The Rules Committee
Te Komiti mō ngā Tikanga Kooti

15 March 2021

C 2 of 2021
Interim Report from Access to Civil Justice Judicial Sub-Committee

Tēnā koutou,

Please find attached for consideration an interim report from the access to civil justice judicial sub-committee (C 2 of 2021). This sets out at a high level the sub-committee's recommended reforms of the civil justice system, based on its review of the submissions received in response to the Committee's initial consultation. The sub-committee seeks the Committee's in principle approval of the proposals and the sub-committee's proposed next steps in advancing the proposed reforms.

Nāku iti noa, nā;

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THE RULES COMMITTEE
TE KOMITI MŌ NGĀ TIKANGA KOOTI

JUDICIAL SUBCOMMITTEE ON ACCESS TO CIVIL JUSTICE

To: The Rules Committee
From: Judicial sub-committee on access to civil justice
Date: 15 March 2021
Subject: Proposed Civil Justice System Following Consultation

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[1] This paper sets out the recommendations of the judicial sub-committee (comprising the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, the Chief District Court Judge, Cooke J and Kellar DCJ) on the civil justice reforms. The proposals draw on the common themes of submissions made during the Committee's earlier consultation.[1]

[2] The submissions that have been received suggest a need to consider the civil justice system as a whole. In the sub-committee's view it is necessary for any proposals in relation to the rules to be considered in light of the civil justice system generally. As such, the recommendations below extend beyond changes to the rules of court. Many of the suggestions below involve proposals for legislative reform, and policy decisions by Government. It is proposed that the Chair and Chief Justice engage with the Attorney-General and the Minister of Justice on those matters and that the Committee undertake a further round of consultation given the potential changes to the rules.

[3] It is also suggested, as an ultimate goal for this phase of the reform effort, that the Committee formulate a report to Government on the proposals it makes, following engagement with the Attorney-General and Minister and an assessment of further submissions received. The Committee would then be in a position to consider reform of the Rules on the proposals, having regard to the views of Government.

[4] The proposals outlined below are materially different from those that were the subject of prior consultation. They seek to respond to the views that have been provided

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1 Which were circulated for consideration at the Committee's meeting of 21 September 2020 as C 25 of 2020, and which are also available to view on the Committee's section of the Courts of New Zealand website.

during consultation, and in particular seek to build on the areas where there was common ground amongst submitters to the extent that the sub-committee believed that reforms were appropriate. A summary of the proposals is provided at [52] below, and the proposed decisions of the Committee are at [53] below.

[5] It is also appropriate to record at the outset that a common view of submitters, and the judicial sub-committee, is that there are significant shortcomings with the overall civil justice system. That is reflected in the submissions that have been received from community groups relating to the social, cultural, and economic barriers to access to civil justice. Such views are consistent with the views of the profession, and other submitters. The proposals below are an attempt to address some of these concerns in a comprehensive way.

[6] By way of summary the proposals outlined below involve:

(a) recommending that legislation be enacted to increase of the jurisdiction of the Disputes Tribunal, and recommending a number of specific proposals to enhance that Tribunal's role in the civil justice system;

(b) reforming the District Court to restore its institutional competence for dealing with civil claims; and

(c) reforming procedure in the High Court to streamline its processes, especially in terms of the conduct of trials, and to encourage early judicial engagement.

The Relevant Concerns

[7] The Committee's approach should reflect the wide-ranging concerns raised in the submissions received. Submissions from community groups said that community members' sense of "justice" requires that everybody 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, perhaps above all expeditiously, identified. It is therefore of concern that submitters to the Committee's initial consultation identified numerous respects in which, practically, various classes of

individuals' access to civil justice is impaired. The facets of access to civil justice canvassed in submissions were as follows.[2]

[8] First are financial barriers. Litigation, as a mechanism for obtaining resolution of civil disputes, has long been perceived as beyond the financial reach of most New Zealanders,[3] which concerns the Committee acknowledged in the consultation papers. Submitters, including academics, individual lawyers and their professional bodies, and community organisations, confirmed this impression. There was particular concern that a broad range of disputes – those too high in value to be resolved in the Disputes Tribunal, but uneconomic to litigate in Court (which range was variously estimated by submitters as between $35,000 and $100,000 to $500,000) – simply cannot be litigated by the average New Zealander.

[9] The concerns raised under this heading can be further divided as follows:

(a) As a matter for which the Committee is primarily responsible, 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 a proceeding, 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 other mechanisms which the absence of which from New Zealand's rules may impede the efficient just disposition of cases. All of this serves to render going to Court more expensive, and the litigation of certain cases uneconomic, without any benefits in terms of doing justice.

(b) Relatedly, the existence of a practice culture among litigators that means counsel do not take advantage of the existing potential within the rules for the tailoring of procedural requirements to the needs of each case,

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2 These parallel the facets of access to civil justice noted by the Law Commission "*Class Actions and Litigation Funding* (NZLC IP 45, December 2020), citing Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 Ga L Rev 1 at 59at [1.9]-[1.5].

3 See, for example, Rob Stock (Many Kiwis just can't afford to fight rip-offs and sue companies, Justice Minister says" (2 February 2020), Stuff <www.stuff.co.nz>; and, further, Law Commission, above at [1.9] n 5.

resulting in a typically maximalist approach to litigation. Submitters attributed this to a range of causes, including:

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

(ii) an unawareness on the party of counsel of their obligations to their clients and the Court to pursue a proportional approach in litigation;

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

(iv) a perceived need amongst lawyers to adopt a "defensive lawyering" posture of leaving no stone unturned to avoid accusations of negligence.

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

[11] Similarly, a related concern is that judges are either 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 extreme restraint; others to an absence of adequate resourcing to allow judges to meaningfully supervise and restrain the conduct of proceeding.

[12] Submitters also noted the sheer expense of obtaining legal representation, however expeditious the rules of court may be, or whatever incentives the costs regime provides for efficiency, will place access to civil justice beyond the reach of many. While some senior members of the profession argued it is not improper for lawyers to charge for their expertise, others, such as Philip Skelton QC, identified that there is an argument

for regulation of the fees charged by lawyers, as is the case overseas, given the monopoly lawyers enjoy on rights of audience before the Courts as the interface between citizens and the Courts, and the fundamental nature of the right to access to civil justice. The magnitude of this issue appears to be growing over time. In her submission, Dr Toy-Cronin noted that, while the median weekly income rose by only 3.4% between 2015 and 2016, the average charge-out rate for employed lawyers rose by 8.4 per cent in that period, suggesting the cost of legal services is outstripping the average New Zealander's means of meeting that cost.

[13] 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.

[14] Relatedly, 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 even self-represented litigants in accessing civil justice.

[15] Finally under this heading, 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. Particularly in that category, the inability of self-represented litigants to receive an award of costs reducing the extent to which they are left out of pocket even after prevailing, once explained to them, had a chilling effect on their going to Court.

[16] As this final point reflects, psychological barriers were put on the same level as financial barriers as an impediment to access to justice by submitters. This was particularly so with members of the wider community who submitted, and organisations often involved in advising indigent litigants, such as the Citizens Advice Bureau and the Porirua Kāpiti, Waikato, Canterbury, and Waitematā Community Law Centres, and Youth Law Aotearoa, who took the time to submit.

[17] As the Porirua Kāpiti Community Law Centre capably summarised it in their submission, in interacting with the Courts, many of their clients experience what in Te Ao

Māori is experienced 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.

[18] This statement, which accords with several other submissions, highlights two related further barriers to all members of the community realising access to civil justice. These are cultural and informational in nature. The cultural barriers are outlined above.

[19] As to informational barriers, this was perhaps one of the most significant issues raised by community-based submitters. At a general level, 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, their clients facing judgment for debt claims against them were unlikely to seek advice until facing enforcement proceedings, even where they had a good defence, not appreciating the difficulties involved in beginning their defence of the claim at that juncture.

[20] So far as the requirements imposed on court users are concerned, submitters noted the highly technical nature, and often academic presentation, of legal information confuses many intending litigants. This was stated as rendering them afraid that technical mistakes would vitiate their claim, and, in turn, as forcing individuals to be more reliant on lawyers for advice. It also tends, in the Community Law Centres' view, to defeat the desire to have people understand the reasons for outcomes, undermining the sense of

justice having been done. Dr Bridgette Toy-Cronin of the Otago Legal Issues Centre, in her submission, joined the Community Law Centres in emphasising that the provision of clear, succinct, information accessible to all Court users is essential, which needs to outline what the process involves, the timeframes involved, their obligations, and where to quickly and accessibly afford help.

[21] It was accepted that the Ministry of Justice has done good work in providing information of this type through website, such as by providing templates for statements of claim and similar. This information is not however, in the submitters' views, comprehensive explained, nor delivered in sufficiently plain English. Nor is it accessible to those with limited access to the internet.

[22] 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, as the Committee's primary responsibilities, are aimed. It also raises questions about the extent to which the assumptions on which the rules are predicated are apt to respond to widely held ideas of what justice entails. More generally, it points to the need for responses that extend beyond the competence of this Committee to deliver.

Disputes Tribunal

[23] As noted, one of the common themes in submissions was the general desirability of civil dispute procedures that are more accessible, that involve greater judicial involvement early in the process, and which are more affordable.

[24] The sub-committee gave thought to adopting inquisitorial style models in the District Court and High Court to achieve this as some submitters suggested, and as was proposed in the consultation material. Submitters also raised alternative structures of a similar kind. While the suggestions below in relation to the District and High Courts have been influenced by the support for processes of this kind, the sub-committee is of the

view that the greatest call for such procedures arises with respect to smaller claims, such as those already dealt with (where valued at less than $35,000) in the Disputes Tribunal.

[25] There was general support in submissions for treating the Disputes Tribunal as an exemplar of how an adjudicative body can effectively and justly provide dispute resolution in a streamlined manner featuring early engagement by the decision-maker, and without the costs associated with legal representation before a decision-making body.

[26] As noted, the Disputes Tribunal is one of a group of tribunals that deal with smaller civil disputes. Other tribunals in this group include the Tenancy Tribunal, the Motor Vehicle Disputes Tribunal and the Employment Relations Authority. The significance of the Disputes Tribunal, from this Committee's perspective, is that it is formally a division of the District Court.[4] (s 9 District Courts Act 2016). It deals with all small claims that are not dealt with by the tribunals in the specialised jurisdictions. As follows, reforms directed to the Disputes Tribunal are directed at the civil justice system more generally.

[27] The sub-committee consulted with the Principal Disputes Tribunal Referee. She has advised that the Tribunal deals with approximately 13,000 claims per year. The referees are part-time, working approximately three days a week. They are paid a daily fee. Claims are addressed at meetings, and it is common for there to be several meetings to deal with one claim. A referee would deal with approximately three claims a day.

[28] One of the advantages of extending the role of the Tribunal is that it already operates in the "inquisitorial"[5] way advocated by many submitters, and the Tribunal members have knowledge and experience of determining dispute resolutions in that way. There are also existing training and other support systems provided to Tribunal members. One concern about introducing this approach in the District or High Court is the lack of current experience or expertise in this form of dispute resolution. The sub-committee's

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4 District Court Act 2016, s 9.

5 The sub-committee notes that 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.

view was that it is preferable to expand the role of the Tribunal already operating in that way, rather than re-training Judges to do so.

[29] Given the positive feedback from submitters about the Tribunal, the extensive existing systems already established and operated by the Tribunal, and the Principal Referee's assessment that it would be able to deal with an increase of jurisdiction, increasing its jurisdiction would appear to provide an appropriate response to some of the access to civil justice concerns noted in submissions.

[30] Submitters suggested a range of extended jurisdictional limits for the Tribunal of between $50,000 and $100,000.[6] Given the views of submitters and commentators that bringing claims in the District Court is uneconomic in cases for less than $100,000, there is an argument to increase the jurisdiction to this level.

[31] However, it is the sub-committee's view that the jurisdiction be increased only to $50,000. There is a point at which what is financially at stake reaches the stage where a decision by a body such as the Tribunal would require a more extensive right of appeal and where the amount at stake would justify the involvement of lawyers. The existing right of appeal to the District Court under s 50 of the Disputes Tribunal Act 1988 is based primarily on a procedural unfairness rather than error of law. If the jurisdiction is increased to levels beyond $50,000, it may be appropriate to have an appeal right of broader scope, but not one that undermines the desirability of the Tribunal effectively operating as an inexpensive and efficient place for resolving claims. Perhaps a right of appeal involving decisions that are "manifestly unreasonable" might then be appropriate.[7] If a more extensive right of appeal to the District Court is contemplated, it may also be that claimants should be entitled to appear in person on such appeals, even if the claimant is an incorporated body. If a more extensive right of appeal were introduced the District Court may find a larger number of appeals from Tribunal decisions.

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6 The jurisdiction was only recently increased from $15,000 to $30,000 in October 2019: Tribunals Powers and Procedures Legislation Act 2018, s 35(2).

7 Adopting part of the standard set out in s 52(1) of the Legal Services Act 2011 for appeals from the Legal Services Commissioner to the Legal Aid Tribunal (the other being that the decision was "wrong in law").

[32] The exact level of the new limit of the Tribunal's jurisdiction can be considered as part of consultation. In addition, experience may suggest that the jurisdiction can be increased in future. The existing power for the Tribunal to transfer a proceeding to the District Court would remain.[8]

[33] There are other changes to the Disputes Tribunal that may be advisable, some of which would need to be implemented through primary legislation. In particular:

(a) the Disputes Tribunal should be renamed, potentially as the Small Claims Court,[9] or Community Court,[10] to more accurately identify its standing as a division of the District Court, which would also be commensurate with any increase in its stature within the civil justice system;

(b) consideration should be given to increase the daily rates for referees given the need to attract referees who are able to deal with claims of higher value;

(c) the Tribunal should be allowed to make decisions to waive filing fees (a power for which the it has been pressing), regulations for which purpose could be made pursuant to s 231(1) of the District Courts Act 2016;

(d) the Tribunal should also be granted a limited costs jurisdiction, and an express ability to award disbursements (for example, in respect of specialist reports obtained by claimants); and

(e) consideration should be given to having a more effective or straightforward way for successful claimants to enforce a successful award.[11]

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8 See Disputes Tribunal Act 1988, s 36.

9 The Disputes Tribunals replaced the Small Claims Tribunals from 1 March 1989: Disputes Tribunals Act 2016, ss 1A and 76.

10 See the recommendation that this be the name of the primary civil trial court for minor cases (as the Disputes Tribunal would essentially become under this proposal) in Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at pt 4.

11 At present, this requires an application be made to the District Court, which would not be commensurate with the envisaged role of the Disputes Tribunal as a primary civil trial court for minor cases.

District Court

[34] The sub-committee considers that there are clearly problems with the civil jurisdiction in the District Court. Resolving the role of this Court in the overall civil justice system is also important in addressing the concerns outlined in the submissions.

[35] The sub-committee considers that the main problems do not lie with the rules operated in that Court. Indeed part of the reason for the Court's apparently 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 to make the District Court more accessible for self-represented litigants. Ultimately, the Rules Committee accepted these reforms had not been successful, and the current Rules were introduced in 2014, with the explanatory note to those Rules referring to the "widespread dissatisfaction" with the 2009 reforms among practitioners.

[36] The 2014 rules have remained largely unaltered since that time. They were based on the Rules Committee's assessment of international best practice as to how to introduce more streamlined civil dispute resolution involving short form trials, an initial judicial conference and potentially a judicial settlement conference. It is the sub-committee's view that these provisions remain, in themselves, fit for purpose.

[37] Under Part 10 of the District Court Rules, a trial in that Court can be a "short trial", a "simplified trial" or a "full trial". The processes for short and simplified trials are designed to ensure proportionate procedures depending on factors such as complexity and amount at stake.[12] At the first case management conference a Judge decides whether the proceedings is to involve a short trial,[13] and if a short trial is not allocated, a judicial settlement conference must be convened unless the Judge directs otherwise.[14] These rules appear to address many of the concerns raised in submissions that there be proportionate procedures and early judicial engagement.

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12 District Court Rules 2014, r 10.1.
13 Rule 7.3(3)(c).
14 Rule 7.2(3)(d).

[38] But the District civil jurisdiction does not appear to have fully recovered from the 2009 reforms. In part, that is due to the significant demands on judicial resources in the criminal jurisdiction, which has taken away resources from the civil jurisdiction. That difficulty will continue notwithstanding more recent District Court Judge appointments, particularly given the backlog created by COVID-19. There is also perceived to be a loss of civil expertise within Registry staff.

[39] Against that background the sub-committee does not recommend further major rule reform in the District Court. It is proposed that reforms be based on seeking to reintroduce the institutional resources within the District Court's civil jurisdiction to allow the 2014 Rules – which, as noted, are assessed as fundamentally fit-for-purpose – to operate as intended. The sub-committee considers that a series of steps should be taken.

[40] First, the sub-committee recommends that:

(a) the role of Principal Civil Judge for the District Court be created; and

(b) 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.[15]

[41] Secondly, the sub-committee recommends the introduction of part-time Deputy Judges/Recorders as has occurred overseas. Such Judges would be appointed from the profession to deal with civil cases on a part-time basis. For example Queen's Counsel who may be considering a judicial career might be expected to make themselves available to perform this role. [16] Other senior practitioners may also appropriately perform it. This would allow decisions to be made by persons with recognised civil expertise and would allow those persons to gain judicial experience. Such Judges could perform the role in a cost efficient manner and, given their part-time status, they could be employed as and when needed. It is considered that the role of such Deputy Judges/Recorders will assist in enhancing the civil justice expertise held by the District Court and would enhance the

[15] This may include the appointment of a Registry officer dedicated to dealing with claims brought by litigants in person.

[16] Performing such a role would also be consistent with the criteria (as amended in 2019) for appointment as Queen's Counsel in terms of supporting access to civil justice.

existing civil expertise held by District Court Judges with civil warrants. Implementing this proposal would require amendment of the District Court Act 2016.[17]

[42] Thirdly, the sub-committee recommends the adoption of at least one of the pre-action protocols for civil proceedings currently used in the United Kingdom.[18] One of the areas of concern raised by submitters, particularly community groups centred on the 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.

[43] The defendants to debt collection claims can frequently come from such groups. Pre-action protocols can assist in reducing such difficulties by requiring steps to be taken before proceedings are filed – such as plainly expressed communications with such defendants which are required before filing. This may also enhance the efficient utilisation of the civil jurisdiction, particularly in relation to debt collection. Having clearer procedures that must be followed before proceedings are brought in the Court may allow the debt collection process to be undertaken more fairly, and more efficiently.

[44] In the first instance the proposal is that the protocols only be employed for debt collection civil work for the District Court. There are other pre-action protocols in place in England and Wales that might usefully be introduced. However, the sub-committee is aware of suggestions that such protocols can in fact serve to impede access to civil justice and would recommend that the functioning of such protocols in the debt context be assessed before wider reforms in this area were pursued.[19]

High Court

[45] The sub-committee also considered the common ground in the submissions provided on the earlier consultation material which suggested changes to the approach in the High Court. The sub-committee agrees that changes should be made as set out

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17 See in particular District Court Act 2016, ss 17 and 30.
18 See Civil Procedural Rules (Eng), Pre-Action Protocols (12 February 2020).
19 See, for example, Victoria Law Reform Commission *Civil Justice Review* (VLRC R 14, 2008) at 109-110.

below. These changes should only be made in the High Court, although submissions could be invited as to whether these proposals should also extend to the District Court.

[46] A new more streamlined structure for general civil proceedings is suggested. This structure draws upon many of the suggestions made in the consultation process. It is proposed that this revised structure be used for all proceedings other than those where the complexity or nature of the issues (such as where fraud is alleged), or alternatively the amount at stake, warrants continued use of the existing procedures in the rules.

[47] Proceedings would commence by statements of claim and statements of defence in the usual way.

[48] The rules of discovery will be replaced by disclosure rules that operate when the statements of claim and statements of defence are filed, adapting the current rule for initial disclosure.[20] In summary:

(a) the party will disclose all of the key document it seeks to rely upon in support of its claim/defence of the claim;

(b) the party is also obliged to disclose adverse documents in accordance with the duty of candour; and

(c) additional disclosure can be directed by a Judge, including at the conferences referred to below.

[49] There would then be an initial issues conference held with a Judge, counsel and party representatives for each party. This would be an expansion of the issues conference currently contemplated under the Rules.[21] The plaintiff would be expected to explain its case and outline the evidence it has for establishing it. The defendant would have to do the same. The merits of the claim would be fully addressed and discussed. At the conference:

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[20] High Court Rules 2016, r 8.4; District Court Rules 2014, r 8.4.

[21] High Court Rules 2016, rr 7.3-7.4 and sch 5; District Court Rules 2014, r 7.4 and sch 3 pt B.

(a) the Judge would participate in identifying the key issues and what would be involved for a party to succeed or otherwise on those issues, and by those means may assist the parties resolving the claim without further litigation;

(b) any further interlocutory steps required for the fair disposition of the case would be identified (such as any additional disclosure);

(c) the requirements of the trial can be identified; and

(d) the potential for resolution by alternative dispute resolution, or judicial settlement conferences would be addressed.

[50] The guiding principle, in assessing what interlocutory steps were required, and how the trial would proceed, would be proportionality, including when deciding what further interlocutory steps are required, and assessing what will be needed for trial. This concept should be added to the purpose provisions in r 1.2 of the High Court Rules (and also r 1.3 of the District Court Rules).[22]

[51] Further issues conferences can be convened, if that is seen as appropriate for the proportionate disposition of the case.

[52] Interlocutory steps are presumed not to involve interlocutory hearings, but rather applications to be determined on the papers (unless directed otherwise, which would occur only where the convening of a hearing was proportionate to the complexity and importance of the issue in dispute, and of the proceeding as a whole).

[53] The trial is to involve changes to the current evidential rules and other practices. In particular:

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[22] This would replicate, to an extent, the provisions of ss 7–15 of the Civil Procedure Act (Vic), which speak identify "the over-arching objective" of civil procedure as being "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute".

(a) documents in the common bundle would be admissible as to the truth of their content subject to a challenge being advanced, revising the current rules set out in rr 9.4–9.6 of the High Court and District Court Rules and contrary to s 132 of the Evidence Act 2006 (which would require amendment);

(b) witnesses would not be expected to address the chronology of events revealed by the documentation, with the facts to be drawn from the documents instead expected to be outlined in a separate memorandum filed with the parties evidence (or perhaps in openings);

(c) the evidence at trial would be given by way of affidavit, with additional *viva voce* evidence in chief only on areas of significant factual contest – in particular, cross-examination would take place on the affidavits and the additional *viva voce* evidence, with the affidavits required to comply with the presumption referred to in (a) above, and required (perhaps more strictly than is the practice at present)[23] not to be argumentative or involve submission disguised as evidence;

(d) the use of expert evidence would be more tightly controlled, including by:

(i) making greater use of single Court appointed experts, paid for by both parties (the appointment of which would be addressed at the issues conference(s));

(ii) imposing, where separate experts are to be called for each side, a presumptive limitation of one expert witness per topic per party; and

(iii) providing that expert evidence is not to be received unless there has been a joint expert conference, except by leave.

[23] Rule 9.7(4) already contains requirements along these lines, though the clear impression to be taken from submissions by practitioners is that the requirement is neither strictly honoured nor enforced in all cases.

Summary of Proposed Reforms

[54] By way of summary, the judicial sub-committee proposes:

(a) increasing the jurisdiction of the Disputes Tribunal to $50,000, or possibly higher, subject to the views obtained on further consultation;

(b) changing the right of appeal for the Disputes Tribunal if its jurisdiction is extended beyond $50,000;

(c) re-naming the Disputes Tribunal the "Community Court" or "Small Claims Court";

(d) making further reforms to its procedures as summarised in [33] (b)-(e) above;

(e) appointing a Principal Civil Judge of the District Court;

(f) approving or restoring the civil registry expertise in the District Court, as overseen by the new Principal Civil Judge in conjunction with the Ministry;

(g) making use of part time Deputy Judges/Recorders for civil cases in the District Court;

(h) adopting of pre-action protocols for debt collection matters in the District Court, and considering the introduction of other pre-action protocols as operated overseas;

(i) introducing a new framework for the High Court civil jurisdiction involving:

(i) disclosure rules being introduced in place of the discovery regime;

(ii) an early comprehensive engagement with Judges at an issues conference;

(iii) interlocutories presumptively being be determined on the papers;

(iv) greater emphasis being placed on the documentary record to establish facts, with the documents admissible as to the truth of their content;

(v) evidence being given primarily by way of affidavit, supplemented by *viva voce* evidence only in areas of factual contest;

(vi) greater controls on expert evidence; and

(j) introducing proportionality as a guiding purpose of the Rules.

Recommendations

[55] The judicial sub-committee proposes:

(a) the Committee receive this report;

(b) that this report provide the basis for further consultation by the Committee;

(c) the Committee authorise the Chair to raise through and with the Chief Justice, the recommendations and proposed consultation process with the Attorney-General and Minister of Justice; and

(d) that on receipt of the submissions on further consultation, that the views of the Committee be formulated in a report to Government, which will subsequently guide future decisions of the Committee in light of the views of Government.