The Rules Committee

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Updating Procedure to Improve Access to Civil Justice

The Rules Committee is seeking comment from members of the legal profession and other courts users on potential areas of reform to the rules governing civil trial procedures. The purpose of these potential reforms is to improve access to justice by reducing the costs associated with bringing a civil matter to court.

The Committee has released a consultation paper. It is available on the Courts of New Zealand Website.[1] Comments are due back by Friday 1 May 2020.

What is the concern?

One of the roles of the courts in New Zealand is to provide an independent and impartial forum in which citizens and other entities, including businesses, can resolve disputes. All citizens have a fundamental right to access to the courts for this purpose. Disputes may involve complex contractual disagreements between companies or the state through to private individuals looking to the courts when they believe their rights have been breached. Civil disputes are heard by different courts and tribunals depending on the nature of the case, its complexity and the type of remedy available.

The object of the rules that govern how cases are heard in the District Court and the High Court is to ensure cases are dealt with in a just, speedy, and inexpensive way.

However, there is concern that there is an increasingly unmet need for civil justice in New Zealand. A growing number of unrepresented litigants are coming before the Courts, including many litigants who cannot afford legal representation. For example, it is often not cost-effective to bring a claim worth less than $100,000 in the District Court.

These trends run counter not only to the fundamental right of all to access the courts, but also to the strategic goals of the Ministry of Justice and Attorney-General.[2]

What is being proposed?

The Rules Committee wants to address the trends identified above by embarking on a wide-reaching review of the High Court Rules and District Court Rules. The goal of this review, in line

1 https://www.courtsofnz.govt.nz/about-the-judiciary/rules_committee/access-to-civil-justice-consultation
2 https://www.justice.govt.nz/assets/Documents/Publications/MOJ-strategy-on-a-page-2019.pdf

with the overall goal of the Committee, is to improve access to justice in New Zealand by reducing how much it costs to bring a civil matter to court. The Committee wants to better enable judges, and encourage lawyers, to honour their responsibility to ensure that the costs of each case are as low as can be while ensuring that justice is done.

Every civil case should be heard in a way that keeps the costs of coming to court proportionate to the nature and value of the issues in dispute. Since the costs of bringing some cases currently outweigh their ability to provide potential remedies, the ways in which cases are heard may need to change. To support a change to the 'presumptive' model of civil procedure that applies in New Zealand, there may need to be a wider change in culture to provide better access to justice. In some cases, this would involve a very significant change in how judges and lawyers manage cases.

This would mean that adopting simpler procedures for administering and hearing civil cases may be a better option than keeping the status quo. For example, the parties in a case might need to demonstrate why justice would require a more time consuming and expensive procedure than alternative procedures available to them.

Why are we consulting?

The Rules Committee was established in 1908. Its membership and functions are currently set out in section 155 of the Senior Courts Act 2016.[3] The Committee brings together representatives of judiciary, government, and the legal profession to make, and improve, the rules of practice and procedure that govern how courts run. The Committee believes the rules of court must promote access to justice, so long as this is consistent with justice being done in each case.

Recognising the wide scope of these potential reforms, the Committee is seeking input at an early stage of the reform process. Feedback is sought from members of the legal profession, government agencies, the business community, and not-for-profit and charitable organisations, especially those involved in assisting self-represented litigants. This will allow the Committee to produce more specific proposals for later consultation.

The Committee has not yet decided its preferred options. However, to assist thinking about this issue, the Committee has produced a paper identifying several potential options. These fall under four broad headings and are more fully detailed in the consultation paper. A summary of each appears below.

The Committee's discussion paper contains examples of other procedures already in place overseas providing possible ideas for reform in these areas. The Committee is also making available the extensive initial research it undertook before drafting the discussion paper.

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3 http://legislation.govt.nz/act/public/2016/0048/latest/DLM5759262.html

Area One: Short form trial procedures

First, introducing a short trial process in the High Court, and/or modifying the existing short trial process in the District Court.

A presumption in favour of the abridged process may apply to cases satisfying certain criteria, such as cases below a certain value; not involving certain claims; or that could be heard in fewer than, for example, four days. This type of process may be particularly suited to legal disputes turning on issues able to be very precisely defined. Pleadings, witness briefs and will-say statements, and submissions would be limited in length.

Area Two: Inquisitorial-type processes

Secondly, an “inquisitorial”-type process could be introduced for the resolution of certain claims in the High and District Courts. This would be based, with significant changes, on procedures in place in some civil law jurisdictions (for example: Germany, France, Sweden).

The intention would be to allow parties to obtain an answer to their dispute more quickly and cheaply than under current procedures in suitable cases. This would be achieved by empowering judges to have a more active role in identifying the issues in dispute, fact-finding, and managing the hearing of the case. Limits would be imposed on the amount of evidence filed and the length of submissions made. Additionally, the judge may have a role in helping the parties to mediate their dispute, only deciding on the merits of the dispute once talks at the facilitation stage fail.

Area Three: Summary judgment triage procedure

Thirdly, most proceedings could be required to begin with a summary judgment application. Summary judgment is a procedure currently available to a plaintiff or defendant where they can satisfy the Court the other party has no chance of success. Obtaining summary judgment requires a party to clearly set out their case and evidence at an early stage of the pre-trial process.

By requiring most parties to go through a summary judgment-like procedure, early clarification of the extent of the dispute, the real points of conflict, and the Court’s likely view could be received. This could help limit the extent, and cost, of the proceeding. Cases not suited to the process, such as those involving fraud or liquidated demands, would not be required to start with the summary judgment-type process.

Area Four: Streamlining pre-trial and trial processes

Fourthly, current pre-trial and trial processes could be streamlined. These modified procedures would likely apply to both proceedings using the current ‘standard’ process and any alternative processes introduced. The Committee considers four current areas of procedure are in particular need of review:

i. Briefs of evidence

Briefs of evidence are the usual way evidence-in-chief is presented in civil trials. The Committee is aware of concerns these are expensive to prepare and, because they are often crafted by lawyers. Because they are not in witness' own words, they are often not particularly helpful in fact-finding. The Committee considers other ways of avoiding ambushes at hearings are available.

ii. Documentary evidence

It may be desirable to make greater use of documentary evidence. In many cases the documents that witnesses' oral evidence is used to introduce are of considerably greater use to fact-finding than the oral evidence. The Committee is also interested in hearing other ideas about how to reduce the time and money spent on oral evidence being given. This may include allowing briefs to be taken as read or filed in the form of affidavits.

iii. Discovery

The default rules regarding discovery could be reduced. Discovery is a pre-trial procedure by which parties to litigation can obtain evidence from the other party or parties to the dispute. The Committee is not satisfied that the costs of discovery are proportionate to the benefits it offers to doing justice, despite major reforms made in 2011. The Committee is prepared to contemplate potentially significant changes to the default position in relation to discovery. These could extend, for example, to removing a presumptive right to discovery in favour of a default "disclosure only" model that would apply except where the Court was satisfied the interests of justice required more onerous obligations.

iv. Presentation of cases

As in some of the above proposals, judges could be given clearer powers to direct how parties present their cases. Possible rule changes in this area might include greater use of time limits in trials, or judges being encouraged to intervene more in the examination of witnesses.

How to submit

Feedback on the discussion document is due by Friday 1 May 2020. Submissions can be filed by email to Sebastian Hartley, Clerk to the Rules Committee, at PO Box 60, Auckland or RulesCommittee@justice.govt.nz.