Better Justice

An Address to the Legal Research Foundation Annual General Meeting
Auckland
20 August 2018

Hon Justice Stephen Kós
President of the Court of Appeal

E nga mana, e nga reo

Tena kotou, tena kotou, tena kotou katoa

[1] I express immediately my congratulations to tonight's prize winners. Legal writing of the finest quality has been rewarded, and continues to be encouraged by the Legal Research Foundation. I thank the Council, its Director and staff for their support of the prizes, and other aspects of legal research — in particular through the very fine New Zealand Law Review; as Professor Bernard Brown has observed, the Foundation pumps our legal imagination. And I thank them for the honour of speaking to you, briefly, tonight.

[2] In the limited time I have I want to provoke some more thought about criminal and civil justice. I will advance eight particular suggestions for reform — which might improve both the rule of law and respect for the law. In doing so I draw together strands from other speeches given since I became President of the Court of Appeal a little over two years ago. It should go without saying, of course, that what I say is my own opinion. We may tend to write unitary judgments, but that does not mean appellate judges do not have divergent views on issues of legal and social policy.

[3] I also want to make clear that what I am advancing are simply suggestions, not solutions. I do not claim mine are necessarily the right answers. I simply seek to provoke debate, because it is by robust debate that improvements emerge, and because not to have such a debate at this time is just unthinkable.

[4] New Zealanders might, I suppose, take some comfort from the fact that international authorities like the World Justice Project place this country highest in the common law world on its rule of law index.[1]

[5] But we surely also know there are some very serious issues about the delivery of both criminal and civil justice in New Zealand. In particular on aspects of criminal justice, and concerning access to civil justice.

[6] Those who think the justice system cannot sensibly be improved, are not thinking.

[7] If I am naturally reform-minded, it might be because it has long occurred to me that this country's occasional claims to greatness are often based on critical reforms in social policy made at turning points in this nation's life. And, moreover, that where great problems arise, it is usually as a result of a failure to protect the vulnerable, whether human or environmental.

Better criminal justice

[8] Let me turn first to criminal justice. I spoke on this subject to Victim Support Manaaki Tāngata in March, in more depth than I can here.[2] I just want to touch on three suggestions I advanced on that occasion.

[9] Over the next two days a major summit takes place in Wellington on criminal justice. I doubt very much that the proposition that our prison population is too high — much too high — will be contentious. I think there is a developing consensus that that is so.

[10] At a time when the crime rate generally (including serious violent offending) has been decreasing, the prison population has been increasing. That seems counter-intuitive. But there are some explanations that need to be accounted for. One is that violent offending, other than the most serious, has increased. Domestic violence,

---

1 The World Justice Project *Rule of Law Index: 2017–2018* (Washington DC, 2018) at 20.

2 J S Kós "Better Criminal Justice" (Address to Victim Support Manaaki Tāngata, Wellington, 27 March 2018): available on the Courts of New Zealand website.

which we recently described in a judgment as one of the scourges of New Zealand society,[3] is a significant part of that, because the increase in violent crime is most manifest in non-public places. That is, in the home.

[11] A second explanation is that that it is important to distinguish between reported crime and conviction rates. Reported crime may fall, yet conviction rates rise with increased policing and scientific crime-fighting techniques. It is a curious fact that the number of police officers and the number of prisoners in New Zealand track quite closely over the last century, though of late there has been a divergence with prisoners climbing ahead.

[12] A third factor is that, abetted by legislative changes in 2013,[4] we have hardened our attitude (as a society, and as judges) to the granting of bail. We have almost 3,000 remand prisoners in New Zealand. That compares to less than 750 in 2000. Presently, 28.5 per cent of our prison population is on remand. In England and Wales it is 11.4 per cent.

[13] While we are comparing international statistics, it is instructive to look at the incarceration rates that apply in like-minded nations whose value systems we broadly share.

[14] We currently imprison 217 people per 100,000 members of the population. The OECD average is 127. Australia — no shrinking liberal violet as we know — imprisons 167, though there is huge variance between individual states and territories. England and Wales, 143. Canada, 114. Norway, 74. Denmark, 59. Sweden, 57. Finland, 55. The last time New Zealand had incarceration rates like the Scandinavian countries now have was in 1965.

[15] A decade ago the average New Zealand prison sentence length was 15 months. Today it is 18 months. The increase has been steady across the decade. In Norway, the average sentence length is eight months — less than half New Zealand's figure.

---

3 *Solicitor-General v Hutchison* [2018] NZCA 162 at [27].

4 Bail Amendment Act 2013.

[16] In the 1980s the effective length of a life sentence for murder was about nine years. By 2013 it was 16.5 years. Sexual offending and class A drug offending have also seen dramatic increases in sentence lengths.

[17] Each prisoner costs $100,000 per year to maintain in prison. The present prison roll — 10,700 — costs over a billion dollars a year. Longer sentences represent a significant part of that cost, and they represent a significant diversion of funds from other constrained central government funding needs such as education and health.

[18] Given that fact, it would be good to have some evidence that increased sentence lengths actually do some good. I am yet to see any convincing evidence that sentence length deters either the specific offender or the criminal (or potentially criminal) population generally.[5]

[19] Instead the evidence is that incarceration increases recidivism.[6] Prisons teach crime, and longer sentences disable prisoners from going straight. Extra sentence years might keep prisoners off the street, but they also increase the level of recidivism on release. They defer, but then reinforce, public safety concerns.

[20] It is not prison sentences that deter. It is the prospect of detection and capture. As Catherine the Great noted in 1767, "[t]he most certain curb upon crimes is not the severity of the punishment but the absolute conviction in the people that the delinquents inevitably will be punished." That is where deterrence efforts need to be focused.

[21] I should not want you to misunderstand me. Prisons are good places for bad people. They are places in which the dangerous should be kept. But not — as I will come to in a moment — the mentally challenged. And those persons who genuinely have decent rehabilitation prospects, especially those who have little criminal history or who are not a significant danger to society, should spend as little time there as is commensurate with the need to denounce their offending.

---

5 See for example Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, Cambridge, 2015) at 86 and 305.

6 At 305–307.

[22] That is the approach taken in Iceland. Interestingly, it is the highest rating place on Earth for safety, according to the Global Peace Index.[7] And yet it has an even lower incarceration rate than the other Scandinavian countries I listed before. Just 45 out of 100,000 citizens — compared to our 217.

[23] On the same Global Peace Index New Zealand comes second.[8] That contrast might suggest we have our balances slightly wrong.

[24] I mentioned the mentally challenged. Roughly 60 per cent of sentenced prisoners have mental health issues, and almost 70 per cent have mental health or addiction issues. As I said in March, this is hardly a surprise. The deinstitutionalisation of formal mental health treatment has resulted in reinstitutionalisation of those who need that treatment in prisons instead.

[25] The rejigged Waikeria Prison is to have a 100-bed mental-health facility. In one sense that is cause for congratulation. But in another it is simply a recognition of a tragic failure earlier in the offender's lifecycle.

[26] The criminal justice summit will focus on these matters, and on the alarming ethnicity breakdown of our prison population: while Māori make up 15 per cent of the general population, they make up 57 per cent of the male prison population and 64 per cent of the female prison population. As I said in March, these figures reflect the misdistribution of economic and educational poverty in this country, and are a sorry stain upon our national character.[9]

Three suggestions

[27] I want to offer three short, sharp suggestions.

[28] **Suggestion 1**: First, we need different institutions. We have a binary corrections system: prisons and community (that is, home) detention. There need to

---

7 Institute for Economics & Peace *Global Peace Index 2018: Measuring Peace in a Complex World* (Sydney, 2018) at 8.

8 At 8.

9 Kós, above n 2, at 9.

be intermediate alternatives. In Scandinavia many prisons are open institutions which provide that intermediate option. They are places which non-dangerous prisoners must attend. But they are humane. No walls, watch towers or barbed wire. In some, no guards. Liberty is significantly restrained, but there is some semblance of normality. Interaction with the community remains possible; some measure of employment remains possible. It is a prison, but not as we know it. And we need it.

[29] **Suggestion 2**: My second suggestion is for more flexible sentencing options. Institutional reform is part of that. But there is more to it than that. Presently, where an offender is not dangerous, and a suitable address is available, he or she will be eligible for home detention if their sentence is two years or less.[10] But there are two serious problems with that legislative rule.

[30] There is the arbitrary barrier of the two-year sentence. The therapeutic advantages of home detention mean that distortive sentencing is resorted to in order to get sentences under two years for the right candidates. In the United Kingdom, home detention is available for a sentence of up to four years. In Norway, there is no relevant limit.

[31] We should consider following suit. And we should also provide that, with good behaviour and community service, the length of sentence may be reviewed, rebated, and reduced retrospectively.

[32] The second problem is that what often stands in the way of a home detention sentence is the absence of a suitable address. The offender has no home, or the victim lives in it, or no one suitable will take him or her in.

[33] As I said in March, here we have someone who is not dangerous, who is otherwise eligible for home detention — and simply because we have not thought up any alternatives to prisons, he or she has to go and spend time in one.[11] That is

---

10 Sentencing Act 2002, ss 15A and 26A(2).

11 Kós, above n 2, at 12.

reprehensible. It is discriminatory against the already disadvantaged, and it demonstrates a woeful want of imagination on society's part.

[34] **Suggestion 3**: My third proposition is that we need to have the collective courage as a nation to consider reducing sentence lengths. As I pointed out in March, we are not the first country to stand in this position, gazing over what almost seems to be a penal precipice.

[35] In the 1950s Finland had incarceration rates similar to ours now. It appreciated it was out of step with its Nordic neighbours, and that that state of affairs could not continue. It reconsidered the aims of its criminal justice policies. It looked at the issue, with pure Nordic logic, in terms of cost benefit analyses. Its policy was to combine minimisation of cost and criminal harm, and fair distribution of those costs across the three interest groups: victim, offender and society.

[36] A key part of the Finnish reforms was the reduction of sentence lengths. In 1950 the average Finnish sentence of imprisonment for theft was 12 months. By 1971 it was seven months, and by 1991 three months. In Norway, the average prison sentence is eight months. As I said earlier, in New Zealand it is 18 months, and climbing.

[37] We need to think about this option very seriously. I raise two points.

[38] First, we begin in the curious place noted earlier. Happily, we have an exceptionally safe society (second only to Iceland). Unhappily, we incarcerate excessively. It is a case of adjusting the balance. The cost savings can then be applied to more therapeutic criminal justice interventions and to other needs such as general societal health and education.

[39] Secondly, we surely would only *not* take this course if we were very sure that increased sentence lengths had a beneficial deterrent effect on criminal offending. And an effect that outweighed the disadvantages of impaired rehabilitation and increased recidivism. So, I say, let's see the evidence that supports the out-of-kilter state of affairs that we have adopted.

Better civil justice

[40] I want to discuss two topics in this part of my address: unrepresented litigants and written witness statements. But really this is all about a single topic: the unsustainable cost of civil litigation, and its consequences. The rule of law depends on two things: accessibility to the institutions of justice and the accountability of one citizen to another where rights have been infringed. Unsustainable litigation cost impairs both, and thereby the rule of law.

[41] Hayne J, recently retired from the High Court of Australia, put the point trenchantly in an article entitled "The Australian Judicial System: Causes for Dissatisfaction", published in the Australian Law Journal earlier this year:[12]

> Australia has long since reached the point where contested civil litigation in the superior courts is beyond the purse of any but the wealthiest enterprises, the insured, or those very few who can qualify for some form of legal aid. … The judicial system is not serving those who cannot, or will not, resort to it for the determination of disputes. … Cost and delay, together, are important considerations for those who could resort to the court but prefer instead to go to arbitration. To those who cannot or will not submit their disputes to determination by the courts, the judicial system is simply irrelevant.

[42] He went on to say that if time and cost are the chief problems (and they are), "[t]he Courts must respond by changing the way in which litigation is conducted and judges do their work lest the judicial system become irrelevant".[13]

Unrepresented litigants

[43] The tide of unrepresented litigants clogging the courts with their rag-tag, rag-bag claims either devoid of merit (but replete with pleadings, replications and reasons) or, tragically, replete with merit but devoid of proper pleading and reasons, are the direct product of the crisis in civil litigation we now confront.

---

12 K M Hayne "The Australian Judicial System: Causes for Dissatisfaction" (2018) ALJ 32 at 42–43.

13 At 32.

[44] While this tide has risen before us, we have simply tinkered with the institutions charged constitutionally with resolving disputes necessary to maintain a civil society. Some reforms have been pallid indeed: the odd adjustment of jurisdictional limits – when the litigant can afford neither court nor counsel in the first place. As one litigant interviewed by Otago University's Dr Bridgette Toy-Cronin said plaintively, "you can't pay $500 per hour when you earn $500 per week."[14]

[45] And some reforms have simply failed: the District Court's foray into plain language and forms in place of pleadings was a descent into chaos and confusion. It has been knocked on the head, but the experiment is an ominous warning for the future of online courts. However, to simply return to the status quo ante does not solve the problem which caused the misguided reform in the first place.

[46] I have written at some length on this subject already, in a piece called "Civil justice: Haves, have-nots and what to do about them" published in the Australian Journal of Civil Litigation and Practice.[15] I will assume for present purposes that there is consensus that unrepresented litigants are a significant problem — in terms of access to justice for those unable to present their own case, in overlooked merits not being vindicated, in all the difficulties for the judge in evening out the uneven playing field, and in all the delay and cost associated with the confusion caused by misconceived claims. I turn to what might be done about the problem.

[47] The conventional answer offered is to modestly alter the institutions of justice, but impose an immodest impost on the legal profession (it being assumed that no sufficient funding can be secured from Government for added legal aid). Instead the unmet need for representation is to come from pro bono assistance by the legal profession. That is an admirable idea as far as it goes, which here is not that far in fact. But in Queensland for instance, the profession has made a significant contribution in this way via the Queensland Law Society Pro Bono Scheme. The Society operates a clearing house; a merits assessment is made and meritorious

---

14 Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis, University of Otago, 2015) at 87.

15 J S Kós "Civil justice: Haves, have-nots and what to do about them" (2016) 5(3) Journal of Civil Litigation and Practice 178.

claims are referred at large to participating firms. They may then offer to take them up and negotiate terms (including the payment of some costs and disbursements).

[48] But despite a clarion call from Winkelmann J in her 2014 Ethel Benjamin address,[16] and despite the existence of a scattering of schemes by particular firms or driven by law schools and students, the profession has not yet risen to the challenge in any systematic way.

[49] In my article I advanced two alternative suggestions.[17] They are the fourth and fifth of my suggestions tonight.

[50] **Suggestion 4**: The first was that it be mandatory for initial pleadings in all cases to be certified by a lawyer.[18] Usually pleadings are prepared by a lawyer. But in other instances, where a litigant in person is involved, civil legal aid to that extent should be provided to ensure that good arguments are identified and really bad arguments jettisoned. The net cost of this proposal would be far less than the transaction costs of bad litigation processes that arise in its absence.

[51] Once of course a writ system operated in the High Court. In Denmark and Sweden it still does. No proceeding is permitted to issue from the courts in those states until the pleadings advance a seriously arguable cause of action. In that country the review is undertaken by a junior judge. We do not have the civilian judicial career path, so it is not a model we could follow exactly. But a combination of modestly enhanced civil legal aid and focused pro bono assistance could work wonders here.

[52] **Suggestion 5**: My second proposal was rather more radical. It was that special list be developed in the District Court for unrepresented litigants who wanted representation but genuinely could not afford it.[19] And that the cases in that list proceed without legal representation by any party and with the Judge conducting the case in the civilian way — including leading the questioning process at trial

---

16 H D Winkelmann, "Access to Justice — Who Needs Lawyers?" (Ethel Benjamin Address, 7 November 2014).

17 Kós, above n 15.

18 At 185.

19 At 188.

(and promptly producing a brief judgment). The details are in the article and I won't weary you with them now.[20]

[53] The idea provoked modest interest two years ago, but hardly an outpouring of support. That is perfectly fine; perhaps it is just too alien an idea; perhaps it is just a bad idea. But meanwhile the problems associated with unrepresented litigants pile up unresolved. We have to do something about it which goes beyond endless hand-wringing.

[54] So I have a third suggestion, less alien than the second, which I will advance later in this address when I talk about structural reforms. It concerns the role of the Disputes Tribunal.

Written witness statements

[55] Hayne J is scathing of the practice of exchanging full written witness statements:[21]

> Procedures introduced with a view to expediting the trial of civil proceedings, like providing written witness statements, were treated as new cost centres. The preparation of witness statements was turned into a prolonged and expensive exercise in legal drafting of pleading and argument, rather than producing a simple and accurate record of what a witness would say in answer to non-leading questions about matters and events of which that witness could speak from personal knowledge.

[56] Later he describes them as "beautifully crafted witness statements which sometimes had some connection with what the witness may say".[22]

[57] I share that reservation. I recall a witness statement I received which began "I will not here adumbrate the various claims my wife has made against me". The witness proved to have no idea what the word "adumbrate" meant.

---

20 At 188–189.

21 Hayne, above n 12, at 35.

22 At 36.

[58] But even more importantly, the cost of drafting full sets of witness briefs is often prohibitive — and Hayne J is right to say it has become a cost centre. These briefs tend to include any kitchen sink within grasp, and are solemnly read out in full even if the issues in the trial have narrowed. Similarly, they invite excessive "cover all bases" cross-examination. If we want to do something about litigation costs we need to re-examine the role these statements play. Especially in the District Court.

[59] Most often these beautifully crafted statements never get near a courtroom. I do not overlook the reality that witness statements marginally enhance the prospects of settlement. But I do not think we should overstate that benefit. The backbone of any contested case (and, I might add, the judgment issued in that case) is the contemporaneous record, rather than direct declarations. In other words, discovery is far more important to both settlement and outcome than written witness statements. And it is discovery that is the best protection against "ambush" – the other prevalent argument in favour of full written briefs.

[60] We reformed the discovery rules some years ago along the Scottish lines: only documents of direct relevance (on an "adverse effects" test) form part of standard discovery orders, and anything more must be the subject of specific orders.[23] Why, though, did we not adopt a like reform for written witness statements? That left the job half done, and left the easier aspect growing rampant and unpruned.

[61] In fact in 2008 and 2009 there was Rules Committee consultation on changing the status quo. Most submitters sought reform of some sort, but the Law Society was opposed. Asher J advanced a case at that time for moving to "will-say" statements, which simply summarise the essential evidence of a witness on key issues.[24] But the proposal was not adopted.

[62] **Suggestion 6**: A decade later, with costs of litigation still a critical obstacle to access to justice, we need to revisit that thwarted reform. I think the costs of pre-trial preparation is a significant obstacle and that detailed written statements are a

---

23 High Court Rules 2016, rr 8.7–8.8; and District Court Rules 2014, r 8.7–8.8.

24 See Rules Committee *Minutes of meeting held on 30 March 2009* (Circular No 42 of 2009, 6 April 2009) at 4; and Rules Committee *Minutes of meeting held 8 June 2009* (Circular No 56 of 2009, 23 June 2009) at 10–11.

significant part of that. If we are to cut back cost, we need to cut back written statements. Will-say statements are the primary alternative mechanism used — quite satisfactorily — in Victoria's Common Law Division, in Scotland and in many other very reputable civil jurisdictions. They represent one option, and might be adopted as a displaceable default position. Expert statements would still be exchanged in full. A reform like that would simply be consistent with what we did with discovery. That has hardly been a disaster; quite the contrary — and despite discovery's central importance to fair process. And like discovery, tailored orders for fuller witness statements on specific issues, in complex cases, might be made where justification can be demonstrated. That is the Victorian approach.

Better structural justice

[63] I turn now to the structures by which we deliver justice. I will focus on two points in the time available. The first returns to the question of unrepresented litigants, the place of the District Court and (especially) the role of the Disputes Tribunal. The second concerns the appellate pathways between the District Court, High Court and Court of Appeal.

Reforming the Disputes Tribunal

[64] As Hayne J said in his Australian Law Journal article, "Australia has long since reached the point where contested civil litigation in the superior courts is beyond the purse of any but the wealthiest enterprises, the insured, or those very few who can qualify for some form of legal aid".[25] My clear impression, however, is that the same may also be said of contested District Court litigation, where essentially the same procedural rules apply as in the High Court.

[65] **Suggestion 7**: It seems to me that it is a very basic idea that the structure be commensurate to the case. Individual litigants and small businesses struggle with the cost structures even of the District Court, which replicate the Senior Courts processes. A course that needs to be examined, therefore, is whether the jurisdiction of the Disputes Tribunal should not be very substantially increased — well beyond the

[25] Hayne, above n 12, at 42.

current $15,000–20,000 limits — to provide greater recourse to more evenly balanced independent decision-making for lower-end civil litigation where District Court litigation costs remain prohibitive. We need to identify the point at which the current District Court processes have become practically unaffordable. Practitioners whom I know say that it is very difficult to run a contested case involving less than $100,000. If that is so, we need a justice system suited for cases of that order and below.

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

Appellate pathways

[67] My final subject is appellate pathways between the Courts. I talked about this in a paper called "A Short History of Appeal", which I gave at the University of Canterbury late last year.[26] In that paper I talked about the workload of my Court, and offered a few salutary statistics. I do not propose to repeat them tonight.[27]

[68] My concern is with aspects of the Criminal Procedure Act 2011 which enable too many appeals to leapfrog the High Court. Last week we sat in Dunedin. It was a heavy enough week, but it included two pre-trial appeals from pending District Court jury trials. They had to come to us because they were jury trials, but on any sensible view they should have been dealt with by a single High Court Judge.

---

26 J S Kós "A Short History of Appeal" (Australia and New Zealand Law and History Society Conference, Christchurch, December 2017): available on the Courts of New Zealand website.

27 At [81]–[84].

[69] The Criminal Procedure Act also provides that conviction appeals from most District Court jury trials (and all trials in the High Court) come to the Court of Appeal.[28] Sentence appeals for a category 3 offence (where the sentence is more than five years), a category 4 offence or a sentence imposed in the High Court go to the Court of Appeal.[29]

[70] So there are two problems. Too much work in the Court of Appeal, and too many appeals bypassing the High Court.

[71] **Suggestion 8**: As I said in my "Short History of Appeals" paper, the right solution will take time to emerge.[30] But it *might* include the following – my eighth and last suggestion for this evening.

[72] First, that all District Court pre-trial appeals go to the High Court (to a single Judge). Secondly, that all judge-alone conviction appeals in the District Court be heard by a panel of two judges in the High Court (with transfer to the Court of Appeal in the event of disagreement). Thirdly, that the Court of Appeal be given the power to refer District Court jury-trial conviction-appeals to the High Court where no point of general importance arises on the appeal. Fourthly, that the same principles apply to sentence appeals. Fifthly, that cautious consideration be given to whether a leave requirement be introduced for civil appeals — as in Victoria — requiring aspirant appellants to demonstrate their proposed appeal has a real prospect of success.

[73] As I also said, we must not simply export a problem to the High Court. Any robust solution lies in a more logical allocation of appeals, reducing the degree to which appeals from the District Court leapfrog the High Court, and resourcing the High Court appropriately to handle any additional work it would have to undertake.

No reira tena koutou, tena koutou, kiora tatou katoa.

Thank you for your very kind attention tonight. Thank you, and good night.

---

28 See Criminal Procedure Act 2011, s 230.
29 Section 247.
30 Kós, above n 26, at [90].