The Rules Committee
Te Komiti mō ngā Tikanga Kooti

Improving Access to Civil Justice

Further Consultation with the Legal Profession and Wider Community

Date of Issue:	Friday 14 May 2021 (Corrections Issued 1 June 2021)
Deadline for Submissions:	5.00 pm Friday 2 July 2021
Address for Postal Submissions:	Clerk to the Rules Committee c/- Auckland High Court CX10222 Auckland
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Introduction

1. By consultation papers dated 11 December 2019 and 2 May 2020, the Rules Committee consulted with the legal profession and the wider community on improving access to civil justice. Having considered the numerous submissions received, the Committee has identified potential reforms intended that might help in addressing barriers to accessing civil justice identified in submissions.

2. In this document, the Committee now sets out these proposed reforms, and invites comment from the legal profession, other court users, and all members of the wider community. The Committee is particularly interested in obtaining the views of community organisations with a role in assisting disadvantaged litigants and other persons with legal problems.

Background to Proposals

3. In its two initial consultation papers, the Committee sought views on four possible areas of reform, but also invited submissions on access to civil justice matters more generally. Those four areas were proposals 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.

4. A number of submissions were received in response. As well as responding to these four proposals, submitters raised issues concerning access to civil justice more generally. Although there were differences of view raised in the submissions, there were also areas of general agreement. An executive summary of the views expressed in submissions can be found on the Committee's website.[1] 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"[2] that has been "slow-burning for at least a generation".

(b) any effective response needs to go beyond rulemaking to promote cultural change in relation to the way civil litigation is practiced 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 justice, and what was 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.

5. At the Rules Committee's meeting of 21 September 2020 the Committee decided to establish a subcommittee comprising the judicial members of the Committee to formulate proposals in response to these submissions. This included the Chief Justice, the 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 proposals in response, which

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1 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.

2 See Helen Winkelmann "Access to Justice – Who Needs Lawyers" (Ethel Benjamin Address 2014, University of Otago, November 2014).

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, forms the basis of the proposals in this consultation document.[3]

6. The proposals set out below are significantly broader than the four suggestions outlined in the previous papers. This is because the Committee is concerned to respond to the full range of issues raised by submitters and to attempt to address these issues comprehensively.

7. In particular, the proposals outlined in this paper extend beyond amendments to the rules of court to questions of policy that it will be for the Government to address. The Attorney-General and Minister of Justice have been consulted. They are both agreeable to the Committee addressing such proposals for reform. It is anticipated that the Committee's final views, which it will determine after this second round of consultation, will include both decisions as to future rule-making and a report to the Attorney-General.

8. By way of summary, the proposals outlined below involve:

   (a) recommending that legislation be enacted to increase the jurisdiction of the Disputes Tribunal, and a number of specific proposals to enhance that 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, especially prior to trial (including encouraging early judicial engagement with the substance of proceedings and reducing the burden associated with interlocutory applications) and the conduct of trials themselves.

The Relevant Concerns

9. 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.[4]

10. As to what this looks like in practice, submitters identified that widely-held conceptions of "justice" require that everybody in society be able to affordably access impartial

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

[4] *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.

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.

11. More broadly, ensuring all individuals are equally able to obtain such redress within legal institutions, whatever their means, "implicates central rule of law values".[5] 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.[6]

12. 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:[7]

> 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.

13. The barriers identified by submitters include, firstly, 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,[8] which concerns the Committee acknowledged in the previous 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 the courts (which range was variously estimated by submitters as between $35,000 and $100,000 to $500,000) — simply cannot be litigated by the average person.

14. The concerns raised under this heading can be further divided as follows:

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

6 A commitment to liberal democracy, which would, in the circumstances of New Zealand's politics, require commitment to the rule of law, is potentially the other 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.

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

8 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 *Class Actions and Litigation Funding* (NZLC IP 45, December 2020) at [1.9] n 5.

(a) As a matter for which the Committee is primarily responsible, submitters identified 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 New Zealand's rules to usefully aid in the just and efficient 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, submitters identified the existence of a practice culture among litigators in which counsel do not take advantage of the existing potential within the rules for the tailoring of procedural requirements to the needs of each case, resulting in a typically 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) an unawareness on the part 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; and

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

15. 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.

16. 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, especially from an early stage, to meaningfully supervise and restrain the conduct of proceedings.

17. Submitters also 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 regulation

of the fees charged by lawyers, as is the case in some overseas jurisdictions.[9] 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 her submission, 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.

18. 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.

19. 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.

20. 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. 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 had, it was submitted, a chilling effect on their going to court.

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

22. As the Porirua Kāpiti Community Law Centre put 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:

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[9] 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.

> […] 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.

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

24. The cultural barriers are outlined above. 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 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.

25. 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. These litigants were reported as being left afraid that technical mistakes would vitiate 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, their obligations, and where to quickly and affordably access help.

26. In this respect, 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 and similar. 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.

27. 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 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 role of this Committee to deliver.

The Committee's Overall Response

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

29. It is for this reason that the Committee has considered the overall issue more broadly than was canvassed in the previous consultation papers. The Committee proposes to make recommendations to Government, so as to inform wide-ranging policy decision-making including potential legislative reform. In this respect, the Committee has recognised that the nature of the issues involved means that a single set of proposals relating to issues the Committee can address is by itself unlikely to remedy the significant issues raised. Co-ordinated responses from a range of actors will be required.

30. It is also recognised that the reforms may need to contemplate significant structural change. The submissions suggest that adjusting the current procedural framework is unlikely to fully address the issues that have been highlighted. The proposals proceed on that basis.

31. Also, as many submitters pointed out, part of the problem is with the culture of litigation prevailing in New Zealand. Rules reform cannot, in itself, produce that change. 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, making the default procedure far more streamlined than that which applies at present, and requiring parties to justify the imposition of more onerous obligations, will hopefully elicit an evolution in mindset on the part of those parties and litigants who currently adopt a maximalist approach.

32. The Committee also notes that there are other matters presently under consideration that are related to these proposals. These included the Committee's own proposals relating to reforming the rules concerning costs awards for self-represented litigants, and the Law Commission's project on litigation funding and class actions (with which the Committee is participating). It is important that all of these responses are implemented in a co-ordinated manner, and that the design of these initiatives has proper regard to overall structure for civil dispute resolution in New Zealand.

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

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

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

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

34. The proposals set out below do not involve proposals in relation to these other, more specialised, tribunals. Whether any of the reforms directed to the Disputes Tribunal should also be considered for each of the specialist tribunals is a separate question that might be considered if and when 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.

35. The Disputes Tribunal is in a different category from the other three tribunals, not only because it is not a specialist tribunal in the sense of dealing only with disputes of a particular kind, but also because it forms part of the general dispute resolution structure involving the District Court and High Court. The Disputes Tribunal is formally a division of the District Court.[10] It deals with all claims up to $30,000 that are not dealt with by the tribunals in the specialised jurisdictions. The Committee's view is that the Disputes Tribunal performs a key role in the overall civil dispute resolution system, providing civil justice in claims ranging from smaller straightforward matters where involving lawyers would add little to doing justice, up to matters that, albeit of relatively low value in absolute terms, are potentially 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.

36. The Committee's overall aspiration for that system aligns with that set out by the Law Commission in its 2004 report *Delivering Justice for All*.[11] 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."[12] 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".[13]

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10 District Court Act 2016, s 9.

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

12 At 3.

13 High Court Rules 2016, r 1.2; District Court Rules 2014, r 1.3.

37. The Committee also shares, broadly, in the Commission's assessment of the guiding principles for the design of a civil justice system that will retain public confidence in this way. These principles, which have guided the formulation of the proposals set out in this paper, are:[14]

(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.

(d) Ensuring proportionality between:

(i) the investment of resources parties are required to make 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.

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

(f) 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.

(g) 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.

[14] Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004), at 4-6.

38. These principles cannot all be given effect to absolutely, given the finite resources available to parties and the justice system. In this respect, the Committee is aware that 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".[15] "Justice" has here been though to refer to the avoidance of error by providing parties with procedural rights; a manifestation of the ethos of the old party-driven adversarial system.[16] In the Committee's view however, a broader conception of "justice" must now prevail, given society's legitimate interest in the efficient allocation of scarcely available judicial time,[17] that all parties have only finite resources available to access legal representation, and also that there is significant inequality of arms between parties.

39. It is the Committee's assessment that justice can be done, in a manner which still accords with citizen' expectations that they will receive a fair hearing, and which recognises the importance of proceedings involving disputes of significant importance to individuals being disposed of correctly, using procedures considerably more streamlined than those currently set out in the High Court Rules 2016 and used in practice in the District Court.

40. For these reasons, the Committee proposes, 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 a wider range of more valuable disputes. We judge that the Tribunal's processes currently reliably achieve justice in an expeditious, efficient, and proportionate manner for claims valued at $30,000 or less, and that this would also be true of claims valued at as much as $50,000, or potentially even more. The status of the Tribunal, and its powers, including particularly with respect to enforcing its decisions, should be enhanced. Appeal rights from the Tribunal may well need to be expanded should its jurisdiction be enhanced, so as to ensure proportionality between 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 and ensuring that best practice in the case management of civil proceedings be applied in all matters. The District Court Rules 2014 already provide flexible processes for civil matters that are proportional to the value and importance of proceedings. However, judges and registry staff are not adequately supported to make the best possible use of these processes. As well as increasing the Court's ability to use the most

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

[16] 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].

[17] 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].

efficient and proportional process possible in each case, this will also increase the Court's ability to provide court users with information to help them understand the Court's processes.

(c) The presumptive model of proceeding in the High Court should be considerably streamlined, with parties required to justify the imposition of more onerous obligations more similar to those currently employed in each case. To assist in the proportional tailoring of the procedural requirements imposed in individual proceedings to the needs of each case, judges will become more involved in identifying the issues in proceedings at an earlier stage. More generally, greater emphasis is to be placed on documentary, as opposed to oral, evidence. The extent to which the presentation of evidence serves as a forum for advocacy must be reduced.

Disputes Tribunal

41. The Disputes Tribunal deals with approximately 13,000 claims per year.[18] The referees are part-time, working approximately three days a week. They are paid $530 for each sitting day. Claims are addressed at hearings, and it is common for there to be several hearings to deal with one claim. A referee would deal with approximately three claims a day. In accordance with s 39 of the Disputes Tribunal Act, its proceedings are in private. Aspects of its existing procedural can be described as inquisitorial or quasi-inquisitorial.[19]

42. The Committee considered whether more inquisitorial processes in the District Court and High Court would achieve more accessible and affordable civil justice, as some submitters suggested, and as was proposed in the initial consultation material. Submitters also raised alternative structures that would, like an inquisitorial structure,

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[18] Over the past 10 years, according to the Ministry of Justice's annual reports, the total number of cases disposed in the Disputes Tribunal have declined from 16,664 in 2011/2012 to 10,144 in 2019/2020. The most recent reported figure may be anomalous due to the effects of COVID-19 reducing the number of Tribunal events during lockdown. In the four preceding years, numbers of cases disposed range between 12,006 (in 2018/2019) and 13,436 (2015/2016).

[19] In particular, the Tribunal's power to seek and receive evidence other than that tendered on behalf of a party and to "make such other investigations and inquiries as it sees fit": Disputes Tribunal Act 1988, s 40(2). The 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. The Committee agrees with the Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) 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. In this document, the Committee, as did most submitters in submissions, describes as "adversarial" procedural systems in which the focus is on the trial as a distinct and separate climax to the litigation process, proceedings are essentially driven by the parties (the conduct of which is controlled by rigid and technical rules) and the adjudicator is largely reactive, and the expense and effort of determining the dispute falls largely on the parties, with "inquisitorial" systems those in which the converse is more true: see 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 [6]-[7].

produce greater judicial involvement. The suggestions below in relation to the District and High Courts have been influenced by the support for processes of this kind. However, the Committee proposes that the role of the Disputes Tribunal, with its features that might be described as inquisitorial, should be expanded, rather than the role of the District and High Court being changed to involve more inquisitorial dispute resolution processes in those courts. That is so for the following related reasons:

(a) Submissions suggested that inquisitorial processes are best suited for lower value claims, especially those that do not involve legal representation. The more formal, or elaborate procedures of a court proceeding with legal representation become justified when what is at stake warrants them. This reflects the concept of proportionality discussed above, the use of which as a guiding principle was supported by many submitters. Nor does the use of such procedures appear to run contrary to widely held conceptions of justice, as identified in submissions.

(b) The Disputes Tribunal has established experience in, and existing systems (such as training) for, employing for this type of dispute resolution. By contrast, the District and High Courts do not. It makes more sense to expand the role of the Tribunal rather than expecting the Courts to significantly change the way they determine, and direct the progress of, civil disputes.

43. 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, while noting that parties can seek legal advice in preparing to appear before the Tribunal.

44. Given the positive feedback from submitters about the Tribunal, the extensive existing systems already established and operated by the Tribunal, increasing its jurisdiction would appear to provide an appropriate response to some of the access to civil justice concerns noted in submissions.

45. Submitters suggested a range of extended jurisdictional limits for the Tribunal of between $50,000 and $100,000.[20] 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.

46. 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, given the importance of the dispute to the parties and the consequently greater importance of avoiding and correcting errors. The existing right of appeal to the District Court under s

[20] The jurisdiction was only recently increased from $15,000 (or $20,000 with the consent of all parties) to $30,000 in October 2019: Tribunals Powers and Procedures Legislation Act 2018, s 35(2).

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. There are a number of alternative approaches that could be considered:

(a) A right of appeal involving error of law. One issue with a right of that kind is the current mandate in s 18(6) of the Disputes Tribunal Act that the Tribunal determine disputes in accordance with the substantial merits having regard to the law, but without being bound to give effect to strict legal rights or obligations or to legal forms or technicalities. More generally, particularly if the jurisdiction of the Tribunal is to be increased, there is an argument that the Tribunal should be required to give effect to the law in all cases (though still with regard to the substantial merits and justice of the case), which would suggest in turn that referees ought to be required to be legally qualified and experienced.[21]

(b) A right of appeal that seeks to reflect a degree of latitude to allow decisions on the merits at first instance; for example, a right of appeal on the basis that the decision is "manifestly unreasonable". This picks up part of the right of appeal relevant to certain legal aid decisions.[22]

(c) A right of general appeal of the same kind that exists from the District Court to High Court, or High Court to Court of Appeal. If so, the issue raised about s 18(6) would also need to be considered.

(d) A graduated right of appeal, with to scope to the right to challenge depending on the amount at stake. For example, the existing right of appeal could remain for awards up to the present jurisdictional limit ($30,000), with greater rights existing beyond that level. A graduated right of appeal is currently provided for in respect of decisions of the MVDT: there is a right of appeal in respect of errors of fact or law in claims exceeding $12,500, but a right of appeal only on procedural unfairness grounds for lesser value claims.[23]

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[21] At present, a referee must be a person who "holds a relevant qualification (for example, a qualification in law, mediation, or arbitration) or has had relevant training" and who "has the personal attributes, knowledge, and experience so as to be capable of performing the functions of a referee": Disputes Tribunal Act 1988, s 7(2). As it is, the Committee is given to understand that most referees, at least those more recently appointed, are already all qualified and experienced lawyers.

[22] 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").

[23] Motor Vehicle Sales Act 2003, sch 1 cl 16.

47. Whether there can be any further appeal from the District Court to High Court may also need to be addressed. For example, in respect of appeals from the MVDT the decision of the District Court is final but can be subject to judicial review.[24]

48. 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.[25] If a more extensive right of appeal were introduced the District Court may find a larger number of appeals from Tribunal decisions.

49. The existing power for the Tribunal to transfer a proceeding to the District Court would remain.[26]

50. Having regard to the above considerations, the Committee's current view is that the Tribunal's jurisdiction should be increased to $50,000 only while largely preserving the current scheme. The Committee welcomes the views of submitters on:

    (a) whether the Disputes Tribunal's jurisdiction ought to be increased to $50,000, on the current model;

    (b) whether the parties to individual proceedings should be able to consent to the Tribunal's jurisdiction being increased beyond $50,000 in their particular case (and, if so, to what extent), again on the current model;

    (c) whether the Tribunal's jurisdiction ought to instead be increased beyond $50,000 (regardless of consent by both parties), to align with the MVDT, which has jurisdiction in respect of claims up to $100,000 (or more with the consent of both parties) and, if so, what changes to its processes would be required – in particular whether:

        (i) greater appeal rights should then be afforded to parties to disputes; and

        (ii) there should be graduated rights of appeal in respect of claims of different values, with more extensive appeal rights arising in cases involving claims of greater value, or identical rights in respect of claims of all values.

51. There are other changes to the Disputes Tribunal that could be considered as part of an expanded role, on which possibilities the Committee also invites comment. In particular:

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[24] For a recent example of a judicial review of a decision of the District Court on appeal from the MVDT, see *Joden Finance Ltd v Auckland District Court* [2021] NZHC 823.

[25] Compare *Re GJ Mannix* [1984] 1 NZLR 309 (CA).

[26] See Disputes Tribunal Act 1988, s 36.

(a) the Disputes Tribunal could be renamed, potentially as the Small Claims Court,[27] or Community Court,[28] 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;[29]

(b) even if the Tribunal is not renamed as a court, changing the title of "referee" to that of "adjudicator" to reflect that, in practice, the parties to Tribunal proceedings expect a judicial decision from the Tribunal, rather than a facilitated outcome;

(c) the Tribunal could be resourced to make greater use of its powers to appoint investigators as Tribunal appointed experts,[30] who would sit with the referee and participate in the hearing and assist in the determination of the dispute (but the decision would remain the referee's alone).[31]

(d) the requirement that the Tribunal proceed in private in s 39 could be amended, so that the Tribunal would conduct public hearings unless the referee considered that it is proper to conduct the hearing in private, having regard to the interests of any party and to the public interest. This would arguably be consistent with the principle of open justice (that 'justice should be seen to be done'); encouraging fair and independent dispute resolution, and maintaining public confidence in judicial decision-making. It may also allow Tribunal decisions to be published on NZLII or a government website, which could improve the transparency of Tribunal decision-making and allow parties to prepare their submissions with a better understanding of how the Tribunal determines similar matters.

(e) the daily fees for referees could be increased, given the need to attract referees who are able to deal with claims of higher value.

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

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

[28] 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.

[29] The Committee is mindful that the Small Claims Court was renamed the Disputes Tribunal to overcome consumer resistance amongst New Zealanders at the idea of 'going to *court*', and that, in terms of promoting accessibility, there is an argument that individuals – particularly socio-economically disadvantaged individuals – might more readily seek redress from a Tribunal than a Court. See further Peter Spiller *The Disputes Tribunals of New Zealand* (Brookers, Wellington, 1997) at 197.

[30] Disputes Tribunal Act 1988, s 41

[31] Compare Motor Vehicle Sales Act 2003, sch 1 cl 10.

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

(h) consideration could be given to providing for a more effective or straightforward way for successful claimants to enforce a successful award.[32]

District Court

52. While the Disputes Tribunal is, by volume, the busiest of the three bodies examined in this document, enhancing its role does not address the issues with the civil jurisdiction more broadly. The District Court has jurisdiction in relation to claims up to $350,000,[33] having concurrent jurisdiction with the High Court within this range. It is recognised that civil dispute resolution for claims at this level is not working well, including for the reasons identified by submitters. Resolving the role of this Court in the overall civil justice system is also important in addressing the concerns outlined in the submissions.

53. The 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 the 2014 Rules referring to the "widespread dissatisfaction" with the 2009 reforms.

54. The 2014 Rules have remained largely unaltered since that time. They were based on the Rules Committee's assessment of international best practice. 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". The processes for short and simplified trials are designed to ensure proportionate procedures depending on factors such as complexity and amount at stake.[34] At the first case management conference, a Judge decides whether the proceeding is to be determined using a short trial,[35] and if a short trial is not allocated, a judicial settlement conference must be convened unless the Judge directs otherwise.[36]

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[32] 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.

[33] District Court Act 2016, 74(1)(a), but see also see ss 75-85, and particularly s 80 with respect to the partial abandonment of claims to give the Court jurisdiction.

[34] See District Court Rules 2014, r 10.1.

[35] Rule 7.3(3)(c).

[36] Rule 7.2(3)(d).

55. These provisions of the 2014 Rules appear to address many of the concerns raised in submissions that there be proportionate procedures and early judicial engagement. Indeed, the New Zealand Bar Association has proposed that rules of this type now be introduced into the High Court, which proposal led to this being one of the four potential reforms previously consulted on. For these reasons, and in the absence of suggestions to the contrary in submissions, it is the Committee's view that the 2014 Rules remain, in themselves, fit for purpose.

56. But the District Court's civil jurisdiction does not appear to have fully recovered from the 2009 reforms. In part, that is due to the significant and growing demands on judicial resources in that Court's criminal and family jurisdictions, which have 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. It is also clear from submissions that there has been a perceived loss of civil expertise within the Registry. Whatever the accuracy of that perception, it is clear from submissions that civil practitioners lack confidence in the District Court, leading to the under-utilisation of that Court compared to the Disputes Tribunal and High Court.

57. Against that background, the Committee's provisional view is that there should not be further major rule reform in the District Court. Rather, it is proposed that reforms in respect of the District Court focus on strengthening the institutional competency of the District Court's civil jurisdiction to allow the fundamentally fit-for-purpose 2014 Rules to operate as intended. Some minor and targeted reforms might be considered as a secondary response, based on specific ideas raised by past submitters.

58. The Committee proposes that a series of steps should be taken to achieve this revitalisation. First, the Committee proposes that:

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

    (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;[37] and

    (c) there also be a focus on addressing the information barrier issues referred to in submissions from community groups as summarised at paragraphs 24-27 above.

59. Secondly, the Committee proposes the introduction of part-time Deputy Judges/Recorders as has been adopted 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. Other senior practitioners not of that rank may also

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

appropriately perform this role.[38] 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 existing civil expertise held by District Court Judges with civil warrants. Implementing this proposal would require amendment of the District Court Act 2016.[39] The Committee does not consider that senior lawyers acting in a judicial capacity on a part-time basis in this way would produce insurmountable issues regarding conflicts of interest or similar, but invites views on this issue.

60. One way in which the Committee considers the District Court Rules 2014 could usefully be reformed is by adopting at least one of the pre-action protocols for civil proceedings currently used in the United Kingdom be adopted.[40] As noted above, one of the areas of concern raised by submitters centred on the social, economic and cultural barriers for meaningful engagement with the courts by some sections of the community, is that some members of the community find court procedures foreign, intimidating, and difficult to comprehend.

61. In particular, as noted, the Waikato Community Law Centre identified in its submission that the defendants to debt collection claims can frequently come from such groups. The Centres reported that many people facing such claims do not seek their advice until after judgment has already been entered, not understanding the difficulties that arise from waiting until that stage. 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. This could include, for example, a requirement on the part of creditors to provide debtors with a warning that proceedings are to be issued urging them to obtain either representation or advice from Community Law Centres or similar, or, perhaps more onerously, to attempt to agree a payment plan with the creditor as an alternative to seeking judgment. 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 both more efficiently and fairly.

62. Ultimately however, the Committee accepts that if the debt recovery jurisdiction becomes unduly inefficient, this will only result in increased costs for borrowers, so is cautious in advancing this proposal. Therefore, in the first instance, the proposal is that the protocols only be employed for debt collection civil work for the District Court. This

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

[39] See in particular District Court Act 2016, ss 17 and 30.

[40] See Civil Procedural Rules (Eng), Pre-Action Protocols (12 February 2020).

is in part because, so far as the Committee understands, 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). There are of course other pre-action protocols, such as those in place in England and Wales, that might in time usefully be introduced. However, the Committee is aware of suggestions that such protocols can in fact serve to impede access to civil justice,[41] and recommends that the functioning of such protocols in the debt context be assessed before wider reforms in this area are pursued. The Committee seeks the views of submitters on that issue.

63. The Committee also seeks submissions on whether the District Court Rules 2014 should be amended, the general desirability of not further amending the procedure of that Court notwithstanding, to allow for more flexible processes to be used for determining the substantive claim. This would involve elements of the more inquisitorial processes of the kind followed by the Disputes Tribunal, such as by:

    (a) allowing judges to direct that the proceeding be set down for determination on the basis of the initial disclosure alone, and without any further interlocutories, given what is in issue as revealed by the first judicial conference; and

    (b) providing for the substantive determination of disputes using an 'iterative' process whereby the issues in dispute may be narrowed and resolved at successive hearings, with Judges allowing parties to call evidence more than once and in the order the Judge directs. This may shorten and lower the costs of processes, because the plaintiff will not feel obliged to cover all possible angles when they first present their case.

High Court

64. The rules reforms set out in the earlier consultation papers largely focused on the position in the High Court. Based on the common ground in submissions responding to those proposals, the Committee proposes that the High Court's procedures should be considerably streamlined in most cases, being of the preliminary view that less onerous forms of proceeding are consistent with the requirements of justice in most cases. The more onerous obligations in the existing rules would attach only where the Court is satisfied that is proportionate to the value, complexity, and importance of the dispute to the parties or wider community and/or necessary in the interests of justice. It is intended that, by requiring parties and their representatives to approach litigation on this footing, and by providing active judicial supervision of compliance with these requirements, a less "maximalist" approach to litigation will in time prevail, addressing (at least in part) the concerning aspects of litigation culture referred to in submissions.

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

65. For the reasons already outlined, the Committee does not propose that fully "inquisitorial" dispute resolution procedures be adopted in the High Court. But the arguments in favour of such processes reflect the desirability of greater proportionality, early identification of the key issues (and focus on those issues), and earlier judicial engagement with those issues. The Committee's proposals seek to draw upon those ideas, with the detailed proposals set out below drawing on many of the suggestions made in the consultation process, and the proposals set out in the previous papers.

66. These changes are only proposed for the High Court, although submissions are invited on whether these proposals should also extend to the District Court, while noting the Committee's hesitancy to revisit broadly the procedure in that Court, for the reasons noted previously.

Commencement

67. Proceedings would commence by statements of claim and statements of defence in the usual way. The experience of the 2009 District Court Rules reforms suggests that the clear delineation of the scope of proceedings (hopefully) provided by (well-drawn) pleadings is of indispensable assistance to the Court and parties.

68. Any difficulties that unrepresented parties may face in complying with this requirement can be met, in part, by the provision of more fulsome advice and information on the Court's website and through registry-based physical resources.

Discovery

69. The rules of discovery will be replaced[42] by disclosure rules that operate when the statements of claim and statements of defence are filed, adapting the current rule for initial disclosure.[43] In summary:

    (a) parties will disclose all of the key document they seek to rely upon in support of their claim/defence;

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[42] The Committee's provisional view that the rules of discovery should be abrogated in most cases, rather than the further winnowing and targeting of discovery obligations, and that parties' disclosure obligations should be set out in fairly broad terms envisaging a wide-reaching residual judicial discretion, rather than being more prescriptive, is informed in part by the English experience during their on-going Disclosure Pilot. This has proceeded on the basis of attempting to prescribe a 'menu' of extensively specified, graduated, disclosure obligations applicable to different categories of cases: see https://www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/. The feedback from court users in that jurisdiction has been that the documentation required to be completed as part of that pilot is too complex and onerous, and that the procedures have done little to change litigation culture or reduce costs. More generally, the experience of the 2009 District Court Rules reforms deters the Committee, at-least provisionally, from proposing the use of a forms-based approach like that in place under the English pilot scheme.

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

(b) parties will also obliged to disclose adverse documents in accordance with a duty of candour; and

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

Issues Conference

70. 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.[44] 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:

(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.

Proportionality

71. The guiding principle would be proportionality; including when deciding what further interlocutory steps are required, assessing what will be needed for trial, and identifying how the trial should proceed.

72. It is proposed to add reference to the concept of proportionality to the purpose provisions in r 1.2 of the High Court Rules (and also r 1.3 of the District Court Rules).[45]

73. Further issues conferences can be convened, including on the Court's own initiative, if that is seen as appropriate for the proportionate disposition of the case.

Interlocutories

74. The Committee envisages interlocutory steps being presumptively disposed of on the papers unless an oral hearing is directed. Oral hearings would occur only where the

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

[45] This would replicate, to an extent, the provisions of ss 7–15 of the Civil Procedure Act (Vic). These sections, amongst other things, 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".

convening of a hearing was proportionate to the complexity and importance of the interlocutory dispute and the proceeding as a whole.[46]

Trial

75. Changes to the current evidential rules and other practices for trial are also proposed. In particular:

(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. This proposal would likely require amendment to the relevant provisions of the Evidence Act 2006.[47]

(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 party's evidence (or perhaps in openings).

(c) The evidence at trial would – as is already the case, for example, in New South Wales[48] - 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. Parties would be required to ensure that affidavits comply with the presumption referred to in (a) above, to ensure that affidavits are not needlessly argumentative, and also that they do not include submission by counsel disguised as evidence. Judges would be required to police compliance with these requirements more strictly than is perhaps the case at present.[49] In arriving at this proposal, the Committee:

(i) has not been persuaded by suggestions that dispensing with oral evidence-in-chief can prove counterproductive for the reason that

[46] The Committee recognises that there is sometimes a real benefit in convening oral hearings in relation to interlocutory disputes in that this allows counsel to be "put to the flame". This can result in the expeditious and just resolution of the dispute, in-keeping with the purpose of these proposals. It may be that any provision implementing this proposed change should require the Judge to have regard to whether it would be beneficial in this respect to convene an oral hearing.

[47] See, for example, Evidence Act 2006, ss 5(2), 20, and 132.

[48] Uniform Civil Procedure Rules 2005 (NSW), rr 31.1(3) and 31.4(2). In the Federal Court of Australia, a determination is made as part of case management as to whether the evidence-in-chief of witnesses is to be given orally or by affidavit or both.

[49] 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. A 2018 survey of the English profession suggests a similar state of affairs prevails in that jurisdiction: see *Minutes of the Meeting of the Commercial Court Users Group* (Courts and Tribunal Judiciary, London, 4 December 2018) at 4-5.

witnesses can become unduly defensive if immediately made subject to cross-examination.[50]

(ii) considered the possibility of abolishing the requirement for briefs of evidence to be produced and served while instead requiring, that witness briefs outlining in general terms only the witness' intended evidence be filed, which would have given more saliency to the witness' oral evidence. Ultimately however, the Committee took the view that attaching greater weight to oral evidence,[51] which this would do, would be at odds with the increasing understanding of the limitations of human memory and the assessment of demeanour as part of assessing credibility (which concerns have also motivated, in part, the proposal set out at (a)).[52]

(iii) considers the best solution to be to take the requirement to produce written statements of witnesses' evidence before trial to its logical conclusion by allowing those to stand as their evidence, obviating the need for the statement to be read at trial.

(iv) is keenly aware of the need curb the worst excesses of the use of witness statements as advocacy by the parties' representatives. The proposal to have evidence-in-chief given by way of affidavit might, absent appropriate caution, exacerbate this problem.[53] This risk could be controlled, for example, by imposing costs sanctions for the filing of inappropriately argumentative affidavits – which sanctions counsel could be made personally liable for paying, as is possible in some circumstances in the criminal jurisdiction[54] – or by more clearly empowering the Court to refuse to read the same.

(v) has considered the possibility of imposing page limits or other restrictions on the length of affidavits, being alive to the risk of this proposal further amplifying the growth in recent years of the amount of documentary evidence adduced in proceedings. The Committee has arrived at no firm view on this issue, being aware of the tension between

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[50] See Andrew Popplewell, Lord Justice of Appeal, and others *Report of the Witness Evidence Working Group* (Courts and Tribunal Judiciary, London, 6 December 2019), especially at [15].

[51] See, for example, those collated by Alan Robertson *Affidavit Evidence* (Paper Presented as Part of the College of Law 2014 Judges' Series, Sydney, 26 February 2014) at 4-5.

[52] See, for example, the summary of those concerns set out by Mathew Rea "A new approach to witness evidence" *The Law Society Gazette* (online ed, 19 November 2018).

[53] See, for example, the illustrative outcome of these see John Kimbell QC "The pen: mightier than the word?" *New Zealand Law Journal* (online ed, 8 November 2018).

[54] See Criminal Procedure Act 2011, s 364. The Committee is aware that the introduction of such a power in respect of non-compliance with civil procedural obligations might require legislative reform, but equally might be determined to be possible under the Court's supervisory and/or inherent jurisdictions.

this concern and the Court's obligation to afford parties a meaningful opportunity to be heard. The Committee also identifies that it might be too difficult to devise a practicable means of calculating appropriate limits for each case, given the wide variety of cases the Courts hear.

(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 or conferences);

(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.

Summary of Proposed Reforms

77. By way of summary, the Committee proposes:

Disputes Tribunal Level

(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 from decisions of 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 paragraphs 51(b)-(f) above;

District Court Level

(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) the introduction of pre-action protocols for debt collection matters in the District Court, and considering the introduction of other pre-action protocols as already operate in England and Wales;

(i) introducing a more flexible process for determining substantive claims, drawing on the more inquisitorial aspects of the procedure of the Disputes Tribunal;

High Court Level

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

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

(ii) early and comprehensive engagement by Judges at issues conference(s);

(iii) interlocutories presumptively being 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 oral evidence only in areas of factual contest;

(vi) greater controls being imposed on expert evidence; and

(k) introducing proportionality as a guiding purpose of the High Court Rules 2016.

Return of Submissions

78. Submissions or comments should be directed to the Clerk to the Committee before 5 pm on Friday 2 July 2021, using the details on the first page of this document. Inquiries regarding this document can, in the first instance, be directed to the Clerk.

79. Submitters are requested to please include their name, any firm or professional affiliation relevant to their submission, contact telephone or mobile number, and one of either their email address or postal address. We may contact submitters regarding their submissions.

80. Please be aware that all submissions received may, at the Committee's discretion, be posted on our website, may form part of our response to any request made under the Official Information Act 1982, and will form part of our records under the Public Records Act 2005 and might be subject to public inspection under that Act.

81. Please indicate in a letter or email covering your submission if you would prefer that confidentiality be maintained in respect of your submission or any part of your submission. It is our policy to remove all contact details not publicly listed from submissions published or released under the above enactments.