RULES COMMITTEE | TE KOMITI MŌ NGĀ TIKANGA KOOTI

Improving Access to Civil Justice

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November 2022

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Tēnā kōrua Ministers

Improving Access to Civil Justice report

I am pleased to enclose the report of the Rules Committee on Improving Access to Civil Justice.

The Committee began a process of reviewing the rules of court for the purpose of improving access to civil justice beginning in late 2019. When doing so it engaged with groups such as community law centres and other community organisations to ensure that it was fully informed by those groups as well as those it traditionally consults. As a consequence of that broader engagement several submissions were made to it suggesting reforms which extended beyond the rules of court and extending into areas of potential legislative and policy changes.

It was in those circumstances that Ministers suggested that our review extend beyond questions directed to the rules of court to address questions of potential legislative and policy reform. Whilst the Rules Committee would not normally address such wider issues, the composition of the Committee suggested that it had some ability to consider those matters – the Committee includes the Attorney-General and senior representatives of the executive, the Chief Justice and other judicial members, as well as representatives of the legal profession. We have engaged in further consultation as a result.

The culmination of that consultation has led to the attached report which makes recommendations for policy and legislative changes, as well as rule changes in three main ways – substantially increasing the jurisdiction of the Disputes Tribunal, reinvigorating the civil jurisdiction of the District Court, and making substantial changes to the procedures to be applied in the High Court. The Committee recommends changes in all three areas, a summary of which can be found at paragraph [44].

During the Committee's extensive consultation, several proposals have been considered. The Committee itself will address the recommendations concerning changes to the rules of court and provides its recommendations for legislative and policy changes for consideration by the Executive.

Nāku noa, nā

The Hon Justice Francis Cooke
Chair Rules Committee

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Chapter one

Introduction

1. In 2019, the Rules Committee[1] embarked on a review directed to improving access to civil justice. This encompassed a consideration of the rules of court, but also broader considerations. With the concurrence of the Attorney-General and Minister of Justice as well as the rules, the review has addressed questions of policy, and potential legislative reform. The Committee's conclusions are set out in this report. These include recommendations for legislative and policy changes for consideration by government.

Background

2. By three consultation papers dated 11 December 2019,[2] 2 May 2020[3] and 14 May 2021[4] the Committee sought views on certain proposals, and also invited submissions on access to civil justice matters more generally. Four areas of proposed reform were outlined in the initial consultation materials. They were to:
   (a) introduce a short trial process in the High Court, and/or modify the existing short trial process in the District Court;
   (b) introduce an inquisitorial process for the resolution of certain claims in the High and District Courts;
   (c) introduce a requirement that civil claims be commenced by a process akin to an application for summary judgment; and
   (d) streamline current trial processes by making rule changes intended to reduce the complexity and length of civil proceedings, such as by replacing briefs of evidence with "will say" statements, giving greater primacy to documentary evidence, and reducing presumptive discovery obligations.

3. A number of submissions were received in response to these initial proposals. As well as responding to these four proposals, submitters raised issues concerning access to civil justice more generally. Although submitters had different views on the proposals, there were areas of general agreement. An executive summary of the views expressed in the initial submissions can be found on the Committee's website.[5] Submitters were in general agreement that:
   (a) There are significant problems with access to civil justice in New Zealand. For example, in its submission the New Zealand Law Society referred to the "justice gap"[6] that has been "slow-burning for at least a generation".

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1 The Rules Committee is established under s 155 of the Senior Courts Act 2016. Its members are the Chief Justice, the Attorney-General, other senior members of the judiciary, the Solicitor-General, representatives of the New Zealand Law Society and the Ministry of Justice and other persons appointed by the Chief Justice. Its primary function is to make recommendations in relation to the rules of court. By constitutional convention such rules are only made by the executive with the concurrence of the judiciary. It is also desirable that such rules be established in consultation with the profession. This is reflected in s 148 of the Senior Courts Act which provides that rules of court for the senior courts can only be made by the Governor-General with the concurrence of the Chief Justice and two members of the Committee. Similar provisions exist in relation to the District Court Rules.

2 Rules Committee *Improving Access to Civil Justice: Initial Consultation with the Legal Profession* (11 December 2019) ("First Consultation Paper").

3 Rules Committee *Improving Access to Civil Justice: Initial Consultation with the New Zealand Community* (2 May 2020) ("Second Consultation Paper")

4 Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and wider Community* (14 May 2021) ("Third Consultation Paper").

5 See https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/access-to-civil-justice- consultation/Executive-Summary-of-Submissions-to-Initial-Consultation.pdf.

6 See Helen Winkelmann "Access to Justice – Who Needs Lawyers" (Ethel Benjamin Address 2014, University of Otago, November 2014); and "Access to Justice – We Need More (Than) Lawyers" (Address to University of Waikato/McKenzie Elvin Law Lecture, Tauranga, 24 August 2022).

(b) Any effective response needs to go beyond rulemaking to promote cultural change in relation to the way civil litigation is practised in New Zealand.

(c) Greater proportionality is needed in respect of the procedures applicable for the determination of disputes, with mandated procedures needing to more closely respond to the needs of justice, and what is at stake, in each case.

(d) It is desirable that there be earlier judicial engagement, both in terms of a consideration of the merits of claims, but also the procedures followed for their determination.

4. At its meeting of 21 September 2020, the Committee established a judicial subcommittee to formulate proposals in response to these submissions. This subcommittee included the Chief Justice, the then President of the Court of Appeal, the Chief High Court Judge, the Chief District Court Judge, the Chair of the Rules Committee (Justice Cooke), and Judge Kellar. The subcommittee reviewed the submissions and formulated new proposals in response, which were reported back to the Committee at its meeting on 23 March 2021. The subcommittee's report, as supplemented by views expressed during that Committee meeting, formed the basis of the proposals in the Third Consultation Paper dated 14 May 2021.[7]

5. These proposals were broader than the four suggestions outlined in the previous papers. This is because the Committee was concerned to respond to the full range of issues raised by submitters and to attempt to address these issues comprehensively. This led to engagement with government ministers, who agreed to the Committee's recommendations having a broader scope.

6. By way of summary, the further proposals involved:

(a) increasing the monetary jurisdiction of the Disputes Tribunal, and a number of specific proposals to enhance the Tribunal's role in the civil justice system;

(b) reforming the District Court to improve its structural ability to deal with civil claims; and

(c) reforming procedures in the High Court to streamline its processes (including encouraging early judicial engagement with the substance of proceedings and reducing the burden associated with interlocutory applications).

7. A number of submissions on these proposals were again received.[8]

8. At its meeting on 29 November 2021, the Committee reviewed the submissions and nominated Committee members to lead discussions and formulate recommendations on particular sections of the proposed report at its next meeting. At its 28 March 2022 meeting, the Committee considered recommendations in relation to the Disputes Tribunal (Jason McHerron and Principal Disputes Referee Janet Robertshawe), the District Court (Judge Kellar and Kate Davenport KC) and the High Court (Justice Cooke and Daniel Kalderimis). At its next meeting, on 28 June 2022, the Committee determined which proposals to recommend for inclusion in the Report. A further sub-committee was created to draft the Report, which was then approved by the Committee.[9]

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7 The minutes of the Committee's meetings are available at https://www.courtsofnz.govt.nz/about-the- judiciary/rules-committee/meetings/.

8 An executive summary of the submissions can also be found on the Committee's website, at https://www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/access-to-civil-justice-consultation/#further_submissions.

9 Kós J, Cooke J, Jason McHerron and Alison Todd.

9. The Committee's final recommendations in relation to the Disputes Tribunal and the District Court are similar to those proposed in its consultation paper of 14 May 2021. However, as a consequence of considering the wider range of issues canvassed in submissions, the Committee's recommendations in relation to the High Court have materially changed. As a consequence of considering the further submissions made, however. As a result, the Committee will take into account any further submissions it receives on these aspects before implementing the recommended changes.

10. The Committee's recommendations go beyond recommended changes to the rules of court, and include suggestions for legislative and policy changes. The Committee considers that it is important that proposals for improving access to civil justice be considered within a broader framework, and that its conclusions include wider recommendations for consideration. It has done so only after first seeking approval from Ministers for it to go beyond its usual role of considering the content of the rules of court.

11. The report will form the basis for the Committee's subsequent consideration of what rules are needed to give effect to the conclusions and recommendations. Because some of the Committee's conclusions involve recommendations for wider legislative reform outside the scope of changes to the rules of court, this report is also provided to government ministers and policymakers for their consideration.

Importance of Access to Civil Justice

12. At the highest level, access to civil justice concerns the ability of individuals to have their civil rights vindicated, and breaches of those rights compensated, in a procedurally fair and transparent manner by neutral adjudicators in accordance with law. This is a fundamental right.[10]

13. Submitters identified that widely-held conceptions of "justice" require that everybody in society be able to affordably access impartial tribunals in which they feel able to understand the applicable rules of law – procedural and substantive – and in which the truth is fearlessly and expeditiously identified.

14. More broadly, ensuring all individuals are equally able to obtain such redress within legal institutions, whatever their means, "implicates central rule of law values".[11] Inequality of access to civil justice has the potential to erode individual dignity, insofar as it risks some individuals being able to wrongfully abrogate the rights of others with practical impunity, contrary to law, in a manner therefore corrosive of rule by law. The rule of law is arguably the cardinal principle underpinning New Zealand's uncodified constitution.[12]

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10 *Universal Declaration of Human Rights* GA Res 217A (1948), art 10. See also New Zealand Bill of Rights Act 1990, s 27; and Statutes of Westminster The First 1275 (Imp), s 1.

11 Law Commission Class Actions and Litigation Funding (NZLC IP 45, 2020) at [1.9]-[1.15], citing Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 Ga L Rev 1 at 59.

12 A commitment to liberal democracy, which would, in the circumstances of New Zealand's politics, require commitment to the rule of law, is potentially another underlying principle: see Sian Elias, Chief Justice of New Zealand "Fundamentals: a constitutional conversation" (Harkness Henry Lecture 2011, Hamilton, 12 September 2011) at 8 and 16; Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321; Robin Cooke "Fundamentals" [1988] NZLJ 158 at 165; Lord Woolf "Droit public – English style" [1995] PL 57 at 67-69.

15. It is therefore of concern that submitters identified numerous barriers to accessing civil justice, meaning that citizens feel as if justice is not being done. This is because, as the Law Commission has put it:[13]

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

The Relevant Concerns

Financial barriers

16. Litigation, as a mechanism for obtaining resolution of civil disputes, has long been perceived as beyond the financial reach of most New Zealanders.[14] Submitters, including academics, individual lawyers and their professional bodies, and community organisations, confirmed this view. There was particular concern that a broad range of disputes – those too high in value to be resolved in the Disputes Tribunal but too low in value to be economic to litigate in the courts (the range of which was variously estimated by submitters as between $35,000 and $100,000 to $500,000) – simply cannot be litigated by the average person.

17. Submitters identified various ways in which the financial barriers arise or materialise. The first relates to the content and operation of the rules themselves. The concerns submitters raised under this heading can be further divided as follows:

    (a) Areas in which the cost of complying with the rules of court is disproportionate to the value or complexity of the issues in dispute in proceedings, or in which the rules of procedure impose requirements seen as doing little to promote the just resolution of proceedings and are therefore needlessly expensive. Submitters also identified additional mechanisms that could be introduced into the rules to usefully aid in the just and efficient disposition of cases.

    (b) Some participants do not take advantage of the existing potential within the rules for the tailoring of procedural requirements to the needs of each case. This can result in a "maximalist" approach to litigation. Submitters identified a range of causes for this phenomenon, including:

        (i) the long tail of the historically party-driven adversarial approach to litigation;

        (ii) failure to pursue a proportional approach in litigation;

        (iii) a conscious desire on the part of some parties to use procedural devices as a tool of attrition; and

        (iv) "defensive lawyering"; leaving no stone unturned to avoid accusations of inadequate representation, or negligence.

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13 Law Commission Delivering Justice for All: A Vision for New Zealand Courts and Tribunals (NZLC R85, 2004) at 3.

14 See, for example, Rob Stock "Many Kiwis just can't afford to fight rip-offs and sue companies, Justice Minister says" Stuff (online ed, Auckland, 2 February 2020); and Law Commission, above n 11, at [1.9].

18. Several submitters identified a need for procedural innovations to robustly counteract these tendencies, and to promote a change in litigation culture, without which the potential of the rules of court – however well-designed – cannot be realised.

19. A second and related concern was that judges were seen as potentially unable or unwilling to exercise sufficient control over litigation to ensure the procedural obligations attached to each case are proportional to the needs of that proceeding. Again, a range of causes for this perceived phenomenon were identified in submissions. Some related this to long-standing conceptions of proper judicial behaviour as involving a high degree of restraint; others to an absence of adequate resourcing to allow judges to meaningfully supervise and restrain the conduct of proceedings, especially from an early stage.

20. Thirdly, submitters noted the sheer expense of obtaining legal representation places access to civil justice beyond the reach of many. Some senior members of the profession argued it is not improper for lawyers to charge for their expertise. Others suggested the fees charged by lawyers should be regulated, as is the case in some overseas jurisdictions.[15] They said this would be justified by lawyers' exclusive right of audience in courts, and the fundamental nature of the right to access to civil justice. The magnitude of the problem appears to be growing over time. In one of her submissions, Dr Bridgette Toy-Cronin of the Otago Legal Issues Centre noted that, while the median weekly income rose by only 3.4 per cent between 2015 and 2016, the average charge-out rate for employed lawyers rose by 8.4 per cent in that period. To her, this suggested that the cost of legal services is outstripping the average person's means of meeting that cost.

21. As submitters identified, this also implicates the comparatively limited availability of civil legal aid, and the comparatively (compared to the criminal bar) small number of lawyers willing to take on work from legally aided civil clients.

22. Fourthly, a number of submitters identified the level at which hearing and filing fees are set in the District Court and High Court as a barrier for litigants, even self-represented litigants (who have no associated legal fees), in accessing civil justice.

23. Finally, some submitters also identified the risk of adverse costs awards as exercising a chilling effect on potential litigants with meritorious claims and limited means, particularly self-represented litigants looking to challenge represented parties. It was submitted that the inability of self- represented litigants to receive an award of costs even after prevailing had a chilling effect on their going to court.

15 See, for example, the Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz*) 2004 (Germany), which limits the available fees in respect of advisory services and expert opinions, and provides for both maximal and minimal fees in respect of work where legal representation is required, essentially producing flat rates for legal services of between 1 and 20 per cent of the value of the disputed matter. In the United States, some states impose limitations on, or prescribe in statute, the fees payable for particular legal services: see, for example, Probate Code (California), ss 10810-18014.

Psychological barriers

24. Some submitters placed psychological barriers on the same level as financial barriers as an impediment to access to justice. This was particularly so with submissions from members of the wider community, and from organisations often involved in advising indigent litigants, such as the Citizens Advice Bureau, the Porirua-Kāpiti, Waikato, Canterbury, and Waitematā Community Law Centres, and Youth Law Aotearoa.

25. As the Porirua-Kāpiti Community Law Centre put it in its submission, in interacting with the courts many of its clients experience what is referred to in te ao Māori as whakamā; which encompasses feelings of shame, a lack of knowledge, inferiority, inadequacy, shyness, embarrassment, and self-doubt. Many of that centre's clients, including not only those of Māori descent, but also Pasifika, other migrants, refugees, and others for whom English is a second language or who lack formal education:

> [...] may feel whakamā when engaging with New Zealand's legal system, a system imported by England and highly professional in nature. The eurocentrism and bureaucracy which dominates the legal sphere does not reflect New Zealand's population. Accessing justice can therefore be an alienating experience for those whose culture(s) do not reflect the dominant values of New Zealand's legal system. In particular, Māori and Pasifika may fear speaking or acting incorrectly in a system which has marginalised and targeted their communities.

26. This statement highlights two related further barriers to all members of the community being able to fully access civil justice. These are cultural and informational in nature. A number of other submitters made similar points.

Cultural and information barriers

27. The average citizen's lack of experience in navigating the court system and unfamiliarity with court processes was reported by the Community Law centres as inhibiting individuals from taking action to bring or defend proceedings. For example, Community Law Waikato reported that many of their clients facing judgment for debt claims were unlikely to seek advice until after the start of enforcement proceedings, even where they had a good defence, not appreciating the difficulties involved in beginning their defence of the claim at that juncture.

28. In relation to the requirements imposed on court users, submitters noted the highly technical nature and often academic presentation of legal information confuses many intending litigants. These litigants were reported as being left afraid that technical mistakes would invalidate their claim. This, in turn, forced individuals to be more reliant on lawyers for advice, even as they were unable to afford that assistance. It also tended, in the Community Law centres' view, to reduce people's ability to understand the reasons for outcomes, undermining their sense of justice having been done. Dr Toy-Cronin, in her submission, joined the Community Law centres in emphasising that the provision of clear, succinct, information accessible to all court users is essential. This information needs to outline what the process involves, the timeframes involved, court users' obligations, and where to quickly and affordably access help.

29. In this respect, some submitters accepted that the Ministry of Justice has done good work in providing information of this type through its website, such as by providing templates for statements of claim. This information is not however, in the submitters' views, comprehensively explained, nor delivered in sufficiently plain English. Nor is it accessible to those with limited access to the internet.

30. As the above makes clear, the Committee's work in this area touches on an inter-related cluster of concerns about civil justice being inaccessible to many New Zealanders, whether for financial reasons or otherwise. These issues provoke broader questions about the audience at which the rules of court are aimed. It also raises questions about whether the assumptions on which the rules are based respond appropriately to widely held ideas of what justice entails. More generally, it points to the need for responses that extend beyond what this this Committee can deliver through rule reform.

The Committee's overall response to these concerns

31. These are deeply entrenched problems, and clearly extend beyond issues with the rules of court. However, aspects of the rules, can be seen as contributing to the problems by making understanding and complying with procedural obligations unduly burdensome and costly.

32. It is for this reason that the Committee considered the overall issue more broadly than was canvassed in its initial consultation papers. The nature of the issues involved means that a single set of proposals relating to matters the Committee can address is by itself unlikely to remedy the significant issues raised. Co-ordinated responses are needed from a range of participants.

33. It is also recognised that the reforms may require significant structural change. The submissions suggest that merely tweaking the current procedural framework is unlikely to fully address the issues that have been highlighted. The proposals proceed on that basis.

34. Also, as many submitters pointed out, part of the problem is with the litigation culture prevailing in New Zealand. Rules reform cannot, in itself, change that culture. However, legislative initiatives, structural changes, and rules amendments can play an important part in changing the overall approach and seeking to change the culture of civil dispute resolution. In particular, changing the presumptive obligations that apply, streamlining the default procedure, and requiring parties to justify adding more onerous obligations, will hopefully begin to break down the maximalist approach.

35. Other matters now under consideration also relate to these proposals. These include the Committee's proposals regarding costs awards for self-represented litigants, and the Law Commission's report on litigation funding and class actions.[16] All of these responses must be implemented in a co-ordinated manner. The design of these initiatives must have proper regard to overall structure for civil dispute resolution in New Zealand.

36. That structure involves a series of tribunals as well as the courts. There are specialist tribunals that deal with particular categories of civil dispute, such as:

    (a) the Tenancy Tribunal, which deals with disputes relating to residential tenancies;

    (b) the Employment Relations Authority, which deals with employment related disputes; and

16 Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa: Class Actions and Litigation Funding* (NZLC R147, 2022).

(c) the Motor Vehicle Disputes Tribunal (MVDT), which deals with disputes concerning the sale of motor vehicles by motor vehicle traders.

37. The proposals set out below do not involve proposals in relation to these specialised tribunals. Whether any of the proposed reforms directed to the Disputes Tribunal should also be considered for each of the specialist tribunals is a separate question that might be considered after the more general proposals for civil justice reforms outlined in this document are implemented. Equally, it may be the case that features of those specialist tribunals' procedures could usefully be incorporated into the Disputes Tribunal's processes, as discussed below with respect to the MVDT.

38. The Disputes Tribunal is in a different category from the other three tribunals. It is a general civil tribunal forming part of the District Court.[17] It deals with certain claims up to $30,000 that are not dealt with by the specialised tribunals. The Disputes Tribunal performs a key role in the overall civil dispute resolution system. It provides civil justice in claims ranging from smaller straightforward matters where involving lawyers would add little to doing justice, up to claims for $30,000 that are of considerable significance to the parties involved. Given this, and also the Tribunal's flexible and expeditious manner of proceeding, the Committee considers that any comprehensive response to the concerns raised in submissions needs to address, and strengthen, the role of the Disputes Tribunal in New Zealand's civil justice system.

39. The Committee's overall aspiration for the civil justice system aligns with that set out by the Law Commission in its 2004 report *Delivering Justice for All*.[18] Like the Commission, the Committee believes that the justice system must deliver civil justice "for all through fair and timely processes" and "procedures that are relevant and responsive to the needs and expectations of the people who use the courts", so that "public confidence in the courts will be maintained."[19] This aligns with the overall goal of civil procedure, as expressed in the High Court Rules 2016 and District Court Rules 2014, being the "just, speedy, and inexpensive determination of proceedings and applications".[20]

40. The Committee also agrees with the Law Commission's assessment of the guiding principles for the design of a civil justice system that retains public confidence. These principles, which have guided the formulation of the recommendations in this report, are:[21]

(a) Promoting quality decision-making by ensuring that judges have sufficient time to deliver quality decisions and, more broadly, ensuring that processes exist to avoid miscarriages of civil justice and other errors occurring.

(b) Providing for principled and proportional appeal rights, so as to allow for the correction of error and the provision of clear guidance to future courts, tribunals, and citizens as to what is to be done and by whom.

(c) Ensuring alignment and coherence between the role and jurisdictions of the various courts involved in providing civil justice, and between the procedures and processes of each of these courts and their role in the system.

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17 District Court Act 2016, s 9.

18 Law Commission, above n 13.

19 At 3.

20 Senior Courts Act 2016, s 145; High Court Rules 2016, r 1.2; District Court Rules 2014, r 1.3.

21 Law Commission, above n 13.

(d) Ensuring proportionality between:

(i) the investment of resources required by parties to comply with procedural obligations in litigating (and also the use of judicial resources required to supervise compliance with those obligations); and

(ii) the nature, complexity, value, and importance to the parties in question and wider society, of each dispute.

(iii) Upholding accessibility by ensuring that everyone in New Zealand is able to use courts and tribunals to assert and defend their rights. This includes ensuring that adequate information and advice is available, cost barriers are minimised, and that processes are comprehensible and culturally responsive.

(e) Promoting respect for all by ensuring that those who come to court are treated with respect and feel respected, including attempting to ensure all court participants feel that what has happened in court was relevant for them, and understand what happened in court, and why.

(f) Ensuring efficiency in the use of scarce judicial resources (which are ultimately funded by taxpayers) and reducing the economic consequences for parties of having to litigate, both in terms of mitigating the direct costs of complying with procedural obligations and reducing the distraction from more productive activity represented by involvement in court processes.

41. These principles cannot all be given effect to absolutely, given the finite resources available to parties and the justice system. It has been said of civil procedure that "the ultimate aim must always be to ensure that justice is done, even though this may not be the quickest or cheapest solution".[22] Here, "justice" refers to the avoidance of error by providing parties with procedural rights; a manifestation of the ethos of the old party-driven adversarial system.[23] We think a broader conception of "justice" must now prevail, given the need to allocate judicial time efficiently,[24] lack of resources available to access legal representation, and the significant inequality of personal resources between parties.

42. Despite these constraints, we think that justice can be done, fairly and correctly, using procedures considerably more streamlined than those currently in place.

43. In making proposals for change the Committee has been conscious of a need to avoid reforms that are experimental in nature. The adoption of untested approaches could cause more harm than good. Rather, the Committee has sought, where possible, to make changes that have a proven track record in one way or another. All of its proposals in the three areas covered by this report – the Disputes Tribunal level, the District Court level, and the High Court level – are based on the Committee's assessment of practices and processes that have worked well in other areas.

22 See Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR1.2.02].

23 Robert Fisher "Whether the Adversarial Process Is Past Its Use-By Date – A New Zealand Perspective" (NZ Bar Association and Legal Research Foundation Civil Litigation Conference, Auckland, 22 February 2008) at [18].

24 See, for example, *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [27]; and *Parlane v Hayes* [2015] NZCA 341 at [30]–[32].

Summary of Rules Committee's recommendations

44. The Committee recommends, as set out in greater detail below, that:

(a) The flexible and responsive dispute resolution services provided in the Disputes Tribunal should be made available in respect of disputes of a higher monetary-value. The Committee considers that the Tribunal's processes currently reliably achieve justice in an expeditious, efficient, and proportionate manner for awards of $30,000 or less, and that this would also be true of awards of $70,000 as of right, and to $100,000 with the consent of the parties. Appeal rights from the Tribunal should be expanded for awards over $30,000, so as to ensure proportionality between the importance of those rights and the importance to parties of the claims being determined.

(b) The institutional capabilities of the civil jurisdiction of the District Court should be improved by appointing a Principal Civil District Court Judge to oversee the strengthening of the expertise of the court's civil registry to ensure that best practice in the case management of civil proceedings is applied in all matters. This will help to address the cultural and information barriers raised by submitters. In addition, the Committee recommends the appointment of part-time deputy judges to exercise the civil jurisdiction of the court, much like the role of Recorders in England and Wales. They should be appointed from those in the profession with civil expertise, including King's Counsel. This is seen as a step that will enhance the capability and mana of the civil jurisdiction of the court. The Committee does not recommend major changes to the District Court Rules. The Committee thinks the current Rules are largely fit for purpose, following their modification in 2014.

(c) There should be significant changes to the High Court Rules, and the procedures followed for determining claims in that court. Proportionality is to be included as a guiding principle. The Committee recommends that there be a requirement for parties to serve witness statements near the commencement of the proceeding, as has been successfully implemented in New South Wales. The witness statements will be in the nature of "will say" statements. The objective will be to remove the traversal of documents, and the inadmissible advocacy that is presently a feature of briefs of evidence. There should be a requirement to include known adverse documents in initial disclosure. A judicial issues conference will then take place, at which the overall issues in the case, any further orders for discovery, other interlocutory orders necessary for the case, and the steps for trial are all addressed. Conferences are intended to involve a comprehensive review of the case with a judge after the key documents and witness statements have been exchanged when the case is better understood. At trial, there will be a much greater focus on the contemporaneous documents to establish the facts. The witnesses will not be permitted to traverse the documents in their evidence, but must rather focus on facts that are in dispute.

Chapter two

Disputes Tribunal recommendations

45. The Disputes Tribunal provides a quick and inexpensive way to resolve civil disputes. It has evolved from the Small Claims Tribunals that were set up in 1976 as a division of the Magistrates' Court to hear claims up to $500. These Tribunals were created in response to the consumer justice movement and the increasing need for alternatives to formal court processes to resolve small disputes.
The Disputes Tribunal has proved to be a success and its jurisdiction has expanded over time to accommodate claims up to $30,000. Nevertheless, the Tribunal still retains many of the original features of the Small Claims model from which it grew, including:
    (a) the role of the referee to impartially assist the parties to resolve their dispute through an evaluative and inquisitorial approach;
    (b) excluding lawyers and the public from hearings;
    (c) a requirement to first consider whether the matter can be resolved by agreement, with an ability to approve appropriate settlements;
    (d) if the matter is not resolved by agreement, the power to determine the case according to the "substantial merits and justice of the case"; and
    (e) a limited right of appeal on procedural issues only.

46. The Disputes Tribunal is the only tribunal that is a division of the District Court. All other tribunals sit outside the court system and deal with disputes in specific subject areas such as motor vehicles, residential tenancies and employment. As explained in the Third Consultation Paper, the Rules Committee considers that the Disputes Tribunal performs a key role in the overall civil dispute resolution system, providing access to civil justice in smaller straightforward matters through to matters that are of considerable monetary or other significance to the parties involved. Given this, and also the Tribunal's flexible and expeditious manner of proceeding, the Committee has decided that part of the response to the concerns about access to civil justice raised in submissions is to address, and strengthen, the role of the Disputes Tribunal in New Zealand's civil justice system.

The current work of the Disputes Tribunal

47. The Disputes Tribunal has jurisdiction in contract, quasi-contract and tort. The tort jurisdiction is limited to where there has been damage to physical property. Jurisdiction also extends to the Fencing Act 1978, Consumer Guarantees Act 1993, Contract and Commercial Law Act 2017 and specific parts of the Fair Trading Act 1986.

48. The Tribunal remains an inherently small claims jurisdiction, with 60% of cases involving sums under $5,000. However, cases involving lower sums often involve important principles. And the proportion of higher monetary value claims is increasing. Also, a growing portion of the Tribunal's work is for claims that would be greater if its jurisdiction allowed, with applicants abandoning the part of their claim that exceeds the $30,000 jurisdictional cap.

What happens in a hearing?

49. A Disputes Tribunal hearing generally takes place in a dedicated room at a local District Court, or in provincial courts, often in the Family Court. Parties therefore have a sense they are "coming to court". This sets the tone, as does the room arrangement, which tends towards the more formal.

Referees are trained to compensate for this by being friendly, helpful, and by building rapport. However, ground rules are set to ensure a fair exchange. A party can bring a support person. A lawyer cannot attend unless they are a party.

50. The hearing is divided into five phases:

(a) ***FACTS:*** Each party has an uninterrupted time to summarise what has happened, with a little help and clarification where needed.

(b) ***ISSUES:*** In the second part, the referee then transforms the dispute from two positions into a series of issues. These are usually a mix of fact and law. The referee will also indicate who has to prove each element. This is often the first time where the parties realise what their respective rights are and what the nub of the matter really is.

(c) ***DISCUSSION:*** The referee then discusses the issues, one by one, to ensure everything relevant has been presented and assessed. Witnesses are heard, and both the referee and the parties can ask questions. The referee identifies evidence favourable to both parties and can point out what may be missing. Sometimes this requires an adjournment, to enable a party to obtain that evidence. Once all the issues are discussed, the referee can reality test the parties' positions and also foreshadow strengths and weaknesses, to give parties the ability to respond to the grey areas. The discussion is directed and evaluative, but at this stage, remains non-determinative.

(d) ***SETTLEMENT:*** The referee then turns to the possibility of settlement. The settlement discussion is without prejudice. This phase presents an opportunity to reframe the perspective of the parties based on what the information is tending to establish, what is immaterial, what cannot be proved and the future interests of the parties. It is important that the referee still does not reveal their conclusions on all matters. Sometimes a settlement is purely pragmatic and commercial. At other times, there are other mutual interests at stake that extend beyond what a decision could take into account.

(e) ***DECISION:*** Finally, if the matter does not settle, the case is reserved for a written decision which is posted to the parties up to two weeks later. That decision provides full legal reasons to support the outcome.

Where the efficiencies lie in what the Disputes Tribunal does

51. The Disputes Tribunal exists to provide access to justice for small claims. It is critical that people have a quick and low-cost place to come to resolve their dilemma, no matter the size of the claim in monetary terms. Each extension of the Tribunal's jurisdiction over the years has shown that the model does work to provide safe and affordable access to justice in higher value cases. This is so for the following reasons:

(a) The Tribunal has developed hearing procedures that uphold the principles of natural justice.

(b) The Tribunal has grown since its inception into a reserve of experienced, skilled and well-motivated judicial officers. They come from all walks of life, and it is rare for a prospective referee to get an interview for the role without a law degree and proven success in the legal profession or in dispute resolution generally.

(c) Most importantly, the Tribunal process allows the parties to have a constructive discussion about the matters in dispute, without the need for representatives, pleadings, legal

submissions, formal examination and cross examination, or any of the artifice that exists in an adversarial court trial. The active and evaluative role of the referee reveals a solution that ends the dispute within the law.

(d) A Tribunal hearing can be a restorative experience, not only by disarming attributions, but also by encouraging new perspectives, arising from the trust and influence generated by the parties' confidence in the referee's knowledge and the fairness of the process.

Where the risks lie in what the Disputes Tribunal does

52. With only one arbiter and two or more perspectives from the participants, a referee needs a range of skills to be able to:

(a) identify the correct issues, and foreshadow strengths and weaknesses of each party's case, while remaining, and appearing to remain, impartial;

(b) ensure there has been an adequate evaluation of the merits and the potential outcomes before beginning the settlement phase of the hearing; and

(c) ensure that the parties do not feel under any pressure to settle.

53. Low rates of appeals and complaints, and the quality of decisions being produced, suggest that principles of natural justice are being upheld. However, the efficiency of the small claims model, and the delivery of justice, relies very much on the right person leading the hearing with the right infrastructure around them. To ensure the trust of participants, a referee requires thorough training, readily available academic support, mentoring and review programmes and a well-resourced complaints process.

Committee's overall view of changes in relation to the Disputes Tribunal

54. In its initial consultation paper, the Committee proposed introducing an inquisitorial process for the resolution of certain claims in the High and District Courts. However, having regard to the submissions received, including positive feedback about the Disputes Tribunal, the Committee proposed in its Third Consultation Paper that, initially, the role of the Disputes Tribunal should be expanded. The main reason for this change is that the Disputes Tribunal has established experience in, and existing systems for, employing inquisitorial dispute resolution. By contrast, the District and High Courts do not yet have an inquisitorial process as their default model of operation (despite many judges taking an inquisitorial approach in particular situations when appropriate, such as in judicial settlement conferences).

55. At this stage, it will be less disruptive of existing processes to expand the role of the Tribunal rather than expecting the courts to make significant changes to the way they determine, and direct the progress of, civil disputes. But the Committee's final recommendations should not be seen as precluding further consideration of implementing inquisitorial processes in the courts in future.

56. The submissions on the Committee's Third Consultation Paper broadly supported the proposal to recommend an expansion of the Tribunal's role. Having reflected on the submissions, the Committee has decided to make the following recommendations for change. The changes would need to be accompanied by a general public education programme about the different avenues for dispute resolution that are available.

Recommendations in relation to the Disputes Tribunal's Jurisdiction

Recommendation 1: Changes to Disputes Tribunal jurisdiction

(1) Increase the Dispute's Tribunal's jurisdictional cap to:
- $70,000 as of right; and
- $100,000 by consent.

(2) Consider amending s 10(1)(c) and s 19 of the Disputes Tribunal Act 1988 to broaden and clarify the ways in which the Tribunal can provide its service under existing areas of jurisdiction.

Increase Financial Cap

57. There is widespread support to increase the Tribunal's jurisdiction from its current limit of $30,000. Figure 1 shows the range of that support. Out of 57 submissions on the Committee's Third Consultation Paper, 35 addressed this topic.

Figure 1: Support for an increase in jurisdiction

Proposal	In support (of 35)	Percentage
Increase to $50,000	10	28.5%
Increase to $100,000 by consent	10	28.5%
Increase to $100,000	9	25.7%
No change	3	8.5%
Increase to $75,000	2	5.7%
Increase to $200,000	1	2.85%
Total in support of an increase	32	91.4%

58. The impetus for this support is largely the cost of proceedings in the District Court. However, as submitted by Dr Bridgette Toy-Cronin, it is important to rely on principle, rather than solely on cost considerations, to determine the proper upper limit. Principle dictates that there needs to be proportionality between the forum and the sums at stake.

59. We recommend that the jurisdiction be raised to $70,000 as of right if sufficient resourcing exists because the current model has succeeded in providing speedy, cost effective and reliable justice in the Disputes Tribunal at the current limit of $30,000. A lift to $70,000 represents an incremental increase, particularly in light of the eroding value of money. There is little risk of crowding out smaller value claims with this increase, given that recent efficiency gains by the Tribunal have created capacity. Some claims already arise from disputes of this magnitude but have been subject to partial abandonment. There is unlikely to be an increase in complexity beyond that already addressed. For these reasons, there is confidence that the model can remain unchanged and support this increase.

60. In addition, we recommend that the Disputes Tribunal's jurisdiction be raised to $100,000 by consent, but subject to our recommendation to extend appeal rights (Recommendation 2). This is so for the following reasons:

    (a) The Tribunal can provide a safe and effective process for resolving a dispute involving higher sums. However, as a number of submitters stated, the operating model of the Tribunal should not be compromised to meet the needs of higher monetary claims if this involved changing the Tribunal's culture as an unencumbered, speedy and friendly process where people can feel confident to speak for themselves.

    (b) The two tribunals most similar to the Disputes Tribunal are the Tenancy Tribunal and the MVDT. The Tenancy Tribunal has a jurisdiction of $100,000 for residential tenancy matters, but a jurisdiction of $50,000 for unit title matters. The Motor Vehicle Disputes Tribunal has a jurisdiction of $100,000 (or more with consent) which is necessary given the value of many cars, particularly new cars. However, these are specialist Tribunals dealing with repeat issues of a similar nature. The Disputes Tribunal covers a wider range of legal issues and factual scenarios. It is likely that there are more cases by number that are lost within the justice gap in general civil matters than those in the jurisdiction of the Tenancy Tribunal or MVDT. An increase to $100,000 for the Disputes Tribunal as of right would lead to higher value claims becoming a significant part of the Disputes Tribunal workload. It might seem logical to align the jurisdictions of similar civil tribunals. But in fact, different considerations are in play in terms of potential complexity and impact on resources.

    (c) As the increase to $100,000 would be by consent only, it is not expected to overburden the Disputes Tribunal with a caseload that it cannot manage on current capacities.

    (d) Split jurisdictional caps in the past have rarely been used, given the lack of incentive on a respondent to engage. However, the equation is different at $100,000, given the greater likelihood of the applicant proceeding in an alternative forum if the respondent's consent is withheld. In addition, the Disputes Tribunal has been increasing its visibility within the community with better communication about its services.

61. The Committee also considers that any increase to the Tribunal's jurisdiction should be reviewed three to five years after implementation to assess how the increase has operated in practice and consider whether to further increase the Disputes Tribunal's jurisdiction to $100,000 as of right. By then, the Disputes Tribunal's institutional capacity to handle such a change without compromising its essential function as a small claims court should have been reinforced.

62. An increase to the Tribunal's jurisdiction should also be combined with a communications strategy to reassure the public that referees are legally qualified and that the Tribunal's professional and well-developed processes will ensure claims are resolved justly.

63. A minority of Committee members expressed reservations about the proposed increase in the Tribunal's jurisdictional cap, by consent, to $100,000. They:

    (a) questioned the premise that it is uneconomic to bring a claim of $50,000-$100,000 in the District Court; and

    (b) noted that $100,000 is a large sum for resolution of a dispute without allowing legal representation or recovery of costs.

Type of claims

64. Turning to the nature of the claims that can be determined by the Disputes Tribunal, the Community Law Centres of Aotearoa submitted that there should be an expansion of the types of claims that can be brought. There are three such areas that it would be practicable to consider within current competencies and resources. We set these out here and offer some preliminary comments for consideration:

    (a) A removal of the current limit on tort claims that requires there to be physical damage to property. This would enable consideration of claims for economic loss, rather than solely claims where there has been economic loss consequent upon physical damage. At times, this restriction inhibits the Disputes Tribunal's ability to deal with small claims in negligence and nuisance, creating a justice gap for some claimants. Indeed, the Committee considered whether it might be appropriate to recommend expansion of the Disputes Tribunal's subject-matter jurisdiction more generally, with the view to making it an all-encompassing body dealing with civil claims at the lower end (i.e. $100,000 and less). On the other hand, opening up the Disputes Tribunal's jurisdiction to include a wider range of tort claims throws up complexities that non-represented parties may struggle to handle. Overall, the Committee considers it will be necessary to proceed very carefully before expanding the Disputes Tribunal's jurisdiction in this way.

    (b) Clarifying and expanding the Tribunal's ability to hear disputes arising under driveway easements, subdivision covenants and claims regarding the removal and trimming of trees. Easement disputes have in recent times been considered to be within the Disputes Tribunal's jurisdiction where there is a dispute resolution clause contained in the instrument (which usually occurs by default under implied provisions). Claims regarding the removal and trimming of trees (s 333 Property Law Act 2007) are difficult for neighbours to progress in the District Court. Such claims would remain subject to a right of transfer by the Tribunal if considered more appropriately dealt with by a judge (s 36(2)).

    (c) To enable practical justice to be achieved in some cases, it would be useful to expand the types of orders that the Tribunal can make under s 19. These are in general limited to the payment of money, a declaration of non-liability, delivery of property or a work order. Current powers do not include orders relating to a declaration of rights or obligations or specific performance of an obligation (e.g., the carrying out of a service, or the removal of an obstruction, such as a car in a driveway.)

65. In summary, there is confidence that an increase of the jurisdiction to $70,000 as of right and $100,000 by consent is a manageable and sought after progression. This will make the most of the skills and experience of referees and the benefits of the Disputes Tribunal forum to enhance access to justice. Consideration could also be given to broadening and clarifying the nature of the claims the Tribunal can consider and the types of orders it can make.

Recommendation 2: Appeal rights from Disputes Tribunal decisions

By majority, the Committee recommends that there be:

- No change to existing appeal rights from Disputes Tribunal orders up to $30,000;
- A general right of appeal to the District Court from orders between $30,000 and $100,000.

66. Current appeal rights from Disputes Tribunal decisions are limited to procedural unfairness.[25] Whilst appeal rights are fundamental to the rule of law and confidence in the justice system, procedural unfairness covers a wide range of failings. Where a manifestly incorrect decision is made, it is rare for it not to be accompanied by a procedural flaw or be represented as such.

67. The Tenancy Tribunal and MVDT have general rights of appeal from $1,000 and $12,500 respectively. However, there are historical and political reasons that account for these differences, and that are justified given the different nature of each body. Finality is an important consideration in smaller claims. Given high rates of satisfaction with outcomes, we consider that a limited right of appeal on procedural grounds is proportional, efficient, low risk, and best promotes access to justice for lower value claims.

68. Nonetheless, we consider that these considerations shift for higher value claims. Not only are the stakes higher, but parties may well not elect to use the service without a substantive right of appeal. If the Disputes Tribunal's jurisdiction is increased to $100,000 by consent, appeal rights would be a telling factor in that election. Two submitters proposed that substantive appeals could be subject to a leave requirement, by application to a District Court Judge, to ringfence the right to those with a legitimate basis. Also, if granted, a judge should retain the current discretion to either refer the case back to the Tribunal for a rehearing or amend the award themselves.

69. As shown by the table in Figure 2, 27 submitters discussed appeal rights, and of those, most submitters support greater appeal rights where the claim involves higher sums.

Figure 2: Support for increased appeal rights

Proposal	Number in support (out of 27)	Percentage
Greater rights > $50,000	8	29.6%
Greater rights > $30,000	6	22.2%
Greater rights > $12.500	2	7.4%
Greater rights > $5k-$12.5k	4	14.8%
Greater rights for all cases	3	11.1%
No change	4	14.8%
Total in support of an increase	23	85.2%

25 Disputes Tribunal Act 1988, s 50.

70. We note that 32% of submitters favoured increased appeal rights to sums more aligned with the Tenancy Tribunal and MVDT. However, it is important to uphold the finality of awards and avoid the administrative burden of ongoing proceedings. The current appeal rights have not been a source of general controversy and there are few successful appeals from Disputes Tribunal decisions in proportion to the number of decisions given. Also, once a graduated appeal right is in play, cases close to the higher bracket may be strategically valued to take the benefit of the greater appeal right, providing a further extension of that right in practical terms.

71. There is a benefit in having a simple and easily understandable point of graduated appeal right. There is good argument that the current point at which a general right of appeal commences ($30,000) has been shown to be proportionate and acceptable representation of that point.[26]

72. Most members of the Committee agreed with the recommendation set out above. If procedural unfairness became the threshold for appeals from Disputes Tribunal orders between $30,000 and $50,000 as well, that would in effect remove current general appeal rights for those matters.[27] And a requirement to obtain leave based on a complex legal test, designed to filter appeals, may create its own accessibility issues for lay-litigants who may struggle to understand (without having to seek legal advice) whether they qualify to appeal the Tribunal's decision.

73. A question arose in relation to how a general right of appeal would operate in respect of a decision made in accordance to the substantial merits and justice of the case, departing from strict legal rights or obligations or legal forms or technicalities.[28] The "substantial merits and justice" obligation is discussed further below in relation to recommendation 7. In respect of appeals, the Committee considers that this can be addressed by requiring the referee/adjudicator to give their reasons for departing from the law if doing so and the appellate court would apply the same legal standard as the Disputes Tribunal.

74. A minority of the Committee disagreed variously with the idea of splitting the legal test for an appeal depending on the amount of the claim, or with the idea of a general appeal (or both).

75. The range of views among dissentient Committee members as to the scope of appeal rights can be summarised as follows:

    (a) Several Committee members thought that as the existing appeal rights up to $30,000 (procedural unfairness only) seem to be working well then there is merit in applying them to the increased limits, given that in practice any instance where something has gone seriously wrong, the District Court is adept at finding a mechanism for dealing with that at a practical level.

    (b) Some Committee members thought it would be appropriate to revisit the threshold for all appeals – given that the Disputes Tribunal was likely to become the first option for most parties for most disputes, the limited appeal right for claims up to $30,000 may no longer be justified.

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26 Currently, claims above $30,000 have to be brought in the District Court. There is a general right of appeal to the High Court from a District Court decision: District Court Act 2016, s 124.

27 On the basis that those matters are currently determined by the District Court, from which there is a general right of appeal. It is assumed that if the Disputes Tribunal's jurisdictional cap were increased, any claims up to $50,000 brought in the District Court would be transferred to the Disputes Tribunal under s 37 of the Disputes Tribunal Act 1988.

28 Disputes Tribunal Act 1988, s 18(6).

(c) Some Committee members considered that a general right of appeal from matters above $30,000 would undermine the attractive finality of the process. An alternative would be to provide for appeals by leave only, on the basis of the threshold for appeals from the exercise of a discretion, as articulated by the Supreme Court in *Kacem v Bashir*.[29] Under that threshold, the criteria for a successful appeal are:

(i) an error of law or principle has been made;

(ii) a relevant consideration was overlooked;

(iii) an irrelevancy was taken into account; or

(iv) the decision is plainly wrong.

This test would allow discretion to filter out appeals where a party was simply unhappy with the outcome. Although it is acknowledged that inefficiencies may be a resulting downside of adding a leave requirement.

(d) A further alternative, as suggested in the Committee's Third Consultation Paper, was an appeal threshold for claims above $30,000 that the decision must have been wrong in law or manifestly unreasonable.[30] Those Committee members in favour of this test consider that it accords better with the substantial merits and justice obligation in s 18(6) than would a general right of appeal.

Recommendation 3: Representation in the Disputes Tribunal

The Committee recommends that there be no change to the current rules regarding representation in the Disputes Tribunal.

76. Current rights of representation in the Disputes Tribunal are limited to where people are unable to adequately represent themselves or where a party is under 18 years of age. Lawyers are excluded, either as representatives, or support persons.

77. The Committee recommends that these rules remain in place even with a higher jurisdictional cap. They send an important access to justice message – that people can have their dispute heard in a forum without lawyers. The reasons for this limit on representation are:

(a) Legal representation upsets a level playing field and is expensive. This disrupts the accessibility of the process and the objective of the reform exercise. It is important to note that parties are currently able to present submissions prepared by their lawyer, and it is not uncommon for them to do so.

(b) The referee has a responsibility to support each party in putting their best foot forward. This involves identifying relevant legal principles and pointing out evidence that is required to establish a claim or defence. It also includes maintaining objectivity and evening up imbalances. For example, a vulnerable person may be on one side of a dispute in which a corporate party has a very experienced representative appearing.

29 *Kacem v Bashir* [201] NZSC 112, [2011] 2 NZLR 1 at [32].

30 This test is the same as the grounds for review of a decision of the Legal Aid Commissioner by the Legal Aid Tribunal: Legal Services Act 2011, s 52.

(c) A case can be adjourned where necessary to give a party an ability to consult with their lawyer about points raised or settlement options. This is rarely sought, but always available.

(d) Of the ten submissions that expressed a view on this issue, eight supported some greater form of representation. We accept that it seems a natural conclusion to draw: that as the stakes are higher, legal representation is needed. However, we think a point made in the New Zealand Law Society's submission represents the better view: that a process influenced by lawyers in lower value claims can in fact undermine access to justice.

(e) Appeal rights have been proposed that would provide parties with reassurance that they have recourse in the case of an incorrect process or result.

Recommendation 4: Public hearings and publication

The Committee recommends that there be:

- no change to the private nature of Disputes Tribunal hearings in most cases;
- publication online of at least 600 anonymised decisions a year;
- development of a library of all Disputes Tribunal decisions issued, categorised into topics, available for research purposes, academics, referees and judiciary; and
- a direction sought from the Minister under s 57 of the Disputes Tribunal Act regarding reporting cases of public interest.

Private hearings

78. Section 39(1) of the Disputes Tribunal Act 1988 requires proceedings to be conducted in private. Whilst there is a discretion to permit any person to attend who has a "genuine and proper interest either in [the proceedings] or in the proceedings of the Tribunal generally" (s 39(2)), this has to date only been extended to peer review, other referees in training, or students or academics undertaking research.

79. There are good reasons to seek greater openness in the manner in which the Tribunal operates, both in relation to hearings, and decisions. However, this is a finely balanced issue upon which the Committee recommends that there be no legislative change.

80. Submitters were split equally in their responses on this issue. Half (eight of 16) sought open hearings. The other eight expressed reservations about the impact of open proceedings on the objectives of the process. Of note, the latter group included Citizens Advice Bureau, Community Law Centres and the New Zealand Law Society.

81. This matter was traversed in the submission by the Principal Disputes Referee: *"Bridging the Justice Gap"*. In summary, it is an important human right to have a fair and public hearing and there is a public interest in openness, encouraging greater knowledge of Disputes Tribunal processes and confidence in the rule of law.

82. However, in the Disputes Tribunal, a presumption of privacy reflects the needs of its users and underpins greater access, by encouraging the use of the service, free and frank exchange, and a safe environment in which to express concerns, interests and private information relevant to a lasting resolution. In a small claims jurisdiction, people do not have a lot of confidence in coming to court, they can be emotional about what they have to say, and there is usually very little public interest in the particular details of the dispute. If there was a sense that people were coming to an open court, this could cut across what the Tribunal is trying to achieve; to provide a sense of comfort for parties that they have somewhere to get help and to talk in an open, constructive and frank way about how problems might be resolved. This could be detrimental to access to justice.

83. Part of the Disputes Tribunal's function is to consider how the parties might be able to work together towards a resolution. It has always been considered to be in the public interest for this to happen in private. As the Tribunal's settlement phase occurs towards the end of the hearing, opening the process to the public after that point would not provide a solution.

84. Nonetheless, there is an argument for giving a referee the discretion to allow public or media into hearings that may be considered to have an element of public interest. There may be room under the existing power in s 39(2) of the Disputes Tribunal Act 1988, to view public interest in the subject matter of a particular proceeding as a proper interest, or if not, to consider amending the Act to clarify this.

85. The Committee also notes that if the jurisdictional cap of the Disputes Tribunal is to be increased, and hearings are to remain private, then that reinforces the need to ensure adequate appeal rights exist as a check.

Publication of decisions

86. Section 57 of the Disputes Tribunal Act requires the Ministry to publish, in such manner as the Minister from time to time directs, particulars relating to proceedings in the Tribunal. In the past, there has been minimal publication (approximately 200 decisions), all of which are anonymised, on the Disputes Tribunal website. It is recognised that more can be done to reveal the nature of the Tribunal's work. Publication of more decisions will help to hold the Tribunal accountable for the quality of its outcomes, and to make available decisions that are of interest to the public. Certain steps have already been taken in this regard:

    (a) In 2021, the capacity of Judicial Libraries was expanded to enable the anonymisation and publication of 600 Tribunal decisions a year.

    (b) In addition, an internal library is being constructed with 50 categories of case. This will contain the unabridged and complete set of the Tribunal's work, and can be made available to interested academics, referees and the judiciary. This represents a significant step forward in improving accountability for and confidence in high quality decision making.

87. The Committee supports these developments, and suggests also:

    (a) Consideration could be given to the reporting of some decisions without anonymisation in cases of public interest, or by ensuring decisions are widely circulated where they inform the community of outcomes of public interest. Direction could be sought on this from the Minister, as envisaged by s 57.

Recommendation 5: recovery of filing fees, costs and disbursements

The Committee recommends that:

- costs in Disputes Tribunal claims continue to lie where they fall (except in limited circumstances);
- the filing fee should be recoverable by an applicant who is wholly or partly successful in their claim; and
- the filing fee should be subject to waiver.

88. Currently, the Disputes Tribunal has no jurisdiction to award costs other than in exceptional circumstances. Those circumstances are limited in s 43 of the Disputes Tribunal Act 1988 to where a party has:

(a) made a frivolous or vexatious claim;

(b) lodged a claim knowing it to be outside jurisdiction;

(c) unnecessarily prolonged proceedings by engaging in conduct intended to impede the prompt resolution of proceedings; or

(d) failed to advise the applicant the matter is in dispute, causing the proceedings to have been filed in the District Court.

89. About half of submitters on this topic supported expanding the Tribunal's costs jurisdiction. Those who opposed further expansion were concerned that costs can be a barrier to access to justice and parties should not be dissuaded from bringing small but meritorious claims out of a fear of a costs award against them. Most submitters supported the Tribunal having the power to waive fees.

Figure 3: Support for costs jurisdiction/fee waiver

Proposal	Number in support (out of 18)	Percentage
Limited costs/disbursements awards	9	50%
Fee waiver	16	90%

90. The Committee recommends that the Tribunal continue to be a jurisdiction where costs lie where they fall, other than in the limited circumstances already provided for in s 43. It is important not to create any deterrent to engagement. Also, parties are generally accepting of the status quo. A simple rule that in most cases there are no costs avoids the extra time and resources required to consider the matter and the inaccuracy and uncertainty of evidence, calculations and awards. Costs can also escalate a dispute, hindering settlement. In many disputes, there are complicated equities about why the matter has not resolved earlier, and many paths the parties can take. Not all successful applicants have acted with optimal efficiency in finding themselves in need of assistance.

91. It would be a simpler matter to allow consideration of disbursements (other than associated with advice or preparation for the hearing). These are represented by clear evidence and are a direct and identifiable cost associated with the proceedings. However, again, there is a simplicity to the current arrangement that would be lost, and a set of expectations generated that might inflate choices.

92. The most important disbursement that is currently not recoverable, and that causes the most consternation among parties, is the filing fee. Successful parties express surprise they cannot recover their filing fee. In some cases, the fee represents a significant portion of their compensation. The Committee recommends that this fee be recoverable by an applicant who is wholly or partly successful in their claim.

93. Further, almost all submitters expressed their support for a fee waiver for the filing fee. This is a long sought-after amendment for which there is already a proposal for change.

Recommendation 6: Qualifications of referees

The Committee recommends that all Disputes Tribunal referees be legally qualified, with transitional provisions for unqualified referees currently in office.

94. In the early days of the Tribunal, a referee was a person who was considered to be of standing in the community and who would preside with common sense, with reference to any legal points raised. As the Tribunal has expanded, the same community standing is sought, but legal experience has become the norm. In 2019, a change in the qualification requirements reset the bar. A referee must now hold a "relevant qualification" in law, mediation or arbitration (Disputes Tribunal Act 1988, s 7(2)).

95. However, particularly in light of the proposed further expansion of the Tribunal's jurisdiction, the wording of this requirement continues to understate the reality of the selection process, and the needs of the role.

96. The Committee understands that it is rare to get an interview for the role without a successful career in the law. We agree that the broad nature of the jurisdiction, even at current values, means new appointees should have that background.

97. There is a small group of longstanding Tribunal members (five of 55) who should be enabled to continue, and reapply, until they no longer wish to seek appointment. However, newcomers should be appropriately qualified in law and the qualification requirements for referees should be amended accordingly.

98. All submitters (12) who discussed qualifications sought a change of this nature.

Recommendation 7: Resolving disputes according to the law

The Committee recommends that there be a slight change to s 18(6) of the Disputes Tribunal Act 1988, which currently requires that the Tribunal must "determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal right or obligations or to legal forms or technicalities". We recommend the words "where that would result in a substantial injustice" be added to the end of this provision.

99. A literal reading of s 18(6) of the Disputes Tribunal Act could lead to a conclusion that the Tribunal overrides legal principle. But in reality this is rare. Section 18(6) is only applied where some unexpected unconscionability would arise from the strict application of the usual rules arising from the particular facts of the case.

100. Given the need to uphold the certainty of contract, and meet expectations that legal rights and responsibilities will result in compensation for departure from these, it is rare that the strict application of legal rights or obligations does not accord with the substantial merits and justice of the case.

101. Section 18(6) can have direct consequences in overriding legal principle. However, there is a lack of information to suggest that the power has been or would be inappropriately used. Section 18(6) is rarely mentioned in a substantive way. If s 18(6) is mentioned, reasoning is usually then provided to explain why it cannot alter the outcome. The section does provide a discretion to do justice in appropriate cases, but these are either justified by legal principle as well as the substantial merits and justice or are best described as outliers and only justified in the particular context of the case.

102. The Committee agrees it is necessary to maintain what is effectively an equitable jurisdiction, which is part of the Disputes Tribunal's distinctive character. Appropriate rights of appeal provide an adequate check on the use of s 18(6). However, it would be appropriate to add a short clarification to emphasise that this ability to depart from the law is only intended to be used to avoid substantial injustice.

Recommendation 8: Enforcement and recovery processes

The Committee recommends that:

- consideration be given by the District Court to finding more effective and straightforward ways for claimants to enforce a successful award; and
- the $200 enforcement fee imposed for collection of a Disputes Tribunal award be abolished, or at least subject to waiver.

103. Currently, a sealed order of the Disputes Tribunal has the status of a District Court order and may be enforced accordingly.[31]

104. A number of submitters proposed enhancements to enforcement processes, such as providing referees with limited civil enforcement powers of District Court Judges, the ability to certify monetary judgments, expanding powers to make orders in s 19 of the Disputes Tribunal Act for a more streamlined registration process (New Zealand Law Society), and implementation of an enforcement plan within the decision itself (Waitematā Community Law Centre).

31 Disputes Tribunal Act 1988, s 45.

105. We recommend that further consideration be given to improving the process for enforcement of Disputes Tribunal orders in the District Court. Although the Disputes Tribunal and Tenancy Tribunal have the ability to make attachment orders, this has had little uptake. Parties rarely attend the hearing with the information required to make the order, and the referee has little time in the hearing to take the additional step to arrange for this. However, amendments in recent years to the enforcement powers of the District Court's Collections Unit has greatly enhanced the ability of a party to obtain an attachment order after the event, without the engagement of the other party.

106. Until recently, s 48 of the Disputes Tribunal Act provided that no filing fee was payable to enforce a Tribunal order through Collections. The cost was added to the amount recovered. However, this provision was repealed by the Tribunals Powers and Procedures Legislation Act 2018. Now, a $200 fee is imposed upfront for enforcement. This fee makes enforcement of some orders uneconomic. We consider that the fee should either be removed, or at least be made subject to an express right in the Disputes Tribunal Act to apply for a waiver.

Recommendation 9: Appropriate name for referees and the Disputes Tribunal

The Committee:

- recommends that Disputes Tribunal referees be renamed "adjudicators"; but
- does not recommend any change to the Disputes Tribunal's name.

107. The term "referee" was originally adopted for the Disputes Tribunal in the hope that parties would see the decision-maker as more of a facilitator than an arbiter. However, the term can carry connotations of quick judgement and control over outcomes and behaviour. As the Disputes Tribunal's jurisdiction has increased, we consider that a party would have greater confidence in a person with the title "adjudicator", as signifying their qualifications and their careful weighing of the legal merits and equities.

108. There was general support for this change amongst submitters.

109. Consideration was also given to the name of the Tribunal itself. As pointed out by the Law Society, some feedback suggests there is general familiarity with the Tribunal under its current name, but a new name could articulate an enhanced role. The Committee understands that the Tribunal is currently considering a change to its current Te Reo Māori name to better reflect the Tribunal's role in restoring balance and resolving disputes.

110. The Committee notes that retention of private hearings in the Disputes Tribunal points against renaming the Tribunal as a court as there is a recognised principle that courts should be open. Having regard to the Disputes Tribunal's role and the names of its counterparts in Aotearoa and overseas, the Committee sees merit in the retention of the current name, which states accurately what the Tribunal is and its point of difference from a court.

111. However, ultimately, the Committee considers it is for the Tribunal to consider the appropriateness of any name change in collaboration with the Minister and Ministry of Justice.

Chapter three

District Court recommendations

Current role of the District Court

112. The District Court of New Zealand is Australasia's busiest court, dealing with around 200,000 criminal, family, youth and civil matters every year. Under the District Court Act 2016, its general civil jurisdiction covers disputes up to $350,000 as well as proceedings where jurisdiction is conferred by other enactments, including appeals from various tribunals.

Decline of the District Court's civil jurisdiction

113. For some time there has been a perception that the civil jurisdiction of the District Court is in decline. Data shows a trend of fewer defended civil proceedings in the District Court. Of the approximately 11,000 civil matters filed in the District Court only approximately 600 – 700 of those cases are defended. The balance (mostly debt collection) proceed by way of formal proof or are resolved.

114. The Rules Committee considers that the main reasons for the decline do not lie with the District Court Rules. But part of the reason for the court's diminished role in the civil justice system may have arisen as a consequence of the reforms to the Rules in 2009 – commonly referred to as the Information Capsule Rules – which were designed, at least in part, to make the District Court more accessible for self-represented litigants. The Committee later accepted these reforms had not been successful, and the current Rules were introduced in 2014. The explanatory note to the 2014 Rules referred to the "widespread dissatisfaction" with the 2009 reforms.

115. The 2014 Rules have remained largely unaltered since then. They were based on the Committee's assessment of international best practice at that time. This involved more streamlined civil dispute resolution processes including short form trials, an initial judicial conference and potentially a judicial settlement conference. Under Part 10 of the Rules, a trial in the District Court can be a "short trial", a "simplified trial" or a "full trial". Short and simplified trials involve proportionate procedures depending on factors such as complexity and the amount at stake.[32] At the first case management conference, a judge decides whether the proceeding is to be determined using a short trial,[33] and if a short trial is not allocated, a judicial settlement conference must be convened unless the judge directs otherwise.[34] Those which do not proceed to summary judgment are referred to settlement conferences in most cases. The court has a flexible short trial process and endeavours to ensure that cases are dealt with as efficiently as possible.

116. The 2014 Rules already address many of the concerns raised in submissions that there be proportionate procedures and early judicial engagement. Indeed, the New Zealand Bar Association initially proposed that rules of this type be introduced into the High Court, which led to this being one of the four potential reforms first consulted on by the Committee. The Committee has identified a single potential change to the District Court Rules to improve efficiency (within Recommendation 13 below), but otherwise the Committee considers that the 2014 Rules remain generally fit for purpose.

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32 See District Court Rules 2014, r 10.1.

33 Rule 7.3(3)(c).

34 Rule 7.2(3)(d).

117. Despite the 2014 changes to the Rules, the District Court's civil jurisdiction does not appear to have fully recovered. In part, this may be due to the significant and growing demands on judicial resources in the court's criminal and family jurisdictions, reducing the resources available to the civil jurisdiction. That difficulty will likely continue notwithstanding more recent District Court Judge appointments, particularly given the backlog created by COVID-19. It is also clear from submissions that there has been a perceived loss of civil expertise within the Central Registry. Civil practitioners lack confidence in the District Court, leading to the under-utilisation of that court for civil claims compared to the Disputes Tribunal and High Court.

118. There are other reasons for reduced confidence. The decision to centralise the processing for civil proceedings rather than processing them at each registry has contributed to the loss of expertise amongst the registry staff. The former decentralised system allowed the expertise of local registry staff to grow and for the profession to know and trust them. This decision and the subsequent loss of expertise in the registry appears to have alienated the legal profession to some degree.

119. Another associated reason for the loss of confidence in the civil jurisdiction is the length of time it takes to resolve a defended case. Of the 600-700 civil cases heard, almost half of them are aged over one year and a quarter are aged over two years. It takes an average of 194 days to determine an undefended application for summary judgment and will take 342 days to hear and dispose of a defended application. This has led to further reputational damage of the District Court. These issues have been compounded by a perception that there are not enough experienced civil-designated judges, especially in the smaller courts.

120. Steps have recently been taken to address the issues and provide more judge-time for civil cases, and the backlog has reduced. The central registry has developed more efficient systems for file management and has built stronger registry experience. There have also been appointments of experienced civil practitioners as judges. But civil registries continue to suffer from a lack of experience and expertise. The confidence of the profession in the District Court's civil jurisdiction still remains low.

121. The submissions received on the Committee's proposals all supported rejuvenation of the District Court civil jurisdiction. Many of the submissions referred to the complexity, cost and delay in civil proceedings and submitted that they posed impenetrable barriers for civil litigants. Generally, those who took part in the consultation process did not identify any failings in the District Court Rules but rather identified the failings in process, time to delivery of a judgment and hearing; and the under resourcing of the civil jurisdiction in the District Court.

122. It is also apparent from submissions, including submissions from community groups, that many in the community find the District Court's procedures foreign, intimidating, and difficult to comprehend. This gives rise to a significant access to justice issue. A substantial proportion of District Court work consists of debt collection, with many claims going undefended. The Rules Committee proposes to introduce pre-action protocols to make these proceedings more accessible.

The proposals put forward for consultation

123. The Committee's Third Consultation Paper asked submitters to comment on the following main proposals to address these issues:

(a) That a Principal Civil Judge for the District Court be created. The purpose of this new role was to oversee the strengthening of the court's civil jurisdiction.

(b) That there be a focus on improving or restoring the civil registry expertise – one of the functions to be overseen by the new Principal Civil Judge in conjunction with the Ministry of Justice. There would also be a focus on addressing the information barrier issues referred to in submissions from community groups.

(c) That deputy judges of the kind adopted overseas be introduced. Such judges would be appointed from the profession to deal with civil cases on a part-time basis. It was proposed that King's Counsel or other senior experienced civil litigators would fulfil this role.

(d) To amend the Rules to allow for more flexible processes for determining civil claims, including more inquisitorial and/or iterative procedures.

(e) To introduce pre-action protocols of the kind currently used in the United Kingdom, given the significant amount of debt collection work currently undertaken in the District Court, and the concerns raised by community submitters that people facing such claims often did not seek legal advice until after judgment had already been entered.

Recommendations

124. Thirty-two submissions addressed the Rules Committee's proposals for the District Court. The submitters included non-lawyers, the New Zealand Bar Association, the New Zealand Law Society, the Crown Law Office, four major law firms, five King's Counsel and several litigation practitioners, Dr Toy-Cronin from the Faculty of Law at Otago University, the Auckland City Council and two Community Law Centres.

125. Most submissions were in favour of the Committee's proposed changes. Almost all submitters commented that the current systems were not working well. Most felt that the current Rules were fit for purpose, although they noted that it was difficult to tell whether the Rules were working well, given the diminished use of the court for significant civil cases.

Recommendation 10: Creation of a separate civil division in the District Court and appointment of a Principal Civil Judge for the District Court

126. All submitters who commented on this proposal were in favour of creating the position of Principal Civil Judge for the District Court.

127. The Committee considers that the appointment of a Principal Civil Judge will form a key part of addressing resourcing issues in the District Court. The new Principal Civil Judge would work with the Heads of Bench and the Ministry of Justice to bolster civil registry expertise and ensure sufficient judge-time was allocated for civil work. The Principal Civil Judge would also have a role in promoting the use of the District Court's civil jurisdiction.

128. The Committee considered whether there should be a separate civil division of the District Court and decided that this would be an effective way to implement the proposed changes.

129. The Committee also recommends that one of the functions of the Principal Civil Judge should be to focus on the information barrier issues referred to in submissions from community groups. Parts of the community are alienated from court procedures, and more may need to be done to reduce these barriers. This is relevant to the Committee's proposal for pre-action protocols in Recommendation 15 below.

Recommendation 11: Strengthen the expertise of the civil registries

130. There was also unanimous support for the strengthening of the institutional competency and knowledge of the District Court Registries. Almost all submitters noted that the proposals for the District Court would not work without significant investment in improving the strength and expertise of the civil registries, and ensuring that there were sufficient District Court Judges with civil expertise (including part-time judges with civil expertise) in order to see that cases were carried through to their conclusion.

131. The Committee considers it important that the proposed changes to the District Court be supported by a consequential increase in funding to ensure that the registry staff are skilled, and that there are other resources available to bolster the civil work of the District Court. The loss of expertise in the registry caused by a combination of centralisation, lack of specialisation and loss of staff in civil registries has contributed to the drop in use of the civil jurisdiction of the District Court.

Recommendation 12: Part-time judges should be appointed to assist with the civil workload of the court

132. The appointment of part-time judges to conduct some of the civil jurisdiction of the court is a further key part of the Committee's recommendations. There was also general support for this proposal. 24 submitters responded to this proposal, three opposed it and 21 supported it (representing 87% support).

133. Such judges could be referred to as "deputy judges", a title used in England and Wales[35] (notwithstanding that the expression "recorders" has sometimes been used). They would be appointed from the profession to perform the role on a part-time basis. For example, King's Counsel who may be considering a judicial career might be expected to make themselves available to perform the role. Other senior practitioners might also consider this role. This would allow decisions to be made by persons with recognised civil experience and would allow those persons to gain experience if they had a judicial career in mind.

134. Deputy judges could perform the role in a cost-effective manner and, given their part-time status could be scheduled to deal with cases as and when needed. Such use of experienced civil litigators would enhance the existing civil expertise held by the District Court Judges with civil warrants.

35 Senior Courts Act 1971 (UK), s 21.

135. Deputy judges would likely be appointed by the Governor-General in the usual way, and they would be rostered on to cases by the Principal Civil Judge as required. They should be remunerated on a daily rate based on a pro rata calculation of a District Court Judge's salary (excluding benefits such as superannuation). Ideally, their appointment would not be included in the cap on the total number of District Court Judges set under s 12 of the District Court Act 2016. Implementing this proposal would require other amendments to the District Court Act.

136. While full-time judges are best practice, part-time judges can be of great assistance when dealing with the variability of workflow. Deputy judges could also be deployed where permanent judges are struggling with an increased workload. The opportunity to be appointed as a deputy judge would allow lawyers to experience being a judge, before deciding to commit to a change of career. It may also appeal to people who do not have full-time judicial aspirations, but are prepared to serve on a more limited basis. The Committee does not envisage part-time judges would have criminal or family jurisdiction.

137. Availability of courtrooms will also need to be considered as part of the proposal to introduce deputy judges. For example, it may be necessary to consider using courtrooms after hours, using alternative venues, or conducting hearings online.

138. Among the issues raised by those who did not support, or raised concerns about this proposal was a view that it may compromise judicial independence. Bell Gully noted that the separation between being an advocate and being a judge was constitutionally and professionally appropriate. But in the Committee's view such appointments do not necessarily erode constitutional principles or the appropriate level of separation between bench and bar. The use of part-time judges has been successfully implemented overseas. Those appointed to such roles can be expected to observe the principles of judicial independence, and there is no reason to expect they cannot manage these requirements in practice. Most submitters who supported the proposal did not think there were likely to be major issues in this respect. There will necessarily be issues to manage in terms of conflicts of interest, or perceptions of conflicts. Normal procedures could be followed to manage such issues. For example, as some submitters suggested, assigning deputy judges from outside the region where the dispute arises might be appropriate. The Principal Civil Judge would be able to manage such issues.

139. The Committee also considered whether it is a concern that deputy judges would lack the individual and collegial support and the independence of tenure enjoyed by full-time judges. Again, this could be appropriately managed.

Recommendation 13: Inquisitorial and case management processes

(1) The Committee does not presently recommend rule changes to introduce inquisitorial processes in the District Court as the default model of operation. The current Rules provide sufficient flexibility to permit active case management and use of inquisitorial processes where required.

(2) A change to rule 7. 8 is proposed to assist with efficient case management.

140. In the Third Consultation Paper, the Committee asked whether, notwithstanding its preliminary view that the Rules were fit for purpose, it was appropriate to make changes to allow for more inquisitorial and/or more iterative processes.[36]

141. Some submitters advocated for greater use of inquisitorial processes in the District Court as had been proposed in the Committee's first consultation proposals. For example, Raynor Asher KC expressed his disappointment that inquisitorial processes, such as those utilised in Germany, had not been recommended, whilst applauding the proposals that the Committee had made. Other submitters wanted to ensure that District Court Judges had flexible processes to use whatever procedure was appropriate to increase efficiency. For example, the New Zealand Bar Association supported the proposal to increase flexibility in the District Court. But some submitters did not consider that the use of more inquisitorial processes would assist. Others were more strongly opposed to the use of more inquisitorial processes. For example, Simpson Grierson opposed the introduction of an inquisitorial process as "it would be a fundamental and significant change to the civil system of justice in the District Court".

142. The Committee does not presently support the adoption of more inquisitorial style processes as the default model of operation in the District Court. There are several related reasons for this:

(a) First, such a change would be significant as the existing processes and resources for this kind of dispute resolution are not in place. By comparison the Disputes Tribunal has the processes and resources for this form of dispute determination. It accordingly makes more sense to increase the jurisdiction of the Disputes Tribunal rather than expecting the District Court to significantly change the way it performs its role. That is particularly so given that inquisitorial processes are generally most appropriate for smaller claims.

(b) Secondly, the implications of the 2009 reforms also suggest that there needs to be real care when implementing more radical reform of an untested kind. There would need to be a considerable degree of confidence in that reform given the potential disadvantages if it is unsuccessful.

(c) Thirdly, the 2014 reforms were carefully considered, and based on international best practice. Submitters supported the view that they provide an appropriate framework for the District Court. Change to the systems surrounding the Rules is needed, rather than to the Rules and underlying principles themselves.

(d) Finally, the 2014 reforms were directed at ensuring that there was early judicial engagement in a proceeding to provide greater direction and control. Whilst that is not the same as fully inquisitorial processes, they involve some of the attributes of such processes and are sufficiently flexible to allow the judge to use inquisitorial skills where appropriate.

36 Concern was raised in some submissions that there is ambiguity about the use of the expression "inquisitorial" and that there are a variety of processes the expression could contemplate. The Committee agrees with the *Law Commission*, (above n 11, at 6) that there is a "continuum" between so-called purely "adversarial" and "inquisitorial" approaches to court processes, both in New Zealand and internationally, with any given court or tribunal combining features of both. See Robert Fisher, above n 23, at [6]–[7].

143. In terms of "iterative" processes, the Committee considered that the existing Rules already adequately permit sufficient flexibility, and allows proceedings to be determined in stages if that is appropriate.[37] The Committee does not consider further changes to the Rules contemplating more iterative processes will achieve greater efficiencies.

144. There was nevertheless one issue arising from the 2014 reforms that the Committee considers should result in a change to the Rules. At present a case management conference does not always take place straight after an inconclusive judicial settlement conference as a matter of practice. The intention of the 2014 changes was that the same judge would preside over both the judicial settlement conference and the subsequent case management conference. This would allow the judge to take on a more inquisitorial role and would place them in a better position to know what directions for the proceeding were required. The Committee considers that an inconclusive judicial settlement conference should move directly into a case management conference, which would allow the judge who understands the issues at the heart of the case to determine the directions for the proceeding. The Committee considers that the current Rules are otherwise sufficiently flexible.

Recommendation 14: Consider using the Disputes Tribunal to conduct settlement conferences for the District Court

No immediate change is recommended, but further consideration should be given to this proposal.

145. After the Committee's consultation concluded, while considering the role of the Disputes Tribunal, the Committee explored whether a process should be introduced for the District Court to refer a proceeding to the Disputes Tribunal for a settlement conference. However, the Committee was advised that current legislation may not permit a transfer to the Tribunal for this purpose.

146. Holding settlement conferences for District Court proceedings in the Disputes Tribunal could be beneficial. The Tribunal has effective procedures for engaging with parties to civil disputes in an attempt to resolve them and there may be some proceedings, particularly those involving self-represented litigants, where the Tribunal's processes may be more appropriate.

147. However, adding a power to refer a proceeding to the Tribunal for this purpose may over-complicate and detract from the benefits of existing procedures for judicial settlement conferences in the District Court.

148. The Committee considers that this proposal warrants further consideration, but does not recommend that it be adopted at this stage.

37 See, for example, r 10.12 of the District Court Rules 2014.

Recommendation 15: Introduce pre-action protocols for debt claims in the District Court

149. In its third Consultation Paper, the Committee proposed the adoption of pre-action protocols for civil proceedings, similar to those currently used in the United Kingdom.[38]

150. This proposal reflected concerns that there are social, economic and cultural barriers for meaningful engagement with the courts by some sections of the community. Some members of the community find court procedures foreign, intimidating, and difficult to comprehend. A pre-action protocol would describe the way the court expects parties to behave prior to initiating proceedings, including, in the debt collection context, requiring lenders to inform defendants of their rights and where they can seek legal assistance. Pre-action protocols could encourage parties to deal with each other in a reasonable and proportionate manner. Early engagement may also encourage parties to resolve the matter without the need for court proceedings.

151. Twelve submitters commented on this proposal. Ten were in favour (83%) and two opposed. The two who opposed the proposal considered that a pre-action protocol would add delay and cost. The New Zealand Law Society supported the proposal. However, it noted that the "devil will be in the detail". Simpson Grierson supported the proposal but said that it should only be used for simple debt collection and not otherwise. Dr Toy-Cronin supported the proposal, but recommended data be collected to assess its effectiveness.

152. The Committee recommends that pre-action protocols be implemented for debt collection claims only at this stage. As the Waikato Community Law Centre identified in its earlier submissions to the Committee, defendants to debt collection claims can frequently come from groups who find court procedures difficult to navigate. It reported that many people facing such claims do not seek legal advice until after judgment has already been entered, without appreciating the difficulties that arise from waiting until then. Pre-action protocols may assist in improving access to justice and redressing inequality of arms in such proceedings by requiring steps to be taken before proceedings are filed. A requirement by creditors to warn debtors that proceedings are to be issued, urging them to obtain either representation or advice from Community Law Centres or similar, or to attempt to agree a payment plan with the creditor as an alternative to seeking judgment can:

(a) enhance the efficient utilisation of the civil jurisdiction, particularly in relation to debt collection;

(b) allow the debt collection process to be undertaken both more efficiently and fairly.

153. Such procedures are already followed by some court users. For example, Auckland Council explained it already follows procedures of this kind.

38 See Civil Procedural Rules (UK), Pre-Action Protocol for Debt Claims, available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol.

154. A potential disadvantage of instituting pre-action protocols for debt collection is that it would front-load the cost, and possibly delay proceedings. If the debt recovery jurisdiction becomes unduly inefficient, this will only result in increased costs for borrowers. Given this risk, the Committee considers that the pre-action protocols should initially only be for debt collection, so those sued by debt collectors fully understand the claim against them. Debt collection represents a significant proportion of the District Court's overall civil workload and is also a jurisdiction in which most claims proceed in an identical and straightforward manner (given most such claims are uncontested).

155. There are other pre-action protocols, such as those in place in England and Wales, that might in time, usefully be introduced. But there are suggestions that such protocols can serve to impede access to civil justice.[39] The functioning of such protocols in the debt collection context should accordingly be assessed before wider reforms in this area are pursued.

156. The Chief District Court Judge may be able to promulgate the protocol and supporting explanatory materials under s 24(3)(i) of the District Court Act, or alternatively could be introduced into Schedule 2 of the District Court Rules.

39 See, for example, Victoria Law Reform Commission Civil Justice Review (VLRC R 14, 2008) at 109-110.

Chapter four

High Court Recommendations

The current position

157. The High Court has general civil jurisdiction as well as jurisdiction in several specialised areas such as judicial review and declaratory judgments, appeals from the District Court and other bodies, and the pared back civil proceedings contemplated by Parts 18 and 19 of the High Court Rules. The number of civil cases disposed of annually in the High Court's different jurisdictional categories is provided in the following table.[40]

Figure 4: number of civil cases disposed of annually in High Court

Year	Appeals		General Proceedings		Judicial Review		Originating Applications		Total	
	Heard	Not Heard	Heard	Not Heard	Heard	Not Heard	Heard	Not Heard	Heard	Not Heard
2019	143	125	126	1,296	66	116	120	723	455	2,260
2020	137	108	105	1,133	74	197	148	701	464	2,139
2021	135	104	119	930	87	154	145	495	486	1,683

158. The Committee's proposals are focused on the general civil jurisdiction of the court rather than the more specialised areas.

Concerns with current approach

159. Most submitters agreed that the High Court provides a high-quality civil justice system. But its quality comes at a high price. As Alan Galbraith KC submitted: "litigation in the High Court has become ridiculously expensive. It has also become unduly complex and delayed". Cost and delay are barriers to access to justice.

160. The reasons why the cost of High Court litigation has increased are likely to be varied, and complex. The same thing has happened overseas. Perhaps we can blame our ever-increasing ability to generate documents using word processors, photocopiers, and now digital technologies.[41] It is also true that the procedural rules adopted over the years have allowed litigation costs to balloon.

161. Three problems identified are:

(a) the scale and burden of discovery, and whether its costs are proportionate and justified;

(b) trials being unnecessarily extended by evidence that contains submissions, is too elaborate, is repetitive, is recitative of documents being produced, and is not confined to admissible evidence directed to factual matters in issue; and

(c) a lack of focus on the key issues that are ultimately determinative.

40 The data was extracted from the court's Case Management System as at 6 January 2022. It includes cases disposed of before final judgment. "Heard/Not Heard" represents whether a substantive hearing was required or not prior to the disposal of the case. The year reflects when each case was disposed of. This data may differ from that previously released or published. Not all specialised jurisdictions are separately identified.

41 The effective use of such technology can facilitate the efficient delivery of justice, however. See Recommendation 23 below.

162. Underlying these problems is the evolution of a "maximalist" approach to litigation. Under this approach, all issues are investigated, all evidence called, and all matters argued, without sufficient regard to proportionality. The Committee does not agree with that approach to litigation. Rather, we consider that the best litigators refine and distil the key issues arising in the case and focus on them, ever mindful of proportionality. Yet it is concerning that, in some quarters, a maximalist approach is viewed as the benchmark for the competent pursuit of litigation.

163. The Committee is not suggesting the full range of procedural steps should no longer be available to parties under the Rules. Parties should remain able to pursue procedures that are necessary for the fair resolution of their disputes. But they should not be allowed to follow procedures that are not truly necessary, or do not have proportionate benefit for the particular case.

164. Change is unlikely to be achieved simply by changing the procedural rules. Litigation culture needs to change as well. But changing culture is difficult. The Committee wishes to discourage the maximalist approach to litigation. Instead, there should be a greater focus on distilling the issues of determinative significance in a case.

165. In seeking to advance these aims, the Committee consulted on a series of proposals, which have been amended in light of submissions received. The Committee's proposals seek to draw on aspects of reforms that have been adopted overseas, including in New South Wales for most commercial cases a decade ago, and also aspects of reforms recently adopted in the English and Welsh High Court.

Overview of proposed new structure for High Court general civil proceedings

166. The Committee's recommendations form part of an overall revised structure for general civil proceedings in the High Court. The new structure would have the following six stages:

Figure 5: proposed new structure for High Court civil proceedings

I	PLEADINGS AND INITIAL DISCLOSURE		
	Initial disclosure to be enhanced to include known adverse documents.		
II	INITIAL KEY INTERLOCUTORY APPLICATIONS		
	eg: strike-out, summary judgment, security for costs.		
III	SERVICE OF EVIDENCE INCLUDING		
	(1) FACTUAL "WILL SAY" OR WITNESS STATEMENTS (2) CHRONOLOGY OF EVENTS to be established by documents nominated for agreed bundle.		
IV	JUDICIAL ISSUES CONFERENCE		
	Purpose is to distil issues and help ensure that the pathway to trial is just, speedy, inexpensive and proportionate. Six key topics: • Identification of key issues with pleading amendments if required. • What discovery is required beyond initial disclosure to address those issues? • Further interlocutory applications. • Expert evidence: (a) usually one per issue; (b) conferencing and joint reports. • Settlement, including mediation / judicial settlement conference. • Where possible, scheduling the trial.		
V	FURTHER INTERLOCUTORIES	FURTHER DISCOVERY	EXPERT REPORTS
	(presumptively online)	(if any, as ordered)	(including conferencing and joint reports)
VI	TRIAL		
	• Key events established by common bundle and chronology(ies). • Factual witnesses only address factual disputes/issues.		

167. The three key features of the reforms contemplated by this structure, addressed in greater detail below, are:

(a) Factual "will say" or witness statements will replace briefs of evidence. Unless ordered otherwise, a party's statements are to be served before discovery orders are made. Statements must contain admissible evidence of fact, rather than submission or recitation of the contents of documents that will be produced anyway. This proposal would adopt the procedure that has been successfully introduced in the Equity Division of the New South Wales Supreme Court,[42] and is now an important procedural option in Singapore (albeit on a case-by-case basis).[43]

(b) Secondly, the judicial issues conference will generally occur after the will say/witness statements have been served, rather than at the outset. At that point, what further discovery (if any) is required can be determined, and greater judicial engagement with the parties on the issues for trial and what further interlocutory steps are required can be addressed. Significant judicial engagement will be expected in the identification of the issues and what is required to fairly resolve the proceeding.

(c) Thirdly, at trial much greater emphasis is to be placed on the documentary record for establishing the facts. Documents included in the agreed bundle, should presumptively be admissible to establish those facts without the need for witnesses to traverse them. In the event an admissibility challenge is made to a specific document, this can be determined at the trial itself. Evidence from the witnesses, including cross-examination, should be limited to issues of fact unless it is expert evidence. This is intended to eliminate the making of submissions through the evidence.

168. The Committee's proposals will significantly change the procedural approach to civil litigation in the High Court. Because they vary from the specific proposals consulted upon, the Committee has decided to outline its conclusions in this report, and make implementation decisions after an opportunity for further comment has been provided. The Committee will also consider whether any of the proposals need to be introduced as a pilot.

Specific recommendations for the High Court

Recommendation 16: Introduce proportionality as key principle

Proportionality should be expressly introduced as a guiding principle in the determination and application of the procedures applied to a civil proceeding, with r 1.2 of the High Court Rules amended to this effect.

42 See NSW Practice Note No SC EQ 11.

43 See Singapore's Rules of Court 2021, which came into effect on 1 April 2022 and especially Order 2, rule 8 and Order 9, rule 8.

169. This proposal underpins many of the Committee's other proposed changes. Of the 12 submitters who directly addressed the proposal, most approved of it without further comment. Only one submitter opposed it on the basis that it was too unclear.[44] Two further submitters supported the proposal in theory but were sceptical about how it could be operationalised in practice.[45]

170. Rule 1.2 of the High Court Rules currently provides:

> **1.2 Objective**
> The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

171. It can be argued, as Chapman Tripp did, that the concept of proportionality already lies within this objective.[46] However, making express reference in r 1.2 to proportionality will recognise that the procedures appropriate for a particular proceeding will vary depending on the nature of the proceeding, and what is at stake.

172. An illustration of the importance of proportionality is found in the discovery requirements. Very large-scale commercial litigation will likely justify extensive discovery orders. This is not the case for smaller more discrete civil proceedings. Equally, a proceeding that turns on allegations of dishonesty, or fraud, is likely to justify more extensive discovery orders and other procedures. Some submissions favoured categorisation of cases by type, with procedures following accordingly.[47] The reference to proportionality underscores the Committee's view that case management should be more closely tailored to each proceeding and that there is no substitute for specific consideration of what is truly required.

173. Even though many existing rules reflect that procedures should vary with the nature of the case, the Committee believes it is important that the Rules expressly identify proportionality as a guiding principle, perhaps *the* guiding principle. As the authors of *McGechan on Procedure* observe, r 1.2 provides the "yardstick" by which all High Court Rules are to be interpreted.[48] For that reason, we think that proportionality should be expressly included in r 1.2 to ensure it is understood as a key concept when interpreting and applying the Rules.

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44 Submission of Michael Lenihan at [8].

45 Dentons Kensington Swan "Submission on improving access to civil justice" (2 July 2021) at [2.3] and [3.16]; and Reflective Construction Law "Submission: Improving access to civil justice further consultation" at [19].

46 Chapman Tripp "Submission to Rules Committee – 'Further Consultation Paper on Improving Access to Civil Justice'" (2 July 2021) at 14.

47 Barristers at Stout Street Chambers "Rules Committee consultation on Improving Access to Civil Justice" (2 July 2021) at [15]; Jonathan Orpin-Dowell and Gareth Richards "Improving Access to Civil Justice – Response to Rules Committee's 14 May 2021 Paper" (2 July 2021) at [17]; and Chapman Tripp at [7].

48 See "HR1.2.01 Importance of Rule".

Recommendation 17: Witness statements

The current rules for the exchange of briefs of evidence for trial be replaced by requirements:

- to serve witness statements shortly after the exchange of pleadings and any preliminary interlocutory applications (such as strike out) but prior to discovery and the judicial issues conference.
- that such statements not be argumentative, or engage in a recitation of the chronology of events to be established by documentation at trial.

174. Preparation of evidence for trial is a key area where reform is necessary. That is why this aspect of the Committee's proposed reforms is one of the most significant proposed departures from existing practice.

175. In the Committee's most recent consultation proposals the evidence to be addressed by witnesses at trial was to be more limited, with greater emphasis placed on the documentary record for establishing the core facts.[49] This is a proposal that the Committee continues to make in Recommendation 22 below. The Committee's Third Consultation Paper included a proposal that witnesses should give evidence by way of affidavit and that the affidavit should be treated as read in appropriate cases.[50]

176. Of the 21 submissions on this proposal, most agreed that oral evidence should only address areas of disputed fact. Submitters also supported a presumption that evidence be taken as read, subject to certain conditions.

177. Some submitters saw no advantage in moving from briefs of evidence to affidavits, however. In their view, it is the underlying approach to evidence preparation rather than the form of the evidence that is causing problems. One judicial officer said that the greatest predictor of the cost of civil litigation is the nature and length of the written evidence served by a party. Many judges consider that briefs and affidavits often contain much inadmissible material, submissions disguised as evidence and unnecessary recitation of the documentary record. There is also a perception that briefs of evidence are often formulated by the solicitors who prepare them, rather than being the true evidence that a witness can recall. Alan Galbraith KC's view, which the Committee endorses, was these problems would not be cured by adopting affidavits instead of briefs of evidence. Moreover, facilitating access to justice favours use of simpler procedures where practicable.

49 The Rules Committee, above n 4, at [40(c)], [75] and [77(j)(iv)].
50 At [75(c)].

178. The current Rules are clear that briefs of evidence should not contain such inadmissible material (r 9.7(4)). Some submitters called for a stronger policing of this rule. In England and Wales, a new practice direction has recently been promulgated with a similar objective in mind.[51] In summary, this practice direction provides that trial witness statements should contain only matters of fact that are in dispute or need to be proved at trial and of which the witness has personal knowledge, and a list of documents that the witness has referred to. It further provides that the statements should not quote at any length from any document to which reference is made, argue the case either generally or on particular issues, take the Court through documents, or set out a narrative to be derived from the documents or comment on any other evidence in the case. This practice direction accordingly identifies the same issues of concern as identified by the committee.

179. The background to this initiative demonstrates that the problems arising from briefs of evidence have also arisen in other jurisdictions.[52] But the difficulty facing trial judges is that objections to briefs of evidence are taken at, or shortly before trial, and the amount of time required to argue and then address the issue is itself a cause of delay and cost. Judges often adopt the pragmatic approach of allowing the evidence to be read, without finally determining admissibility, as it is more efficient than confronting the problem.

180. There have been longstanding concerns about the written briefs regime. The profession resisted the Committee's earlier proposals to reduce the emphasis on written briefs of evidence.[53] But the problems with the current regime persist.

181. The Committee agrees that the current processes and practices for briefs of evidence remain a key cause of the unnecessary expansion of litigation.

182. Having reflected on these issues in light of its initial proposals, and the view of submitters, the Committee recommends that the procedure successfully adopted in 2012 by the Equity Division of the New South Wales Supreme Court, which extends to most commercial cases in that jurisdiction, be used for all general civil litigation in the High Court. The relevant rule is set out in Practice Note SC EQ 11. That Practice Note requires a party's evidence to be served near the beginning of the proceeding, and before any discovery is ordered, absent exceptional circumstances. Subsequent cases in New South Wales have demonstrated that the courts have been reluctant to order discovery before evidence is served to avoid undermining the purpose of the reform.[54] The Committee understands that, in practice, earlier exchange of documents occurs between the parties by consent. This more confined category of disclosure may be similar to the initial disclosure currently required by our r 8.4.

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51 Practice Direction 57AC. It concerns witness statements for use at trials in the Business and Property Courts.

52 See also Gillian Coumbe *KC Just prove it – key witness statements and admissibility in civil cases* paper for Legalwise Evidence and Advocacy Masterclass webinar, 2 June 2022 at [112]–[114].

53 See Andrew Beck and others *McGechan on Procedure* (loose-leaf ed, Brookers, updated on 10 June 2022) at [HR9.1.01(2)–(3)].

54 *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [23]; In the Matter of *Mempoll Pty Ltd & Ors* [2012] NZWSC 1057 at [12].

183. There was initially considerable resistance by the profession in New South Wales to this approach when it was proposed. But it is now well supported by the judiciary and the profession and it is seen as having meaningfully contributed to the reduction of the cost of litigation. The position is described in *Hammerschlag's Commercial Court Handbook* in the following way:[55]

> SC Eq 11 has proved to be effective in reducing cost and delay. In the vast majority of cases, the practical reality is that discovery before evidence is not genuinely needed (and never was). Many commercial disputes are about the nature and effect of communications between the parties and all parties usually know enough about their position to put on their evidence without the necessity for prior disclosure. It has encouraged parties to examine the real issues in the case early and has engendered a more disciplined analysis of the need for disclosure by reference to those real issues.
>
> Once evidence has been served, it is not unusual for parties to be satisfied that sufficient disclosure has taken place. Often, they do not press for any further disclosure, or where they do, it is narrow because service of the evidence has enabled a targeted assessment of what further evidence is necessary.
>
> However, SC Eq 11 and the [Civil Procedure Rules] allow flexibility. The judges… have had extensive experience as practitioners and as judges (or both) and approach the requirements of the practice note, in particular the requirement for 'exceptional circumstances', in a pragmatic way.
>
> Of the applications for early disclosure that are brought, few are actually ruled on because the parties frequently agree and implement by consent, and without any order of the court, a regime for (or equivalent to) disclosure.

184. The Committee's proposal is also consistent with civil procedure reforms in Singapore, which came into effect on 1 April 2022. The Rules of Court 2021 (No. S 914/2021) now empower the Singapore High Court to order the parties to file and exchange affidavits of evidence-in-chief for some or all witnesses before any exchange of documents and before the Court considers the need for any application.[56]

55 D Hammerschlag *Hammerschlag's Commercial Court Handbook* (2nd ed LexisNexis Australia 2002) at [2.26.10–2.26.12] (footnotes excluded).

56 See Order 2, rule 8 and Order 9, rule 8.

185. Reasons for the reforms in New South Wales and Singapore included to:

- Avoid evidence being formulated by the legal representatives of the parties in light of the issues in the case, and to ensure the evidence is more likely to reflect the witnesses' actual recollection of events.
- "... avoid the mischief of parties constructing their ... evidence around the discovered documents by requiring them first to commit their case to [the witness statements]".[57]

186. The Singapore rule operates on a case-by-case basis, rather than by default. But the Committee considers that in New Zealand we need to go further and reverse the current default order of discovery and evidence. It is only by doing so that the required culture shift in civil litigation, through more focused evidence, is likely to be achieved.

187. We also propose that key documentary information be exchanged through the enhanced initial disclosure requirement addressed in Recommendation 18 below. In exceptional cases, some form of discovery may be necessary to allow witness statements to be formulated. That has been the case in New South Wales. But in most cases, a witness's factual statement will not be improved by reference to documents the witness does not have in their own possession or cannot recall. Discovery prior to the preparation of fact evidence usually serves only to expand the compass and scope of the fact evidence, by facilitating the recital of the contents of the documents themselves.

188. A draft chronology would also be served by each party. The chronology must not contain an argumentative characterisation of events, or submissions.

189. The Committee believes that these proposals will reduce the prospect of witness statements containing submissions or reciting the contents of the documents. It is envisaged that the witness statements so served will be closer in format to the former "will say" statements that used to be common in civil litigation. Several submitters suggested a return to that system. The expected content of witness statements will likely be further refined in the rules implementing these proposals.

190. A further key advantage of this proposal is that the earlier exchange of witness statements will allow the parties to better understand the issues.[58] This may lead the parties and the Court to better understand the stance of the other side, facilitating resolution. It will also allow a fuller understanding of the issues for the purposes of the judicial issues conference, and accordingly for the purposes of the making of discovery and other interlocutory orders, and other decisions for the conduct of the proceeding.

191. The requirement that the evidence of witnesses be directed to questions of fact that are in dispute (with the exception of expert evidence) is intended to limit not just the evidence-in-chief given by those witnesses, but also cross-examination. Cross-examination should not involve putting arguments to witnesses or inviting arguments in answers. Arguments arising from the facts are properly dealt with in submissions of counsel. It may be necessary to reconsider the extent of the duty to cross-examine in s 92 of the Evidence Act 2006, by limiting that duty to situations of factual dispute.

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57 Hammerschlag, above n 55, at footnote 111, relying on *Graphite Energy Pty Ltd v Lloyd Energy Systems Ltd* [2014] NSWSC 1326. The evidence is provided by affidavit rather than witness statements in New South Wales.

58 See *Armstrong v Expense Reduction* [2012] NSWSC 393 at [65]–[66].

192. Earlier service of witness statements, prior to discovery, may require allowing supplementary witness statements. However, this would be subject to judicial control and should not be automatically allowed.

193. The prospect of a party leading oral evidence that had not been properly disclosed in a witness statement, taking the other side by surprise, will also need to be controlled by the trial judge.

194. But these matters, if properly supervised, ought not detract from the substantial advantages to be achieved by minimising the extensive advocacy, and the recitation of events disclosed by the documents, which currently characterises briefs of evidence.

Recommendation 18: Discovery and Disclosure

That existing discovery rules be changed so that:

- Initial disclosure includes adverse documents known to the party.
- Subsequent discovery be ordered at the judicial issues conference as is necessary, and proportionate for the determination of the issues in the case.

195. This topic was addressed in paragraph [69] of the Committee's Third Consultation Paper. The proposal was expressed in terms of replacing the rules of discovery with adapted initial discovery rules, requiring parties at the time of filing initial pleadings to disclose: (a) all of the key documents on which they seek to rely in support of their claim/defence; and (b) adverse documents in accordance with a duty of candour. The Third Consultation Paper suggested that additional disclosure would then be available as directed by the judge where justice requires.

196. This formulation elicited a range of submissions, many defending the importance of discovery in our civil justice system.[59] The Committee agrees with the force of these submissions and has modified the suggestion in the Third Consultation Paper that discovery would be abrogated and replaced by a lesser regime.

197. Other points were made by submitters, which have also been taken into account. These include submissions:

(a) outlining the difficulties for a party, especially a plaintiff, providing meaningful initial disclosure at the outset before defences have been revealed and issues have been joined;[60]

59 See, eg, Bell Gully "Submission in response to Rules Committee consultation paper *Improving Access to Civil Justice*" (2 July 2021) at [2.6]; Simpson Grierson "Submission by Simpson Grierson on Further Consultation with the Legal Profession and Wider Community" (2 July 2021) from [20]-[21]; Anderson Lloyd "Improving access to civil justice – proposed civil law reforms" (2 July 2021) at [12]; and Gilbert Walker "Improving Access to Civil Justice – Submission" (5 July 2021) at [4]. The submission by Duncan Cotterill suggested that some concerns relating to the discovery proposals could be addressed by allowing a second tranche of discovery: Duncan Cotterill "Improving Access to Civil Justice" (2 July 2021) at [11].

60 Andrew Barker KC "Improving access to justice – consultation paper" (8 July 2021) at [8]-[14]; Barristers at Stout Street Chambers at [4]-[7]; and Jonathan Orpin-Dowell and Gareth Richards "Improving Access to Civil Justice – Response to Rules Committee's 14 May 2021 Paper" (2 July 2021) at [26]-[28].

(b) expressing caution around the notion and enforcement of a duty of candour to disclose adverse documents;[61] and

(c) suggesting that the work involved in identifying and agreeing tailored discovery categories may in some (especially smaller) cases not be worthwhile and that greater efficiency might be gained in such cases by resorting more readily to standard discovery.[62]

198. It may assist to explain the Committee's reasoning for Recommendation 18 more fully than was set out in the Third Consultation Paper:

(a) Discovery is not an absolute right in the High Court Rules, but rather a presumptive right to be ordered *"unless [the judge] considers that the proceeding can be justly disposed of without discovery"* (HCR 8.5(1)).

(b) Where discovery is ordered, the present presumption in larger or more complex cases, is that the interests of justice require tailored discovery, unless the judge is satisfied to the contrary (as specified in HCR 8.9).

(c) This system effectively works as an 'off-the-rack' triaging system so that, unless parties otherwise agree, smaller cases mostly get standard discovery, and larger cases mostly get tailored discovery. Although there is judicial discretion as to both the availability and the form of discovery, in practice the Court may not have sufficient familiarity with the case in the existing case management process to make decisions on what discovery is proportionate.

(d) The result is a default tendency towards maximalism, where considerable work is undertaken in locating, listing, producing and inspecting documents, in many cases without a clear appreciation of whether this work is necessary to resolve the issues that really matter in the litigation. This can be both time-consuming and costly.

(e) Given the relationship between cost and access to justice it is important to try to adjust the system so that more thought and care is taken before ordering parties to undertake this level of work.

(f) The focus of this proposed reform is therefore to provide the parties and the Court with a sufficient basis of information about the claim, defences, issues, fact evidence and existing documents in order to make an informed decision as to what further discovery, other than that exchanged through the proposed enhanced initial disclosure regime (if any) is required.

(g) To this end, the Committee considers presumptions as to the availability and form of further discovery are not apposite. But it is not proposed that discovery be abrogated. Rather, it should be better fitted to each specific case. That is why the initial disclosure regime does not replace the discovery regime. It merely precedes it, with decisions about the scope of any further discovery to be made with the benefit of context available at the judicial issues conference.

61 Raynor Asher KC "Submission of Raynor Asher KC to the Rules Committee" at 4; Peter Stockman "Improving Access to Civil Justice – Further Consultation Submissions" (2 July 2021) at [33]; and Simpson Grierson at [22(f)].

62 David Bigio KC "Improving Access to Civil Justice" (2 July 2021) at 1 and Jonathan Orpin-Dowell and Gareth Richards at [22].

199. It is also relevant that the cost of discovery has continued to expand with technological developments. As summarised in Hammerschlag's Commercial Court Handbook:[63]

> The problem of the cost of discovery has become more acute over time as a result of the huge amount of information which modern technology permits to be stored and the complexity of processes required to search for and identify relevant material. Questions of confidentiality frequently arise.

200. It is anticipated that serving fact evidence before discovery will also assist in reducing the perceived need for extensive discovery orders. In New South Wales, for instance, the service of evidence before formal discovery orders are made by the court was perceived as assisting in reducing the excessive burden created by discovery requirements. In *Armstrong v Expense Reduction* Bergin CJ in Eq said:[64]

> The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. The process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgements to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in this evidence. However it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their lengthy relationship for "review" by teams of lawyers and students in the absence of any knowledge of the proposed evidence.

201. The Committee understands that the operation of these rules in practice have involved achievement of these objectives.

202. The revised Singapore regime is new and untested. But in cases where fact evidence is ordered to be exchanged before any exchange of documents, the nature and extent of any production of documents is then one of many matters to be considered at the sole case management conference arranged to consider the single interlocutory application to be filed by each party.[65]

203. The Committee also acknowledges the concerns of some submitters regarding the duty of candour. Like any new reform, a change will take time to bed in. But the existing discovery regime ultimately relies on parties and their legal advisers honouring their obligations. These obligations are serious matters, hence rule 13.9 of the Conduct and Client Care Rules which applies to all lawyers who act in New Zealand proceedings. So too would be the obligation to disclose known adverse documents. This would not require a search process in order to identify documents, including potentially adverse documents. At the initial disclosure stage, a party would only be required to provide documents which it is aware are adverse to its case.

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63 Hammerschlag's, above n 55, at [2.26.2].

64 *Armstrong v Expense Reduction*, above n 58, at [66].

65 See footnote n 44.

204. It is significant to note that the Committee's proposals are not unique. In England and Wales a new practice direction is shortly to come into effect following the operation of a pilot scheme for the Business and Property Courts. This includes an obligation to preserve and disclose "known adverse documents".[66] At the implementation stage the Committee will consider the formulation adopted in this practice direction and assess whether it is suitable to introduce in New Zealand.

205. In the Committee's view, qualified practitioners can be trusted to properly advise clients about this obligation and to abide by it themselves, as is the case with the current discovery obligations. The risks the Committee apprehends are outlined below. These do not, in the Committee's view, (either alone or together) outweigh the benefits to be gained by the proposed revisions:

(a) Some clients may, despite being properly advised, deliberately not provide adverse documents to their lawyer in the first place. To the extent this is a risk, however, it is not excluded by the existing system, and is not in itself a reason to forestall appropriate streamlining of the discovery regime.

(b) Some clients and lawyers may conduct themselves differently in order not to find out about potentially adverse documents that would then need to be disclosed. The Committee does not, in practice, expect parties and advisers to refrain from informing themselves about the facts of a case out of fear that unhelpful facts may turn up.

(c) Ambiguity as to the definition of adverse documents may lead to some parties acting differently, or otherwise cause confusion. However, although any definition of adverse documents may not exclude any form of interpretation at the margins, the concept is generally well-known to litigators and litigants, who the Committee considers have a reasonable sense of which documents may be difficult to explain or awkward to reconcile with other parts of a case. The Committee considers that, especially with practice, what is required and expected is likely to become known and accepted.

Recommendation 19: Judicial issues conference

That a judicial issues conference occur later in the course of the proceedings, after initial interlocutories and the service of witness statements, to review the matters in dispute, what other steps are required for trial (including further discovery and interlocutories), the prospect of settlement and potentially to schedule trial.

206. A key proposal is to emphasise earlier identification of the key issues in proceedings. Maximalism can lead to parties' focus straying from the key issues. A judicial issues conference is an opportunity for a judge to engage with counsel and the parties to identify what the case is really about and what is important for its determination. This can allow more appropriate directions to be made for the trial and potentially facilitate early resolution.

66 PD 57AD, Para 2.

207. The majority of High Court general civil proceedings are resolved without the need for a trial.[67] This is to be further encouraged. But settlement of proceedings earlier than just before trial would be more efficient, given the cost of preparing a case for trial and the delay that can arise before the trial date.

208. The Committee proposed that a judicial issues conference be compulsory. The 27 submitters who addressed the proposal were mostly positive. The three submitters who expressed reservations considered it would not work in practice,[68] that provision for similar processes already existed in the Rules,[69] and that judicial engagement would likely remain inadequate because of a conservative legal culture and inadequate judicial resourcing.[70]

209. Submitters also thought that the existing provisions for judicial issues conferences had not been working as well as they should. Raynor Asher KC pointed out that earlier judicial engagement had been the aim since the original case management reforms led by Tompkins J in 1993. The same idea has been promoted since then, leading to rule changes or further emphasis on such processes for short periods of time, or for specific purposes such as the Christchurch Earthquake List. But the pattern is that, over time, such conferences fade in their significance and no longer operate as intended.

210. The requirement for a case management conference under subpart 1 of Part 7 of the Rules is partly directed to the objective of early judicial engagement, although there are separate provisions in the existing Rules for an "issues conference" (r 7.5). Whilst there is some variation in practice between the registries, case management conferences have largely not operated as fully effective judicial issues conferences in the way contemplated.

211. The explanations for this vary. Some judicial submitters suggested that counsel are not always prepared, or able to participate at such conferences at an early stage so that the case management conferences have largely not succeeded in properly identifying the issues in a case. Other submitters were of the view that judges are sometimes not sufficiently well prepared or do not have sufficient time or resources to allow for meaningful engagement.

212. There are also different views within the judiciary on the extent to which judges are properly able to, or should give any views, about the prospects of success of litigation at an early stage, even informally. Some judges have reservations about expressing any such views at an early point. Other judges consider that the key issues in a case can often be identified at an earlier point, and much time and cost are wasted because the parties do not focus on those key issues earlier. These judges feel more comfortable about giving direction at an early stage and believe that judicial guidance can be of real assistance. To some extent these differences reflect different judicial philosophies and backgrounds.

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67 See table at para 156 above.

68 Bell Gully at [2.13].

69 Barristers at Stout Street Chambers at [9].

70 Rhys Harrison KC "Memorandum for Rules Committee on Proposals for Improving Access to Justice" (2 July 2021) at [5].

213. Again, these issues are not limited to New Zealand. The position is described in the following way with respect to case management in New South Wales:[71]

> … Case management is an art. Its success depends on the skill of the judicial officer who does it and on the positive participation of the parties (through their lawyers) in the process. Case management is directed to achieving the just, quick and cheap disposition of disputes. In the commercial context, this is necessary to ensure the efficient circulation of money.[72]
>
> Effective case management requires:
>
> - procedural steps devised or tailored to suit the particular case;
> - consistency combined with flexibility in approach; and
> - a culture of compliance.
>
> A culture of compliance is achieved by the protagonists having confidence in the process, maintenance of a system for monitoring compliance, and the application of appropriate sanctions in the face of non-compliance.
>
> Management of a commercial cause can conveniently be divided into the following stages:
>
> - ascertaining the issues;
> - controlling the evidence gathering process;
> - conducting the final hearing;
> - marshalling the material produced at the final hearing so as to enable production of a satisfactory judgment; and
> - producing the judgment at the earliest reasonable time.

214. In addition, provision for alternative dispute resolution at an appropriate stage also has a potentially important role to play as part of case management.

215. The Committee has reflected on all of the views summarised above. In the Committee's view a well-focused judicial issues conference remains highly desirable, and most likely to promote the efficient disposal of civil claims and resolution before trial. The Committee considers that this should be a key part of a reformed civil litigation processes. But three key changes are needed to the current procedures are needed to maximise the beneficial effects of such conferences:

(a) First, in the Committee's view one of the reasons for the lack of success of current case management conferences is their timing. At present a conference takes place shortly after the proceeding is first filed. The Committee proposes the judicial issues conference should occur later, when all sides understand the case better.

(b) Secondly, the Committee's proposal for witness statements to be prepared and served earlier, and prior to a judicial issues conference, is also directed at ensuring that, at this conference, there is a fuller understanding of the issues arising in the case.

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71 Hammerschlag, above n 55, at 1.1.1–1.1.5.

72 See Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; 258 ALR 14.

(c) Thirdly, the fact that these conferences will address whether additional orders by way of discovery are required for the case (over and above the documents disclosed by the parties as part of initial disclosure) means there is more likely to be engagement by the parties on the issues, and what is fairly needed to dispose of the case. It is also anticipated that, in addition to discovery, the judge presiding over the conference will discuss with the parties what other interlocutory applications may be necessary. The judge may also explore with the parties what matters can be agreed for the fair disposition of the case without the need for such applications to be pursued.

216. These three initiatives will improve the likelihood of issues conferences being successful. In short, the conference will address the overall issues in the case, and what is necessary to dispose of it, after the parties have served their proposed evidence and provided key disclosure.

217. Counsel and the parties themselves will be expected to attend the conference. Counsel will outline the issues, the parties' position on each of those issues, and what further discovery and interlocutory steps are required to fairly dispose of them. The merits of a party's claims and defences will therefore be identified in a way that allows the parties, and the judge, to understand the issues and what the case is really about. The judge may wish to comment on the issues and the parties' respective positions. Directions and timing for trial, and settlement procedures, may also be discussed.

218. The length of the conference will depend on the complexity and scale of the relevant case. In some cases, it may be more efficient to hold the conference online.

219. It will be necessary for judges to be provided with time before a scheduled conference to properly prepare. It is preferable that issues conferences be conducted by the trial judge. However, this will not always be practicable. It is anticipated that associate judges will conduct issues conferences, even though they will not be presiding at the trial. However, High Court Judges should generally preside over conferences for more significant litigation.

Recommendation 20: Interlocutories

That there be a presumption that interlocutory applications will be heard by remote means with time limits, and that provision be made to allow interlocutories to be determined on the papers.

220. As part of the proposals seeking to introduce greater efficiencies for the interlocutory steps before trial the Committee proposed that interlocutories would be a matter that would be considered at the judicial issues conference, and that there would be a presumption that all such interlocutories would be determined on the papers.

221. The consideration of the required interlocutory applications at the judicial issues conference has been addressed in the context of Recommendation 19 above. Nineteen submitters addressed the proposal for interlocutories to be determined on the papers. Five submitters supported the proposal, and nine supported the proposal in limited circumstances only, or were ambivalent. The remainder opposed.

222. Judges opposed the proposal because interlocutory hearings give the court an opportunity to:
- engage with counsel and the parties;
- indicate to the parties where the important issues in the case might arise; and
- provide other oversight and guidance and otherwise influence the conduct of the proceedings.

223. Judges were also concerned that the presumption interlocutories are to be determined on the papers might increase the number of applications that are pursued, including in circumstances where they were not warranted. The concern was that this might increase the prospects of litigation being pursued maximally.

224. Similar concerns were also expressed in submissions from the profession and others who opposed the proposal, or who thought it appropriate in limited circumstances only. There was a concern that it would result in more applications being pursued on the basis that a party would "have a go" where they might not otherwise. In common with the view of judicial submitters there was also a concern that there was a lost opportunity for the parties to engage with the court in relation to the litigation.

225. The Committee shares these concerns. The object of the judicial issues conference is for the court to engage with the parties in relation to the overall litigation. The Committee's proposals in relation to the issues conference are directed to that end. Pre-issues conference interlocutory applications (such as summary judgment, striking out, security for costs) also allow judicial engagement where it is of assistance to the parties.[73]

226. Interlocutory applications following the judicial conference may also allow for judicial engagement before the trial that can be of wider assistance. Multiple interlocutory applications made after the conference should, so far as practicable, be packaged into a single application to be dealt with before trial. That is a feature of the Singaporean reforms.[74] Where possible, there may also be an advantage in those interlocutory applications being determined by the same judge who was involved in the judicial issues conference.[75]

227. For these reasons the Committee agrees that interlocutories should generally involve a hearing, and that interlocutory applications should usually be dealt with as a single application. The Committee also agrees, however, that there should be a power to enable the court to determine interlocutory applications on the papers if this is in the interests of justice. As the submitters who supported the proposal suggested, there will be some circumstances when this will give rise to efficiencies. There is no express rule that contemplates this, and it would be appropriate to add one.

228. There is a related issue concerning the mode of such hearings. The Committee has received feedback from the judiciary and submitters that the experience of conducting hearings online by remote means led to efficiencies, particularly for shorter hearings and matters such as chambers lists. The Committee understands this has also been the experience in overseas jurisdictions, who have been required to conduct work by remote means during COVID-19. The Committee addresses the use of such technologies for civil proceedings in a broader sense at Recommendation 23 below.

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73 See structure at Figure 5, para 165 above.

74 See Order 9, r 9(2) as well as Order 2, r 9(1).

75 Indeed there may well be advantages if the trial judge is also be the judge who presided over the judicial conference. That is already something that the schedulers seek to achieve if it is practicable, albeit it is not always possible to do so.

229. Under the Courts (Remote Participation) Act 2010 the court is able to use audio-visual links (s 7) and audio only links (s 7A) in civil proceedings. The definition of audio-visual link is broad, and encompasses the range of technologies currently used, and would allow an expansion of those technologies. Section 5 sets out general criteria in allowing audio-visual links. Section 11 allows directions to be made if a determination to use such links is made. These provisions provide the framework for remote hearings.

230. The Committee has decided that there should be a presumption that interlocutory applications be heard by remote means, and with time limits. The experience both of the court, and of the profession, is that remote hearings of this kind can produce efficiencies not simply because the parties can avoid the cost and expense of travelling to court, but also because such hearings appear to be more focused. The Committee only proposes that this be a presumption, however. There will be some interlocutory hearings that should more appropriately take place in court for a number of reasons.

Recommendation 21: Expert evidence

That expert evidence be subject to the following presumptions:

(a) One expert witness per topic per party.

(b) That there be a requirement for expert conferral before expert evidence may be led at trial.

231. This topic was dealt with briefly in the Committee's Third Consultation Paper.[76] The recommendations were: (a) to make greater use of single court-appointed experts; (b) imposing, where separate experts are to be called for each side, a presumptive limitation of one expert witness per topic per party; and (c) providing that expert evidence is not to be received unless there has been a joint expert conference, except by leave.

232. Submissions supported the latter two recommendations, which are reflected in this Recommendation 21.[77] The Committee does not consider it necessary, at present, to suggest changes to the rules relating to the appointment of court experts (rr 9.36 to 9.41). Court appointed experts can be useful and they are recommended to the profession for consideration in suitable cases. There is, however, neither sufficient support nor need to elevate the court-appointed option into a presumption. In so considering, the Committee acknowledges that parties have legitimate reasons in many cases for their choice and briefing of an expert witness to provide independent support for aspects of a case that may, due to nuances and complexities, be difficult to elicit without direct interaction.

76 Rules Committee, above n 4, at [75](d).

77 Several submissions showed a lack of support for greater use of a single court-appointed expert. For example, Chapman Tripp at 13; Bell Gully at [2.24]. Other submissions noted a degree of support for the use of court-appointed expert in some situations, with some reservations. For example, Gilbert Walker at [39]; Simpson Grierson at [79], Anderson Lloyd at [15]; Barristers at Stout Street Chambers at [22]-[24]; and New Zealand Law Society "Rules Committee further consultation paper: *Improving Access to Civil Justice*" (2 July 2021) at [5.27].

233. The proposal to impose a presumptive limit of one expert per topic per party and to require expert conferral before expert evidence may be led at trial attracted widespread support, from both bench and bar.[78]

234. The presumptive requirement of one expert per topic per party encapsulates the objective of focusing on quality rather than quantity. The persuasive value of expert evidence ought to come from its cogency rather than from force of numbers. If a particular view has mainstream scientific or other expert support, this can be properly conveyed to the court through a single report evidencing data from the relevant field, rather than through a plurality of voices.

235. It is already established practice to consider and arrange for expert conferral. This recommendation merely converts the present discretion in HCR 9.44 into a further presumptive requirement. The Committee considers this modification to be both sensible and, in light of submissions received, uncontroversial. The Committee also contemplates that there may be greater use of moderators appointed to manage the process of conferral between experts. These can be further experts within the same discipline, or professional facilitators. Such facilitators have proved to be successful in maximising the opportunity for refining the issues and disputes between experts.

Recommendation 22: Evidence at trial

That the rules for evidence at trial be changed so that:

(a) The core events are to be established by the documentary record evidenced by the documents in the agreed bundle, and chronologies setting out facts to be drawn from the documents will be required.

(b) The provisions in the Evidence Act 2006 and the High Court Rules be amended to allow such documents to be admissible as to the truth of their contents.

(c) Evidence given by witnesses will not be expected to traverse the events disclosed by the documentary record, or engage in argument, but address genuine issues of fact.

(d) Witness statements are allowed to be taken as read, and supplemented by further statements or viva voce evidence.

236. The Committee proposes that there be a significant change to how evidence is received by the court at trial.

237. A key aspect of the Committee's proposals is that the primary evidence of events should be taken from the documentary record, and that, subject to any specific obligation to be resolved at trial, the documents nominated for inclusion in the agreed bundle should be received as evidence of these events without the need for witnesses to traverse those events or produce documents in their evidence. A chronology setting out the facts to be drawn from the documents will be required. As part of these recommendations the Committee proposes that the documents in the agreed bundle

78 See, eg, Duncan Cotterill at 13; Chapman Tripp at 13; Bell Gully at [2.22]; Gilbert Walker at [36]; Simpson Grierson at [84]; Anderson Lloyd at [15]; and The Rules Committee *Proposed Civil Justice System Following Consultation* (Judicial sub-committee on access to civil justice, 15 March 2021) at [53](d)].

be admissible as to the truth of their contents. This change may in turn require some changes to ss 130 and 132 of the Evidence Act 2006 as well as rr 9.5 and 9.6 of the Rules, although an effective change might be possible by amending the Rules alone.[79]

238. As indicated above, the proposal that oral evidence at trial be limited to matters of factual dispute was generally supported by submitters. In terms of the proposition that documents in the agreed bundle be admissible as to the truth of their content, opinion was divided amongst submitters. Amongst the concerns raised by those who opposed this was a view that there would be increased argument about the content of the common bundle.[80]

239. The Committee does not see these proposals as controversial, however. It is well recognised that "as a record of a fact, a document may have considerably more weight than oral testimony about the fact; it will generally have been made at the time, or at least much nearer the time, of the facts it records and its terms are settled. It is not therefore so subject to testimonial infirmities such as defective memory and ambiguity of narration".[81] Section 130 of the Evidence Act contemplates documentation being admitted in evidence for the truth of its contents without it being introduced by a witness. But the provisions relating to including documentation in the common bundle in r 9.5 are more limited, and are confined to a presumption as to the nature and origin of the document, so that neither s 132 nor the Rules "… operates to admit into evidence documents being offered to prove the truth of their contents. …".[82] The Committee's proposal would effectively expand the presumptions in s 132 to cover the type of admissibility contemplated by s 130. This removes the need for documentation to be referred to by a witness before it is admissible as to its contents. The proposal seeks to remove the artificial recitation of documents in the briefs of evidence.

240. In other jurisdictions the ability to rely on documentation for the truth of its contents is orthodox.[83] The New Zealand technical requirements appear out of step. The Committee's view is that judges already rely on documentation as their primary source of the relevant events for the purposes of making findings. An alteration to the statutory provisions and/or rules to streamline the procedures to allow findings to be based on what may be classified as documentary hearsay is unlikely to involve a substantial change to judicial practice in this respect. What the proposals seek to achieve, however, is the minimisation of the extensive reference to underlying documentation by witnesses in evidence-in-chief, and the associated advancement of argument in those briefs. The witness statements are designed to focus on genuine factual disputes. This is associated with the Committee's recommendation that witness statements be served earlier in the proceedings.

241. The proposed change to allow documentation to be admissible as to the truth of the events does not mean that any particular documents will be given weight by trial judges, or that there will be any material changes in this respect. Self-serving documentation is unlikely to be accepted by trial judges.

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79 The High Court Rules could provide that the inclusion of a document in the common bundle (or the bundle proposed by the party with its chronology) amounted to the notice contemplated by s 130 of the Evidence Act 2006.

80 For example, Alan Galbraith KC "Improving access to Civil Justice" at 3; Chapman Tripp at 5; and Nicola Hartwell and David Grindle "Further consultation by Rules Committee on improving access to civil justice" (2 July 2021) at [21].

81 I S Dennis *The Law of Evidence* (7th ed) Sweet & Maxwell London 2020 at [12-004].

82 Elisabeth McDonald and Scott Optican (General eds) *Mahoney on Evidence Act and Analysis* (Thompson Reuters, 2018 at [EV132.02].

83 See, for example, s 8 Civil Evidence Act 1995 (UK) and s 48 Evidence Act 1995 (NSW).

242. It is anticipated that documents in the agreed bundle will be referred to by a party through its chronology (which could also serve as a nomination list for the agreed bundle), albeit it will be the underlying documents rather than the chronology that will be treated as the evidence.

243. The Committee has carefully considered submissions suggesting that this change would draw parties into unnecessary disputes about chronologies and objections to documents in the common bundle. The Committee understands these concerns. It considers, however, that:

- Existing trial practices involve documentation being (artificially) included in the evidence of witnesses, often with an attempt to characterise, or even re-characterise the events it records. The procedure contemplated by s 130 of the Evidence Act is not followed as it is not contemplated by r 9.5. The existing trial practices are accordingly inconsistent with an approach the Evidence Act allows.
- Existing trial practice means that the process of reviewing documents for admissibility is already undertaken in the course of reading voluminous briefs that have a primary purpose of effectively indexing and therefore admitting into evidence documents, including emails. The proposed reform has the principal virtue of separating out genuine fact evidence from recitation of documents. A chronology of events may well help focus, rather than extend, the time required to read such documents.
- The fact that a document is included in the agreed bundle as admissible for truth, does not mean its truth cannot be challenged, or that admissible documents will be given any weight by a trial judge. It merely puts the onus on a party seeking to dispute the narrative of events that emerges from contemporaneous documents to identify the documents it wishes to challenge, so that this can be addressed in the course of the trial itself if it becomes relevant to do so.
- The Committee is alive to the difficulties for counsel and parties to agree chronologies, a task which is not made easier where presumptive admissibility of documentary evidence would now follow. For this reason, it is proposed that any party can introduce documents into the agreed bundle and then refer to it in its own chronology, with the parties potentially then coming under a subsequent obligation to prepare a joint chronology to assist the court at the trial itself, which can identify any irreconcilable differences. The Committee will be able to address the processes with greater particularity at the implementation stage.

244. Arguments about chronologies, or whether particular documents should be admissible are not encouraged by the Committee. But neither should witnesses be required to formally prove documents. The Committee also anticipates that trial judges are unlikely to be enthusiastic about such matters as in the vast majority of cases they are unlikely to be of any ultimate significance. For this reason, the Committee's expectation is that parties will appreciate that such arguments are not a productive use of time, and that the matters of real importance to the outcome of the litigation will be the focus. Removing a recitation of documents from the briefs of evidence and focussing the parties' attention on the conclusions to be drawn from the contemporaneous documents (rather than their admissibility, or a witness's comment/argument about them) is seen as promoting efficiency.

Recommendation 23: Remote hearings

That the practices developed during the COVID-19 pandemic, including electronic filing, document management and remote hearings become a standard part of the court's procedures.

245. Whilst not subject to any particular proposals during consultation, the greater use of technology for the conduct of litigation was raised by some submitters. It has also arisen as a consequence of the required response to the COVID-19 pandemic. The changes that have been required have been considered by the Committee and are appropriately addressed as part of these recommendations.

246. There have been substantial efficiency gains arising from measures introduced during the COVID-19 pandemic. There has been a greater use of remote hearings, and the electronic management of documentation. The experiences in New Zealand during the pandemic are consistent with experiences of overseas jurisdictions.

247. There are three components of the greater use of technology that the Committee recommends be continued after the impacts of COVID-19 no longer need to be so clearly managed.[84] First, during the pandemic the High Court Rules were amended to allow for electronic filing.[85] That change has been further enhanced by the Ministry of Justice's development of the "File and Pay" system which allows court filing fees to be paid online. Electronic filing is more efficient than the manual payment process of the past. The Rules still allow paper filing and ordinary payment to take place which is necessary for access to justice reasons as not all court users have access to technology. But the ability to file documents in court electronically, and to pay for that filing by online systems, has introduced efficiency gains.

248. The second area is electronic document management within the court registries. The requirement for electronic filing has given rise to document management issues for the Registries given that court files are currently maintained in paper form. That has meant that there have been inefficiencies within those Registries, including because of the need to print documents filed electronically. The need to address this situation has led to the acceleration of initiatives that were already in existence for the courts to move to electronic rather than paper-based file management.

249. In the 2022 budget the Ministry of Justice has successfully sought funding for a new electronic document management system to be introduced across the courts. That system will not be available until fully developed, and it needs to be carefully considered on its introduction to ensure that it is consistent with appropriate needs of court users. In the meantime, a project has been developed by the High Court and the Ministry to use existing technology to transition from the paper-based to an electronic-based court file for the High Court. Existing technologies are not optimal, but a transitional period using them will continue to be implemented. The Committee understands that the profession will be consulted on any impacts of such changes. Those steps are necessary for a proper transition to an electronic document management system within the High Court system.

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84 Including after the withdrawal of a notice under the Epidemic Preparedness Act 2006, which in turn removes the ability under ss 24 and 24A of that Act to vary rules of court. In addition some of the amendments made to the rules of the High Court only exist for so long that such a notice remains in effect.

85 See rr 5.1A and 5.1B. See generally the High Court (COVID-19 Preparedness) Amendment Rules 2020 (LI 2020/59).

250. The third major area of change has been the use of technology for remote hearings. As indicated above, the Courts (Remote Participation) Act provides the current framework for remote hearings. A range of remote technology platforms have been used including Virtual Meeting Room (VMR) and Microsoft Teams. The use of such technologies for hearings should continue. As indicated above, the Committee recommends that all interlocutory hearings presumptively take place using remote technology. Remote hearings may also be used for some trials and other fixtures. When it would be appropriate to conduct trials remotely rather than in person is currently dealt with on a case-by-case basis by the presiding judge. All the senior courts now have successful experience with remote hearings. The Committee also understands that the judiciary have received informal feedback from other jurisdictions that it is possible to use remote technology for a range of trials and other fixtures. For example, it would seem that utilising remote technology for fixtures of less than one week may be appropriate for some cases. It may also be appropriate for some longer cases.

251. In some jurisdictions there are more ambitious proposals for the use of technology for civil dispute resolution. That is particularly so of the United Kingdom.[86] It is not proposed that this be adopted in New Zealand for the time being. The experience of the District Court Rule Reforms of 2009 suggest that it is advisable to exercise some caution when considering more radical reform. A new Digital Strategy Project led by Justice Goddard is addressing technology issues in a broader context. The Committee considers it appropriate to consider whether more significant reform is appropriate when the experiences of overseas jurisdictions and this project are available.

86 See C Denvir and A D Selvarajah *Safeguarding Access to Justice in the Age of Online Court* (2022) 85(1) MLR 25. See also a series of speeches by Sir Geoffrey Vos at Sir Geoffrey Vos | Types | Courts and Tribunals Judiciary.

Summary

Recommendations

Summary of Recommendations for Legislative and Policy changes

Disputes Tribunal

Recommendation 1: Changes to Disputes Tribunal jurisdiction

(1) Increase the Dispute's Tribunal's jurisdictional cap to:

(a) $70,000 as of right; and

(b) $100,000 by consent.

(2) Consider amending s 10(1)(c) and s 19 of the Disputes Tribunal Act 1988 to broaden and clarify the ways in which the Tribunal can provide its service under existing areas of jurisdiction.

Recommendation 2: Appeal rights from Disputes Tribunal decisions

By majority, the Committee recommends that there be:

(a) No change to existing appeal rights from Disputes Tribunal orders up to $30,000;

(b) A general right of appeal to the District Court from orders between $30,000 and $100,000.

Recommendation 3: Representation in the Disputes Tribunal

The Committee recommends that there be no change to the current rules regarding representation in the Disputes Tribunal.

Recommendation 4: Public hearings and publication

The Committee recommends that there be:

(a) no change to the private nature of Disputes Tribunal hearings in most cases;

(b) continued publication online of at least 600 anonymised decisions a year;

(c) continued development of a library of all Disputes Tribunal decisions issued, categorised into topics, available for research purposes, academics, referees and judiciary; and

(d) a direction sought from the Minister under s 57 of the Disputes Tribunal Act regarding reporting cases of public interest.

Recommendation 5: recovery of filing fees, costs and disbursements

The Committee recommends that:

(a) costs in Disputes Tribunal claims continue to lie where they fall (except in limited circumstances);

(b) the filing fee should be recoverable by an applicant who is wholly or partly successful in their claim; and

(c) the filing fee should be subject to waiver.

Recommendation 6: Qualifications of referees

The Committee recommends that all Disputes Tribunal referees be legally qualified, with transitional provisions for non-legally qualified referees currently in office.

Recommendation 7: Resolving disputes according to the law

The Committee recommends that there be a slight change to s 18(6) of the Disputes Tribunal Act 1988, which currently requires that the Tribunal must "determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal right or obligations or to legal forms or technicalities". We recommend the words "where that would result in a substantial injustice" be added to the end of this provision.

Recommendation 8: Enforcement and recovery processes

The Committee recommends that:

(a) consideration be given by the District Court to finding more effective and straightforward ways for claimants to enforce a successful award; and

(b) the $200 enforcement fee imposed for collection of a Disputes Tribunal award be abolished, or at least subject to waiver.

Recommendation 9: Appropriate name for referees and the Disputes Tribunal

The Committee:

(a) recommends that Disputes Tribunal referees be renamed "adjudicators"; but

(b) does not recommend any change to the Disputes Tribunal's name.

District Court

Recommendation 10: Creation of a separate civil division in the District Court and appointment of a Principal Civil Judge for the District Court

Recommendation 11: Strengthen the expertise of the civil registries

Recommendation 12: Part-time judges should be appointed to assist with the civil workload of the Court

Recommendation 14: Consider using the Disputes Tribunal to conduct settlement conferences for the District Court

The Committee does not recommend that this change should be made at this time, but recommends that the position be further considered.

High Court

Recommendation 22: Evidence at trial

The provisions in the Evidence Act be amended to allow documents in the agreed bundle to be admissible as to the truth of their content.

Summary of Recommendations for Rule changes

District Court

Recommendation 13: Inquisitorial and case management processes

The Committee does not recommend rule changes to introduce more inquisitorial processes in the District Court as the default model of operation. The current rules provide sufficient flexibility to permit active case management and use of inquisitorial processes where required. A change to rule 7. 8 is proposed to assist with efficient case management.

Recommendation 15: Introduce of pre-action protocols for debt claims in the District Court

High Court

Recommendation 16: Introduce proportionality as key principle

Proportionality should be expressly introduced as a guiding principle in the determination and application of the procedures applied to a civil proceeding, with r 1.2 of the High Court Rules amended to this effect.

Recommendation 17: Witness statements

The current rules for the exchange of briefs of evidence for trial be replaced by requirements:

- to serve witness statements shortly after the exchange of pleadings and any preliminary interlocutory applications (such as strike out) but prior to discovery and the judicial issues conference.
- that such statements not be argumentative, or engage in a recitation of the chronology of events to be established by documentation at trial.

Recommendation 18: Discovery and Disclosure

That existing discovery rules be changed so that:

- Initial disclosure includes adverse documents known to the party.
- Subsequent discovery be ordered at the judicial issues conference as is necessary, and proportionate for the determination of the issues in the case.

Recommendation 19: Judicial issues conference

That a judicial issues conference occur later in the course of the proceedings, after initial interlocutories and the service of witness statements, to review the matters in dispute, what other steps are required for trial (including further discovery and interlocutories), the prospect of settlement and potentially to schedule trial.

Recommendation 20: Interlocutories

That there be a presumption that interlocutory applications will be heard by remote means with time limits, and that provision be made to allow interlocutories to be determined on the papers.

Recommendation 21: Expert evidence

That expert evidence be subject to the following presumptions:

(a) One expert witness per topic per party.

(b) That there be a requirement for expert conferral before expert evidence may be led at trial.

Recommendation 22: Evidence at trial

That the rules for evidence at trial be changed so that:

(a) The core events are to be established by the documentary record evidenced by the documents in the agreed bundle, and chronologies setting out key facts to be drawn from the documents are required.

(b) The Rules be amended to allow such documents to be admissible as to the truth of their content.

(c) Evidence given by witnesses will not be expected to traverse the events disclosed by the documentary record, or engage in argument, but address genuine issues of fact.

(d) Witness statements are allowed to be taken as read, and supplemented by further statements or viva voce evidence.

Recommendation 23: Remote hearings

That the practices developed during COVID-19, including electronic filing, document management and remote hearings become a standard part of the Court's procedures.