular judge who then oversees, and makes directions with respect to, all interlocutory matters before hearing a case assigned to him or her. The procedure for trials in the jurisdiction also involves the preparation, exchanging and filing of statements and documents in advance of the hearing which may, and almost always will, be read before the trial begins.

[175] This system has its disadvantages and dangers. On the one hand, the trial judge will be well educated in many of the details of the case on each side by the time that the hearing starts. But on the other hand, it may sometimes be difficult for the trial judge, apparently fully conversant with the facts and issues, not to have formed some provisional view at least of the outcome of the case. The justifications for the provision of written statements in advance of trial have been thought to be the avoidance of surprise and the shortening of hearing time. These advantages will often be more illusory than real. The provision of written statements by one side will afford to the other an opportunity to rehearse in some detail his or her response. It is also impossible to avoid the suspicion that statements on all sides are frequently the product of much refinement and polishing in the offices and chambers of the lawyers representing the parties, rather than of the unassisted recollection and expression of them and their witnesses. This goes some way to explaining the quite stilted and artificial language in which some of the evidence is expressed in writing from time to time, as it was here. Viva voce evidence retains a spontaneity and genuineness often lacking in pre-prepared written material. It is also open to question whether written statements in advance do truly save time and expense, even of the trial itself. Instead of hearing and analysing the evidence in chief as it is given, the trial judge has to read it in advance, and then has the task of listening to the cross-examination on it, and later, of attempting to integrate the written statements, any additional evidence given orally in chief, and the evidence given in cross-examination.

²⁶

At 4-5.

Justice Callinan was perhaps making an ironic understatement in saying it was impossible to avoid the suspicion that statements on all sides are frequently the product of much refinement and polishing in the offices and chambers of the lawyers representing the parties, I think any contrary suggestion would have an element of the fairy-tale about it. But there is an incontrovertible truth in the observation that viva voce evidence retains a spontaneity and genuineness often lacking in pre-prepared written material.

Bear in mind that if an order has been made that the trial will be conducted by affidavit then, except with the leave of the court a witness will not be permitted to give additional oral evidence. Such leave will seldom be given in circumstances where the additional oral evidence is of any substance. Were it otherwise, the purpose of ordering affidavits may, self-evidently, be defeated.

Remember that what you are doing as a lawyer is assisting in the preparation of an affidavit of a witness being the written evidence that reflects the honestly held recollection of the individual, assisted by sensibly ordered and presented documentary and other background material, per Allsop J in *Byrnes v Jokona Pty Ltd* [2002] FCA 41 at [14].

50. At-least two points emerge from the points made by Justice Robertson in his paper. First, as the quotation from Callinan J in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* at [174] and [175] indicates, the issue of witness briefs, affidavit evidence, and will-says must be considered together with the total structure, culture, and practice of litigation, advocacy, and case management in a given jurisdiction. For example, the adoption of a docketed judges system (such as that in place in the commercial list in New Zealand), or otherwise, is of relevance to the efficacy of case management of a matter where, because of the production of written briefs or affidavit evidence as a matter of course, there is the potential for more effective narrowing of issues, management of hearings, and more effective use of judicial time. These are material considerations to promoting access to justice under present conditions of scarcity, as Callinan J noted at [175].
51. Secondly, these observations reinforce the importance, in attempting to adopt the most expeditious and cost-effective model of civil procedure possible in support of promoting access to adjudicative justice, of ensuring that the Court is still seized of all relevant and material evidence and that interests of natural justice are still served. That is quite separate from whether the current practice and procedure are best suited to achieving that goal. The temptation, noted by Justice Callinan, to “polish” witness’ evidence suggests that may well not be the case. Nonetheless, it is important to ensure access to “justice”, in this sense, is not prejudiced by any departure from the current practice and procedure: particularly if a radical departure is proposed.

England and Wales

52. The English position must be understood in the context of Lord Woolf's comments in the *Access to Justice Final*²⁷ and *Interim*²⁸ reports. These warrant reproduction at length, given that they considered and, ultimately, rejected a number of the same concerns around a system of evidence based on evidence being given by way of witness statement (written brief) as are present in New Zealand and continue to influence the English and Australian systems.

53. In the *Interim* report, his Lordship noted that (as of the date of that report in July 1995):

History

In 1981, the Official Referees produced a voluntary arrangement for the exchange of witness statements as a method of improving the trial process. It was intended to encourage a more open approach to litigation. It was not intended as a substitute for oral evidence in chief. The experiment was considered to be a success. [From 1986, a rule of civil procedure was introduced providing for the exchange of statements, so as to avoid ambushes at trial, promote fair settlement of issues, aid in the identification of issues, and reduce the length of trials. From 1992, the Court was empowered to treat witness statements as evidence in chief, and from 1995 this was made the default position.]

The problem

The Inquiry has received a considerable volume of information indicating that the exchange of statements is not proving as beneficial as had been intended. At a meeting of the Commercial Court Users' Committee on 1 February 1995, there was general agreement that it was having a devastating effect on costs. This was because statements were being treated by the parties as documents which had to be as precise as pleadings and which went through many drafts. It was suggested that this practice would continue if practitioners feared that they would not be allowed to supplement the contents of a statement at the trial. It was felt that limiting costs recoverable would not assist. On the other hand it might help if the statements were recorded in a question and answer form.

A Commercial judge expressed the position very clearly. He said: "From the court's point of view they may save time and reduce costs, but there are downsides. First, an enormous amount of time is now spent by lawyers ironing and massaging witness statements; that is extremely expensive for clients, and the statements can bear very little relation to what a witness of fact would actually say. Second, they

27 Lord Woolf *Access to Justice: Final Report* (Lord Chancellor's Department, London, 1996) at [12.53]-[12.60].

28 Lord Woolf *Access to Justice: Interim Report* (Lord Chancellor's Department, London, 1996) at [22.1]-[22.21].

can produce an unfair result because a witness can be unfairly caught saying something contrary to that which a lawyer has put in his statement. It may not be dishonesty, but inexperience in checking lengthy statements, that leads to being caught, and time is taken up in the trial trying to resolve which it is. Third, the exchange also allows lawyers to spend hours preparing cross-examination and can thus lead to prolix cross-examination. That prolixity is compounded by the fact that the statement crosses every "t" in the first place and those "ts" cannot be left unchallenged".

The views as to expense in complex cases were confirmed by others. At a meeting held by a number of court users, a leading QC indicated that in a case in which he was then involved, £100,000 had been expended in preparing statements, yet it was his view that a more satisfactory result would have been achieved if the judge had had the opportunity of seeing and hearing the witness examined in chief in the normal way. Other contributors indicated that as a consequence of the statements being treated as the witness's evidence in chief, the witness had often to face hostile cross-examination before he had had time to adjust to giving evidence.

There is justification for the concerns which are being expressed about the results of requiring witness statements to be exchanged. The problem is primarily in relation to the heavier litigation. Nonetheless, it does spread to more modest litigation and it needs to be addressed.

Addressing the problems

I firmly endorse the practice of requiring the exchange of witness statements. They ensure that the parties are fully aware before the trial of the strengths and weaknesses of the case which they have to meet. The sooner a party is aware of this, the more likely it is that the outcome of the dispute will be a just one, whether it is settled or tried. In many situations, the exchange of witness statements will obviate the need to develop pleadings or to seek to administer interrogatories. Exchange of statements should help to achieve settlements well before trial. Under the proposed new arrangements, it will assist case management by enabling judges to be familiar from the start with the nature of the evidence and so shorten the trial. However, in order to preserve these benefits, the excesses to which contributors to the Inquiry have referred need to be eradicated.

In the context of the existing rules, the recent Chancery Guide tackles the subject and sets out a number of instructions which, if followed, should improve the situation. The Guide affirms the principle that statements will normally stand as the evidence in chief of the witness. It sets out a number of practical directions, which I endorse:

- A party seeking to examine in chief a witness who has provided a statement must satisfy the judge of the need to do so.

- Where practicable a supplemental witness statement should be prepared and served on the other party to deal with matters not dealt with in the original statement on which the witness is to give evidence in chief.
- Leave must be sought to adduce a supplemental witness statement at trial if any other party objects to it.
- The judge has complete discretion to permit supplementary examination in chief.

If the Chancery Guide is followed, it should produce an improvement in the present situation. However, even if the Guide were to be extended to the remainder of the civil justice system, I fear that the present problems may not be cured. The abuse which is occurring is at least in part due to an over rigid and technical approach to witness statements being encouraged by the courts. If witnesses are not normally allowed to supplement their statement with oral evidence, it is almost inevitable that painstaking care is going to be involved in their drafting in a case of any substance. This will be particularly true if, as the Guide suggests, "a professional adviser may be under an obligation to check where practicable the truth of facts stated in a witness statement if he is put on inquiry as to their truth".

Content and use of witness statements

It is more likely that the new industry devoted to the creation of witness statements will wither if a more relaxed attitude is adopted by the court to the statements. If it is generally understood that a witness will be allowed to develop points already referred to in a witness statement, most of the benefits which are to be derived from the exchange of witness statements should still be achieved, but without the need for exhaustive drafting intended to achieve pedantic accuracy.

[...]

If the summaries or witness statements are allowed to be supplemented, subject to new points not being raised, there will be less excuse for over-elaboration in their preparation. The costs recoverable for the preparation of the statements should reflect the fact that they are not intended to be drawn with the precision of affidavits. If the trial judge is of the opinion that they are unduly extensive, he should indicate that no costs should be recovered for their preparation. The court should make it clear that it is not prepared to tolerate extravagance in the preparation of statements.

In the case of witness statements as with the other subjects dealt with in this section, the solution to the present problem will depend on practitioners behaving in a sensible and co-operative way. If the court is prepared to adopt a more flexible attitude, the parties and their advisers will need to respond by adopting a more sensible approach to the preparation of witness statements. If they do not, the court must make it clear that they will bear the cost.

54. His Lordship repeated these points in the *Final* report, making recommendations as to the content and form of witness statements that have been incorporated, as is apparent, into subsequent rules reforms such as those in Victoria and Western Australia. These were:²⁹

- (a) witness statements should, so far as possible, be in the witness's own words;
- (b) they should not discuss legal propositions;
- (c) they should not comment on documents;
- (d) they should conclude with a statement, signed by the witness, that the evidence is a true statement and that it is in his own words.

55. The relevant contemporary rule of civil procedure in England is found in pt 32 of the Civil Procedure Rules (England). Under r 32.1(1)(b), the Court has power to control the evidence given before it by giving directions as to, inter alia, the way in which evidence is to be placed before the court. This includes, according to the *White Book*, to direct that evidence be given viva voce, by way of affidavit, by use of witness statements, and also to make directions limiting the length or format of witness statements.

56. This is subject to r 1.2, which requires courts to act, in all matters of civil procedure, in accordance with the overriding objective to deal with cases justly, and r 1.4, which requires Courts to actively manage cases to further this overriding objective.

57. Rules 32.4, 32.5, 32.8, 32.9, 32.10, 32.11, 32.12, and 32.13, building on the general powers noted above, deals specifically with statement statements and witness summaries, providing that:

32.4 Requirement to serve witness statements for use at trial

- (1) A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.
- (2) The court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial.
- (3) The court may give directions as to –
 - a. the order in which witness statements are to be served; and
 - b. whether or not the witness statements are to be filed.

32.5 Use at trial of witness statements which have been served

- (1) If –
 - (a) a party has served a witness statement; and
 - (b) he wishes to rely at trial on the evidence of the witness who made the statement;

²⁹

Lord Woolf *Access to Justice: Final Report* (Lord Chancellor's Department, London, 1996) at [59].

he must call the witness to give oral evidence unless the court orders otherwise [...]

- (2) Where a witness is called to give oral evidence under paragraph (1), his witness statement shall stand as his evidence in chief unless the court orders otherwise.
- (3) A witness giving oral evidence at trial may with the permission of the court –
 - (a) amplify his witness statement; and
 - (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.
- (4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.
- (5) [If a party who serves a witness statement does not call the witness to give evidence at trial or puts the statement in as hearsay evidence, any other party may put the statement in as hearsay evidence.]

32.8 Form of witness statement

A witness statement must comply with the requirements set out in Practice Direction 32.

(Part 22 requires a witness statement to be verified by a statement of truth.)

32.9 Witness summaries

- (1) A party who –
 - (a) is required to serve a witness statement for use at trial; but
 - (b) is unable to obtain onemay apply, without notice, for permission to serve a witness summary instead.
 - (2) A witness summary is a summary of –
 - (a) the evidence, if known, which would otherwise be included in a witness statement; or
 - (b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.
- [...]
- (5) Where a party serves a witness summary, so far as practicable, rules 32.4 ... 32.5(3) ... and 32.8 ... shall apply to the summary.

32.10 Consequence of failure to serve witness statement or summary

If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time frame specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.

32.11 Cross-examination on a witness statement

Where a witness is called to give evidence at trial, he may be cross-examined on his witness statement, where or not the statement or any part of it was referred to during the witness's evidence in chief.

32.12 Use of witness statements for other purposes

- (1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
- (2) Paragraph (1) does not apply if any to the extent that –
 - (a) the witness gives consent in writing to some other use of it;
 - (b) the court gives permission for some other use; or
 - (c) the witness statement has been put in evidence at a hearing held in public.

58. As is evident, the English position is essentially still that recommend by Lord Woolf, and reflects his Lordship's proposed balancing of the policy and principled concerns related to evidence-in-chief being led by way of written brief in favour, with restraints on "extravagance", of retaining that mode of evidence (together with enforcement in the form of costs consequences).

59. The distinction between witness statements and witness summaries, the *White Book* commentary confirms, is the same as that between a written brief of evidence and a will-say statement.

60. The *White Book* commentary on r 32.5(1) notes that the savings in hearing time that ought to accrue from this procedure will not be fully realised where the statement includes irrelevant matter because of the need to deal with objections to the inclusion of irrelevant matter, and also where counsel unwisely elects to cross-examine on matters of limited relevance (as noted by Tugendhat J in *Cummings v Ministry of Justice* [2013] EWHC 58 (QB)).

61. The *White Book* also notes, in commenting on the amplification of evidence provisions, that these are an important safeguard against the temptation to produce overly-elaborate, and consequently overly-costly, witness statements; undermining the savings that the procedure ought to produce. Equally however, a late and unjustified change of track requiring such amplification may equally attract a costs sanction to rebuke the party doing an injustice to the opponent, contrary to their obligations as officers of the court and considering the overriding objective.

62. Rules 32.12, the authors of the *White Book* notes, is designed to give effect to Lord Woolf's intention that requiring parties to serve witness statements would avoid

ambush at trial and to promote settlement, so as to encourage candidness in the preparation of statements, reduce the need (in practice) for amplification of witness statements, and prevent the collateral use of statements so as to help achieve the overarching objective of the rules.

63. All this being said, the authors of the *White Book* state (at [32.4.5]), having recounted the relevant observations in Lord Woolf's report and the similar directions given in each bench's practice guide, that:

Unfortunately, rules, practice directions and guidance as to the content of witness statements appear to be habitually ignored by practitioners. Periodically, the Court of Appeal and individual trial judges have criticised lawyers for overloading witness statements with material that should not be included. In *JD Weatherspoon PLC v Harris (Practice Note)* [2013] EWHC 1088 (Ch), the Chancellor stressed that a witness statement ... should cover those issues, but only those issues, on which the party serving the witness statement wished the witness to give evidence-in-chief; should not provide a commentary on the documents in the trial bundle ... nor engage in matters of argument; and should not deal with other matters merely because they may arise in the course of the trial.

64. To achieve the promise of the scheme, it is necessary that, the authors of the *White Book* continue:

... the court should be able to assume that witness statements were properly prepared, it cannot be too strongly emphasised that a witness statement should be in the words which the witness wanted to use and not the words which the person taking the statement would like them to use, where a witness statement is prepared by a legal representative the statement must, so far as practicable, be in the witness's own words ... Where it is apparent that the statement of a witness has been drafted with considerable assistance from solicitors instructed by the party calling the witness, and that statement stands as the witness's evidence in chief, the judge's task of evaluating the witness' credibility is made more difficult.

65. In her memorandum, Dr McKenzie cited the finding of Hollander QC that the typical detail of lawyer-drafted witness statements has meant that, while Court time is saved by disposing of oral evidence in chief, cross-examination on those statements becomes more detailed and takes longer.³⁰ More generally, Dr McKenzie noted that Hollander QC cited Lewison J as noting that:³¹

... the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words, remains at the heart of civil litigation too. In light of the disappearance of oral evidence in chief in civil cases, it may be

³⁰ C Hollander QC *Documentary Evidence* (9th ed, Sweet & Maxwell, London, 2006) at 470.

³¹ At 469, citing *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (QB) at [25].

thought that the importance of the witness' own independent recollection in giving his evidence under cross-examination is all the greater.

Canada

66. My research indicates that there are no practices analogous to briefs of evidence in the Canadian jurisdictions. By way of example, rr 269-289 of the Code of Civil Procedure (Quebec) and r 27 of the Supreme Court Civil Rules (British Columbia) illustrate those jurisdictions' commitment to a presumption of the purely oral delivery of evidence-in-chief where that evidence is not given by way of affidavit.

67. In terms of the above observations, this may be thought (as a matter of fact if not of intention) to privilege the perceived advantages of the hearing of witnesses in person through the leading of oral evidence over values such as expedition.

Concluding Observations

68. The foregoing observations demonstrate remarkable consistency in the concerns regarding, and responses to, written briefs of evidence and will-say type statements. Fourth continuities are particularly notable. I briefly examine each of these by way of conclusion.

69. First, between the experiences and concerns of the common law jurisdictions surveyed. Secondly, between the concerns noted in the records of the Committee's and professions discussions in 2008-2012 and 2009. In summary, the tension is between concerns including:

- a. that requiring the preparation of written briefs of evidence helps focus the issues in dispute and, as a result, allows parties to make more effective use of hearing time and, also, more likely to settle;
- b. as to avoiding surprise in proceedings and other unscrupulous conduct in relation to this, other, and alternative procedural requirements;
- c. that "justice", in the sense of ensuring adjudication according to the best possible view of the facts, favours and requires the giving of evidence orally in certain cases, but not others;
- d. relatedly to point (c), that it is not appropriate to fetter the discretion of judges to adopt the course of action more appropriate to each case that exists under the current rules;
- e. conversely to point (d), that it is necessary to reform the rules in order to encourage judges (and parties) to adopt a more focused and proportionate approach to the preparation of each case as a matter of practice and culture;

- f. also conversely to point (d), the importance of predictability, consistency, and fairness in the application of the rules in each case;
 - g. that the role of lawyers in drafting witness statements means that the truth of witness' own understanding of events is likely to be obscured by lawyers' attempts to present that evidence in the best possible light, undermining the truth-finding function of the Courts;
 - h. relatedly, that the requirement to produce witness statements leads to massive increases in the cost of litigation due to the tendency of lawyers towards extravagance in the preparation of witness statements, particularly where strictly limited to their terms; leading to the inclusion of large amounts of erroneous matter out an excess of caution (including to avoid negligence claims); and
 - i. for some, that the quality of advocacy and advice that lawyers is able to offer is eroded by over-reliance on witness-briefs as a means of the leading of evidence.
70. Thirdly, more generally, there are the similarities in each jurisdiction's and time period's noting of the intersection between written briefs of evidence and the mode of the giving of evidence more generally and wider issues of the degree of judicial involvement in, and management of, proceedings to achieve the promises of good civil procedure of expedition, cost-effectiveness, and justice. This is related, in turn, to wider still concerns about prescription as opposed to flexibility, and on wider discussions regarding the importance of active judicial management of parties and lawyers' behaviour to promote a culture and practice of litigation consistent with achieving the overall objectives of the rules. As noted above, this may suggest the need to revisit the relationship between rules of civil procedure and professional ethics.
71. A fourth continuity, unsurprisingly perhaps, given the inter-relatedness of each jurisdiction's rules, is the relatively limited range of approaches that have been adopted. These might be summarised, in something of a continuum, as:
- a. an approach privileging the perceived advantages of oral evidence, such as that in place in Canada;
 - b. a flexible approach in which the full range of options (a) and (c)-(e) are available to the Judge in each
 - c. an approach seeking to balance the concerns noted above by requiring the exchange of will-say type statements only;
 - d. an approach like that presently in place in New Zealand, England, and several of those parts of Australia not referred to above, in which witness statements are

provided, and in which this may stand as the witness' oral evidence-in-chief, either with or without the prospect of amplification; and

- e. an approach in which all evidence-in-chief is given by way of affidavit evidence only, without prospect of amplification, but subject to cross-examination.

72. I hope that these materials will be of assistance to the working group in its consideration of potential reforms in this area.

Yours sincerely,

Sebastian Hartley
Clerk to the Rules Committee