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ADLS CIVIL LITIGATION COMMITTEE

**COMMENTS AND OBSERVATIONS ON THE RULES
COMMITTEE CONSULTATION PAPER ON
IMPROVING ACCESS TO CIVIL JUSTICE**



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Introduction

1. The ADLS Civil Litigation Committee (“committee”) wishes to assist the preliminary deliberations of the Rules Committee on the Initial Consultation Paper: Improving Access to Civil Justice with the following comments and observations.
2. The committee comprises eight practitioner members with a range of civil litigation experience and one student member at the University of Auckland. More information on the committee can be found on the Auckland District Law Society website.
3. We expect most of lawyers in New Zealand support any practical and useful reform that will enhance access to justice and make resolution of civil cases more cost-effective. Before we provide comment, and although perhaps trite, we hope it is worth repeating some relevant fundamental rights and principles applicable to civil litigation.
4. We consider it should be borne in mind when considering reforms such as short track or fast track or ‘summary’ procedures that a claimant/applicant/plaintiff usually retains rights under the Limitation Act and other limitation enactments to commence a civil claim for some time after a right to sue has accrued. Often this time is measured in terms of years. Provided the claim or action is commenced within the limitation period - even if on the last day of that limitation period –the limitation defence is not available.
5. Within the limitation period the claimant may have taken quite some time to: carefully consider the basis for the claim, the evidence needed, collect and collate documents involved, obtain legal advice even if not represented later, and investigate any evidence not readily to hand that might assist or be needed. It follows that it can be several years before the party on the receiving end of a claim is even aware of its existence. A defendant or respondent party may have been proceeding busily with their life without any advance knowledge of the claim they are then suddenly faced with. It hardly seems ‘fair’ to such litigants that while the claimant has taken time to commence they are nonetheless then to be compelled or obliged to act with haste or under short time pressure to deal with what is to them a new claim.
6. It follows in our view that initiatives advanced to hasten the procedure by which civil claims are dealt with by our courts must take into account the need for those parties on the receiving end to have time to fairly and properly prepare their answer or defence if they wish to do so. They too need time to carefully consider the elements of the claim, to seek and collate documents they may not have thought of for years (or had disposed of or stored somewhere), to investigate further evidence that may not be to hand readily, to obtain legal advice and, if they wish, to also seek legal advice and arrange legal representation.
7. It is also worth remembering that many experienced lawyers know well that so long as a legitimate claim is commenced within a limitation period - even if on the last day - it is ‘within time’. Many lawyers have had experience of instructions received late in a limitation period so there is time available only to prepare a legitimate statement of claim or other pleading that sets out the essential elements of the claim and the basis on which it is made. There will be time later to refine

and amend the initial pleading but the important demand is to get the claim started within time. There may be no time to collect and collate documents necessary to accompany the basic statement of claim or pleading. There may be no time to prepare affidavits in support to prove essential elements at the time of filing or commencement. It follows that rules imposing such obligations and requirements may cause more problems than they solve if they are to apply to all ordinary cases. There is a serious risk injustice may result. Such an initiative would be a serious departure from the well-known precedent cases relating to the application of the limitation periods and enactments.

8. While it is well-known that justice delayed may be justice denied, and that claimants can often be criticised for taking a long time to issue a claim, we should resist the temptation to hasten the process by which fair hearings and trials are prepared and take place for all parties involved. To do so would likely be at the risk of causing and creating injustice, or perhaps just wasted time and effort (and costs) in hasty steps undertaken in the procedure that must be redone or reheard in order to serve justice.
9. An observation: The flipside to ‘justice’ is ‘injustice’. The costs of injustice are incalculable. While the consultation paper recognises this at paragraph 13, we consider it important to place greater emphasis on how vital it is to our citizens that our process of civil litigation does not elevate the terms ‘speedy and inexpensive’ to take priority over ‘justice’. There will be no comfort to our citizens in knowing they will be assured of priority being given to a speedy and inexpensive process which by implication considers the resultant increased risk of an unjust result and/or an unfair hearing to be an acceptable collateral damage risk.

Overall observations/goals of the proposed changes

10. Summarised, the goals of the proposed changes were stated to focus on:

- 10.1 The “justice gap” – addressing litigants who can’t afford a lawyer.
- 10.2 The increasing number of litigants-in-person before the courts.
- 10.3 Facilitating the just, speedy, and inexpensive determination of proceedings and interlocutory applications.
- 10.4 Reducing burdens considered disproportionate to the cost and complexity of the disputes being litigated – the issue of ‘proportionality’.
- 10.5 That it is routinely considered the costs of litigating a defended civil claim worth less than \$100,000 in the District Court make it uneconomic.
- 10.6 Flexibility in the District Court Rules may be underutilised in pursuing cost-effective procedural steps proportionate to the value and complexity of claims.
- 10.7 Encouraging the use of the short trial procedure, requiring evidence to be given by affidavit and imposing time limits for the presentation of a party’s case – and other rules aimed at tailoring the procedure to the value and complexity of a claim, while observing here is still an absence of limits applied to discovery.
- 10.8 The responsibility of judges and lawyers to facilitate access to justice by minimising the costs of each proceeding to the extent the interests of justice allow, and that a culture change may be needed to enhance achievement of this objective.

- 10.9 But it observes prioritising the rules' objectives of "speedy" and "inexpensive" should not take place at the expense of the pursuit of "justice".
- 10.10 Expediting civil trial processes in both High Court and District Court should be considered afresh.

11. These may be further distilled into four main goals – namely, will the suggested new process:

- 11.1 Mean lower legal fees?
- 11.2 Make things easier for litigants? (NB: this includes litigants-in-person of course.)
- 11.3 Speed up determinations?
- 11.4 Adapt to the complexity of the action?

Proposal one: introduction of short-form trial processes

General observations

12. Para 16 of the consultation paper says:

A short trial format is already available in the District Court for cases that can come to a hearing quickly, where the issues are relatively uncomplicated or a modest amount is at stake, or where the trial time is not likely to exceed a day. A simplified trial format also exists for claims that neither qualify for a short trial nor justify a full trial

13. As a first step, it is suggested that there be an analysis of whether the existing District Court short-trial format is successful. If it isn't, then it should not be replicated in the High Court.

Comment

14. Without statistics from the courts, it is difficult to assess whether the short trial, simplified trial and full trial options work well. Part 10 of the District Court Rules, dealing with the differing forms of trials, seems to be a well-thought-through regime. However, before considering whether the current Rules need to be changed it would be logical to first ascertain more information about how the current Rules are working now - and, if they are not working well or at all, then why not.

Recommendation

15. Collate data on the use and success of the existing format from the District Court, and from the experience of courts in England (and elsewhere, perhaps) which have their own truncated regime.

A short-causes procedure suggested by the New Zealand Bar Association

16. The Bar Association points to the UK, Civil Procedure Rules 1998 (Eng), issued Practice Direction 57AB. This provides for two schemes: the shorter-trials scheme and the flexible trials scheme to operate from 1 October 2018. The 'shorter trial' is defined by the claims unsuited to this process

– ie, cases including an allegation of fraud or dishonesty and cases likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence, etc. The length is less than four days and a judge is designated for that action.

The ‘shorter trial’

17. The ‘shorter trial’ course is undertaken by agreement of the parties or by order of the court. To commence and progress a ‘shorter trial’ claim the following is prescribed:

2.17 *Save where there is good reason not to do so, as in a case of urgency, a letter of claim should be sent giving succinct, but sufficient, details of the claim to enable the potential defendant to understand and to investigate the allegations.*

2.18 *The letter of claim shall notify the proposed defendant of the intention to adopt the shorter trials scheme procedure.*

2.19 *The proposed defendant shall respond within 14 days, stating whether it agrees to or opposes that procedure, or whether it has insufficient information to commit itself either way.*

2.20 *Particulars of claim must be served with the claim form.*

2.21 *In addition to the above requirements, the particulars of claim should include—(a) a brief summary of the dispute and identification of the anticipated issues; (b) a full statement of all relief or remedies claimed; (c) detailed calculations of any sums claimed.*

2.22 *The particulars of claim should be no more than 20 pages in length. The court will give permission only exceptionally for a longer statement of case to be served for use in the shorter trials scheme and will do so only where a party shows good reasons.*

2.23 *The particulars of claim should be accompanied by a bundle of core documents.*

2.24 *The claim form and particulars of claim shall be served promptly following—(a) the 14-day period allowed for the defendant’s response to the letter of claim; or (b) the defendant’s response, if a longer period for response is agreed between the parties.*

2.25 *The claimant shall, promptly after serving the claim form and particulars of claim, take steps to fix a CMC (Case Management Conference before a judge) for a date approximately (but not less than) 12 weeks after the defendant is due to acknowledge service of the claim form.*

2.26 *The defendant shall be required to file an acknowledgment of service within the time periods prescribed by the rules.*

2.27 *If the defendant files an acknowledgment of service stating that he wishes to dispute the court’s jurisdiction, the period for serving and filing a defence is 28 days after filing the*

acknowledgment of service (unless an application to challenge the jurisdiction is made on or before that date, in which case no defence need be served before the hearing of the application.)

2.28 *In cases where the jurisdiction of the court is challenged, these provisions will not apply until the question of the court’s jurisdiction has been resolved.*

2.29 *The defence and any counterclaim must be served within 28 days of acknowledgment of service of the claim form.*

2.30 *The defence should include—(a) a statement indicating whether it is agreed that the case is appropriate for the shorter trials scheme and, if not, why not; (b) a summary of the dispute and identification of the anticipated issues (if different to that of the claimant).*

2.31 *The defence and counterclaim should be no more than 20 pages. The court will give permission only exceptionally for a longer statement of case to be served for use in the shorter trials scheme and will do so only where a party shows good reasons.*

2.32 *The defence should be accompanied by a bundle of any additional core documents on which the defendant intends to rely.*

2.33 *Unless such extension would require alteration of the date for the CMC, if it has already been fixed, the defendant and the claimant may agree that the period for serving and filing a defence shall be extended by up to 14 days. However, any such agreement and brief reasons must be evidenced in writing and notified to the court.*

2.34 *Any reply and defence to counterclaim must be served within 14 days thereafter.*

18. After the above is done, there follows a CMC where the court:
- (a) reviews the issues;
 - (b) approves a list of issues;
 - (c) considers ADR;
 - (d) gives directions for trial;
 - (e) fixes a trial date (or window), which should be not more than eight months after the CMC and with a trial length of not more than four days (including reading time); and
 - (f) fixes a date for a pre-trial review.
19. There is a regime to seek additional disclosure before the CMC, but the issue is resolved at the CMC by the judge. For trial, witness statements are limited to 25 pages. Any pre-trial applications are dealt with on the papers.
20. At the pre-trial review hearing, the judge sets the timetable for trial including time for speeches and for cross-examination.

Comment

21. The 'shorter trial' format looks similar to the regime experimented with in the last major changes to the District Court Rules which were later abandoned. Significant differences in the above shorter trial procedure which may assist in a more cost-effective process that does not compromise 'justice' may be: (a) that a bundle of key documents must be supplied with the claim and defence, and, (b) a settlement conference or ADR is not an automatic step at the end of the 'exchange of claim/pleadings' stage. Instead, the matter goes to ADR or straight to court hearing.
22. Observation: the above draft procedure assumes compliance with the time limits prescribed for the steps involved. It does not provide for what is to happen if the proposed time limits for filing an acknowledgement of service and/or a defence are not observed as prescribed – but arrive late – or even at the last minute, as they so often do, especially perhaps with litigants-in-person. How are the late filing issues to be dealt with in such an apparently short form process? Will injustices result? Will applications to set aside judgment and/or for rehearing increase? But, how can such short procedure rules allow for dealing with such lateness? We expect overriding residual discretion and flexibility for the court to deal with such situations must be retained or included.

Recommendation

23. Review the successes and failures of Judge Joyce's initiative. There seems little point reintroducing a regime that did not receive universal approval before and was abandoned in favour of a return to the traditional High Court based rules regime.

Achievement of the four goals

24. Does the format:
 - 24.1 Mean lower legal fees? Possibly – because of the shorter timescales.
 - 24.2 Make things easier for litigants? The process seems straightforward and simple. The discovery obligation is minimal.
 - 24.3 Speed up determinations? The strict time deadlines would suggest it may do.
 - 24.4 Adapt to the complexity of the action? This seems to be addressed by involvement of a judge at commencement and at the first CMC.

Flexible trial

25. A flexible trial is less structured than the 'shorter trial' format. It enables parties by agreement to adapt trial procedure to suit their case. Trial procedure encompasses pre-trial disclosure, witness evidence, expert evidence and submissions at trial. For instance, they may agree to invite the court to determine identified issues on the basis of written evidence and submissions. In such a case, whilst the court will seek to comply with the parties' request, it may call for oral evidence to be given or oral submissions to be made on any of the identified issues if it considers it

necessary to do so. Where an issue is to be determined in writing it is not necessary for a party to put its case on that issue to the other party's witnesses.

26. Most of the other parts follow a routine approach to the claim. Each party is obliged to disclose the documents on which he/she relies and documents which are relevant without the need for a search. Witness evidence at trial will be given by written statements and oral evidence shall be limited to identified issues or identified witnesses, as directed at the CMC or as subsequently agreed by the parties or directed by the court. Submissions at trial are made in writing with oral submissions and cross examination subject to a time limit, as directed at the CMC.

Comment

27. It is difficult to foresee how this process will work – or work well – with a litigant-in-person. Even with represented parties it will be hard to achieve an advantage over current procedure rules without close judicial management. It will probably not work at all with a litigant-in-person.
28. Has this worked overseas? The lack of structure invites disagreement with one party achieving and advantage of the other less informed party.

Recommendation

22. Unless there is evidence such reforms have worked well in a comparable jurisdiction overseas, we consider it is unlikely to assist in achieving the stated goals and may not be worth pursuing.

Achievement of the four goals

23. Does the format:
- 23.1 Mean lower legal fees? Not necessarily; it depends on the procedure agreed upon. Lawyers may import the old process because it is familiar and works.
 - 23.2 Make things easier for litigants? We doubt litigants-in-person will have sufficient understanding of the available alternatives to negotiate with lawyers about appropriate trial procedure, in any event. Much time and costs may be wasted trying to seek agreement.
 - 23.3 Speed up determinations? Without time deadlines, it is unclear how this procedure speeds things up.
 - 23.4 Adapt to the complexity of the action? It could achieve this when experienced lawyers control the matter, but perhaps not otherwise.

Fast-track procedure

24. This purportedly reintroduces the fast-track procedure in place in the High Court between 2009-2017 (or a variation of that procedure). Parties' consent was required for fast-tracking, which was generally intended for cases with an estimated hearing duration of up to five days, with confined issues and not requiring extensive interlocutories.

25. Once transfer to the fast-track was ordered, a conference was held where a hearing date was directed to be allocated. This would normally be a further two to six months after the date of the conference. Directions leading up to the trial would also be made, including whether written briefs or “will say” statements would be utilised. A pre-trial conference was held approximately 15 working days before the trial, when all evidence would have been served and an agreed bundle of documents filed, and when any outstanding interlocutory matters would be dealt with.

Comment

26. Analysis of the prior uptake would be useful. It is unclear what cases do not ‘require extensive interlocutories’: are these originating applications? If so, all that seems to change is the prospect of an earlier allocation of a trial date. Is that realistically useful at such an early stage in all ordinary case, given the demand for courtrooms and judges’ availability, and all the inherent variable factors involved?

Recommendation

27. Collate data on the use of the existing fast-track procedure. If it is under review, then why does it require modification? Is it not working or being utilised?

Proposal two: introduction of inquisitorial processes

Highly abbreviated adjudication/facilitation process

28. An inquisitorial process may reduce some delays and costs, but certain parts of these proposals cause concern. The first concern is the proposal to limit or abolish appeal rights.
29. The stated underlying philosophy is that any ultimate decision will not be as full, precise, or perfect as the decision that would follow from a trial, but that the parties would have a much quicker and less expensive final answer to their dispute. However, the inherent problem is that it increases risk of an unjust result. It may lead to more appeals if the right to do so is not prevented – which would be a serious reform step that risks injustice being entrenched. It may lead to more cases for stay of execution pending an appeal or rehearing, and thus to applications for rehearing too.
30. Removing appeal rights is likely to cement errors and set controversial precedents which may lower the public’s faith in the judicial system. Outcomes that are quick but incorrect could have an even more undermining effect on the public perception of the justice supplied by such a scheme.
31. The ‘key steps’ are not very different from the regime in the Employment Relations Authority, but a major distinction is that there is a right to a de novo appeal by way of a full hearing from the ERA to the Employment Court with limited rights of appeal thereafter.

32. The employment regime achieves many of the benefits of the above ‘underlying philosophy’ and the ERA tends to be the final resolution in most cases, yet in cases where one party is aggrieved by the outcome, there remains relief by way of the de novo appeal. Anecdotally, it seems that taking the dispute to the Employment Court prevents frivolous cases because the court setting is more traditional and austere, and this dissuades many from taking the matter further.
33. Further comments on this proposal for consideration:
- 33.1 The regime might be tested by changing the process in the Disputes Tribunal with an increased financial threshold.
 - 33.2 Then cases of a greater value, say \$50,000 to \$100,000, proceed by agreement in the Disputes Tribunal or, in default of agreement, by an inquisitorial process in the District Court.
 - 33.3 The usual rights of appeal applying from tribunal to District Court and from District Court to High Court should be retained.

Achievement of the four goals

34. Does the format:
- 34.1 Mean lower legal fees? Not necessarily. Experience in the ERA suggests there is still considerable preparation involved in inquisitorial hearings in terms of gathering and preparing evidence to be placed before the judge. Even though the judge leads the investigation, the lawyers tend to prepare evidence statements and even submissions as if for a trial.
 - 34.2 Make things easier for litigants? Certainly, unrepresented litigants receive greater assistance because the responsibility for the soundness of their claim is passed to the judge. This may result in unfairness for those who pay for legal advice and representation.
 - 34.3 Speed up determinations? Given the material curtailing of the discovery process and lack of interlocutory steps, it is likely the process would be faster than a traditional court proceeding, but at the cost of increased risk of unjust results.
 - 34.4 Adapt to the complexity of the action? The consultation paper informs that the process can be adapted to complicated matters. It is queried whether this means complicated factual matters or complicated matters of law, or perhaps even both.

Alternative Inquisitorial process.

35. This format is proposed to apply if one party is not represented and cannot reasonably be expected to be represented. It is proposed that the plaintiff would file a short statement of claim which would be reviewed by a court-appointed assessor. The danger here is that the assessor acts as a gatekeeper or filter for claims rejected but which may have the potential to be otherwise tenable claims.
36. The protection of judicial review may not be of much protection at all to the average litigant who is not represented and perhaps cannot reasonably be expected to be represented.

37. The detailed steps involved in the proposed inquisitorial process look similar to the ERA process. No mention is made of appeals from the format.
38. Taking the above comments into account, the 'four goals' analysis produces a similar result.

Proposal three: requiring all proceedings to begin with a summary judgment application

Introduction

39. Introducing such a process as suggested is unlikely in our view to reduce the costs of civil litigation. It may instead lead to an increase in appeals with parties being dissatisfied with the outcome and may create an unjust result.

General observations

40. The summary judgment procedure was developed so the courts could deal more cost effectively with claims which on their face constituted an abuse of process, or where a pleading disclosed no reasonable claim or defence. In other words, where there is an absence of any real question to be tried, a short circuit to the ordinary process has been created. In these limited circumstances it was considered appropriate that judgment could be obtained through an interlocutory process.
41. What is proposed seems more suited perhaps to a triage process to assess whether there is a legitimate cause of action to be tried. That process almost duplicates the existing summary judgment process. Neither is appropriate where significant work is required to safely establish the existence and relevance of disputed facts relevant to a legitimate cause of action. As soon as there is a real question to be tried, care must be taken the process is not abbreviated so as to prejudice one or more of the parties involved, or the corollary, to give an advantage to any party.

Early clarification of issues/points of difference

42. The committee's consultation paper suggests the introduction of a summary judgment procedure in all ordinary claims would include early clarification of the issues and identification of the points of difference between the parties (by inference suggesting this is not currently achieved at case management conferences).
43. Obviously, the current summary judgment process applies to what would otherwise be ordinary matters. Thus, it is difficult to envisage what other 'ordinary' cases might be appropriate for a different process.
44. Although first case management conferences do not always achieve early clarification of the issues and identification of points of difference between the parties, they often do succeed or at least make a decent start on the process. Further CMC's are possible to further refine the issues.

Issues conferences are also possible to achieve greater specificity. It is not clear a new summary procedure in the nature of a triage assessment would assist in cost savings for litigants.

45. The Notice of First CMC (the “notice”) in relation to some civil proceedings notes that:
 - 45.1 The purpose of the CMC will be to give directions to secure the just, speedy and inexpensive determination of the proceedings, including the fixing of timetables and directing how the trial or hearing is to be conducted; and
 - 45.2 Requires the parties to confer and try to reach an agreement on appropriate discovery orders; and
 - 45.3 Requires the parties to file a joint memorandum (where possible) addressing the matters set out in Schedule 5 of the High Court Rules, which includes resolution and refinement of the issues.
46. As a result, memoranda for the first CMC do often set out the key issues as identified by each party, thereby providing clarification of the issues agreed and the points of difference.
47. From that position, the parties can agree and, if not, then ultimately the court can determine, the appropriate process to adopt towards resolving the matter.
48. One useful extra suggestion may be to amend the directions in the First CMC Notice to require the parties to consider whether a judicial evaluative-type process would be appropriate for their case at an early stage. However, it is submitted that if one or more of the parties considered this to be an inappropriate procedure, the claim or defence would have to proceed on the traditional summary judgment basis.
49. Further, an early judicial evaluation of all civil claims to ascertain whether a summary judgment process would be appropriate will, of necessity, increase judicial time on cases not presently qualifying for summary judgment. This will lead to another step in the schedule of costs, and thus increase costs unless there is a saving in costs gained later.

Early assessment of adequacy of plaintiff’s evidence/necessary scope of discovery

50. The consultation paper suggests adopting the summary judgment procedure in appropriate ordinary claims would include an early assessment of the adequacy of the evidence produced by the plaintiff and of the necessary scope of the discovery.
51. Most claims are considered not suitable for the summary judgment where reasonably extensive evidence is required, including expert evidence. Having to commit to incur costs on investigating whether such evidence is necessary at the commencement of the process and prior to defining the issues without any guarantee as to whether a fast-track or more traditional process will be ordered, may well be unhelpful to litigants. It may just add a further preliminary step in the procedure and add to costs.
52. Further, an early evaluative procedure based on a preliminary and likely premature assessment that the case is not complex, may cause the plaintiff or the defendant to be deprived of the

benefit of relevant information that is gained through the discovery process and other interlocutory applications (applications for further and better discovery/further particulars). Such a process is likely to increase the risk of an unjust result.

Initial preliminary judicial reaction

53. It is suggested the proposed process would reduce costs and correspondingly increase access to justice on the basis that parties would obtain an initial informed judicial reaction to their case which would encourage and expedite settlement discussions.
54. It is submitted that any summary evaluative-type procedure, given various interlocutory procedures would be truncated or dismissed entirely, may well result in parties being more dissatisfied with the outcome than they might otherwise have been. There is a high risk they will consider their case has not been properly considered or dealt with, or that they did not get a fair opportunity to explain it or prepare it.
55. Any early judicial evaluation or reaction, notwithstanding that it might be correct, is unlikely to change this perception.
56. If we are correct, the number of evaluative outcomes or 'decisions' appealed or challenged is likely to be reasonably significant. This would mean time and costs would be increased, not reduced, by this process. What looks like a procedural shortcut is unlikely to prove so.

Identification of best path to trial

57. Finally, the consultation paper suggests access to justice would be improved as the process would include identification of the best path to, and thus reduce the costs of a trial, thus making it easier to appropriately tailor discovery and limit the number of issues to be addressed.
58. In addition, the truncated process might result in the defendant finding itself in a position where it unwittingly fails to identify genuine complexities. This would not be expected under the current summary judgment process where there is opportunity for more care and consideration which would not be present in the procedure suggested. In the type of procedure suggested the issues may not be properly identified or properly and carefully defended.

Achievement of the four goals

59. Does the format:
 - 59.1 Mean lower legal fees? It is believed this format would be unlikely to reduce the costs of civil litigation but may increase appeals with even greater costs and use of judicial resources.

We consider this proposal would, in practise, constitute an additional burden for litigants and add unhelpfully to the present court procedure and rules. It is therefore likely to operate in a counter-productive way and should not be included in the current procedure. Further, should this procedure be applied in all cases, it is likely to clog up commercial cases and increase costs by imposing yet further costs including perhaps filing and scheduling fees. Taking these considerations together, it is suggested the costs of proceedings will be

- increased by having additional interlocutory/case management appearances. This is especially so in cases that disclose a proper basis for the claim and/or the defence.
- 59.2 Make things easier for litigants? The increased procedural steps will likely make it more difficult for unrepresented litigants to understand the process and the goals it is intended to achieve. It will likely add to the work and costs of litigation lawyers.
- 59.3 Speed up determinations? It is unlikely the process would be any faster for the bulk of cases than the present system. Additional procedural steps usually slow matters down.
- 59.4 Adapt to the complexity of the action? Any judicial involvement early in proceedings ought to ensure the procedure followed adapts better to the nature of the proceedings involved. So, this goal would likely be better served by greater use of existing rules with judicial involvement at an early stage.

Proposal four: streamlining standard pre-trial and trial processes

60. Before dealing with the specific suggested reforms in proposal four, we observe that many provisions already exist in the rules to enhance the just, speedy and inexpensive determination of cases. If they were better and more fully utilised, the type of reforms proposed in part four of the consultation paper may not need further consideration. Alternatively, after serious reconsideration of existing rules, other reforms might be better proposed.
61. For instance, for pre-trial procedure the following rules already exist. They are designed to enhance cost-effective conduct or trial preparation and of trials themselves – to mention a few:
- 7.1 – initial case management conferences where a number of issues are to be covered and dealt with by the parties in order to promote just, speedy, and inexpensive determination of proceedings.
- 7.2 – additional CMCs can be held at any time and on the initiative of a judge or of one or more of the parties. Directions as may be appropriate can be issued to secure the just, speedy, and inexpensive determination of proceedings.
- 7.3– specific mention of the details to be covered at the first CMC and any following CMCs (and at 7.4 further CMC's are provided for) all aimed at facilitating the just, speedy, and inexpensive determination of proceedings.
- 7.5 – provision is also made for specific 'issues conferences'.
- 7.8 - specific provision for pre-trial conferences where specific directions can be made - all aimed at facilitating an efficient trial with as much time saving initiatives as possible. 7.8(3) states specifically a judge at a pre-trial conference can make such directions as appropriate to secure the just, speedy, and inexpensive determination of the proceeding, including directions as to how the trial is to be conducted.
- 8.31 – under this rule time-wasting or inefficient management of cases can be curtailed through documents not included an affidavit of documents being prevented from being

produced in evidence – and must not be without consent of other parties or without leave of the court.

9.1 - the rules relating to briefs, oral evidence, common bundles of documents and chronologies, it is again stated that application of the rules in this part are aimed at pursuing the just, speedy, and inexpensive determination of the proceeding and are to be applied accordingly.

9.1 (2) – where it is stated expressly that:

“The parties must also ensure that the briefs and the common bundle are commensurate with the goal of keeping the cost of the proceeding proportionate to the subject matter of the proceeding.”

9.6 – again – to prevent inefficient and time-wasting case management or preparation documents not included in the common bundle may be produced at the hearing only with leave of the court – and this is intended to be available only where no injustice is caused as a result.

9.10 - contains an obligation to bring significant facts in dispute to the attention of the court once chronologies of facts have been filed and served – and directions can be given that evidence be given orally if the court so decides. All aimed at curtailing time and improving cost-effectiveness.

9.11 – provision is made for dealing with challenges prior to trial to the admissibility of evidence contained in briefs. Again, if used properly as intended, this can and should lead to better and more cost-effective trials as inadmissible evidence in briefs ruled out in advance of trial does not then need to be dealt with by opposing parties or the court.

62. It is obvious the above list does not cover all relevant rules that can be utilised during the pre-trial process. All aimed at facilitating cost-effective means of achieving a fair hearing while aimed at keeping costs proportionate to the subject-matter of the proceeding. We consider that if such rules, among others, were utilised with greater judicial involvement in the pre-trial process it would greatly enhance the prospects of reducing costs for the parties.
63. Thus, although the proposals for reform in part four are admirable in their aims, it would probably be more effective in achieving cost reductions in litigation if there was greater judicial involvement during the pre-trial process right up to trial, with greater use of rules which already exist. If the objective of rules reform is to achieve less judicial involvement through introducing yet more detail into the rules, then we consider it is likely to be counter-productive. Often new rules lead to yet more disputes between and among parties who disagree and dispute the effect of them in any given case. The prospect of such new Rules being counter-productive is real.
64. Judicial involvement, almost in the role of an umpire, in procedural disputes at an early stage in such disputes and perhaps dealt with at CMCs is more likely in our view to achieve costs savings in terms of avoiding wasted time than the reverse. Unfortunately, such processes require more judicial time and involvement – not less. Disputes that arise often between opposing parties can be curtailed in terms of the amount of time and cost involved in resolving them if they are brought before a judge for a ruling or determination at the earliest opportunity.

65. A useful and probably cost-saving reform might be to repeal those elements in the rules that appear to compel counsel and/or parties to either confer or co-operate or produce joint memoranda on discovery issues. Fewer obligations or requirements upon parties (or their counsel) to confer and co-operate over various procedural steps (such as 'disclosure/discovery' for instance) would aid cost-savings, bearing in mind such compulsion to co-operate is often the antithesis of how opposing and adversarial parties view each other. Our system is, after all, and adversarial one. Such obligations to cooperate and confer to seek agreement often involve a futile waste of time and costs, unless perhaps between experienced counsel. Experienced counsel can be relied upon to pursue such co-operative measures in the interests of their clients or to seek appropriate rulings at CMCs. But, for the parties and their lawyers to be required by the rules in all cases to co-operate to resolve opposing viewpoints where parties are determined not to 'give an inch', usually consumes more time and creates more costs for the parties than if a judge was to rule on such an issue at the earliest opportunity.
66. To expand on our observation above:
- (a) Having to contact and trying to make contact with an opposing litigant to discuss procedural issues, whether a litigant in person or counsel for an opposing side constrained by client instructions, usually creates more costs because it involves more time. For instance, just trying to get agreement on the terms and wording of a joint memorandum can be far more time consuming than seeking a direction ruling on the issue at a CMC.
- (b) The parties themselves often do not want their lawyers to co-operate with the opposing side, which is often regarded with hostility and as an enemy. A litigant client who does not want their lawyer co-operating with the other side may want to change lawyers even after detailed explanations as to why this is expected or required to be done. All this adds more time to a case – and usually unproductive time, at that.
- (c) It seems elementary that a compulsion or obligation to confer and co-operate merely creates more prospect of time wastage for adversary parties who simply do not agree on almost anything. This is especially so in the case of lay litigants who, for instance, may have no idea of what 'relevance to the matters at issue as defined by the pleadings' means.
67. In our view it would be more cost-effective not to impose obligations on parties which are of general application in all cases for opposing sides to confer or cooperate in seeking agreement. There are some cases and some parties where an obligation to cooperate with an adversarial party will always add cost for everyone through wasted time and effort. It is often counter-productive in the overall sense of the case as disputes about such interlocutory steps tend to entrench opposing parties into their negative views of the other.
68. Depositions pre-trial: Greater cost savings in general may be achieved for litigants if more effective use is made of the procedure for taking depositions prior to trial. We expand on this theory below, but point out there is an existing procedure under subpart 2 of part 9 of the rules which could be used to far greater advantage than currently although it would need to be reviewed and amended or expanded to enable this.

69. If litigants could arrange for some witnesses (perhaps non-key ones) to have their evidence taken at one or more depositions hearings in advance of trial, especially relating to the production of documentary evidence, there may be serious cost savings to be gained.
70. Some potential consequential benefits may be that doubts held by one party about whether another party can prove certain points would be answered before trial. Further, any doubts about availability of non-key witnesses and/or exactly what they might say in cross-examination would be answered before trial. It is likely the chances of realistic settlement discussions or initiatives would be enhanced once depositions on certain (even non-core) issues were completed before trial, thereby leaving only key issues in dispute for trial – or for negotiation.
71. The length of trials might potentially be seriously condensed and focused on key core factual issues. Counsel and parties would have better opportunity to prepare arguments and submissions once peripheral issues had been dealt with at depositions prior to trial. The potential for mishaps and unexpected events impeding the smooth flow of a trial should also be reduced.
72. The above are some observations and comments we suggest be considered seriously when assessing the reforms contemplated in part four.

The specific proposals in part four – briefs vs will say statements

73. The proposal for reforming the written signed briefs procedure is obviously affected by the other proposed reforms, particularly those in part three. If adopted, they might lead to all proceedings beginning with a summary judgment application and affidavits in support with consequential effect on whether to continue with the need for briefs, and if so, to what extent.
74. We consider the reasons for adopting the use of the written signed briefs procedure as were apparently expressed in the Rules Committee minutes of October 2012 remain valid. They do tend to assist in achieving a smoother trial process. They do tend to limit the possibility of unfair 'ambush' in the presentation of evidence. That is not to say that if the rules relating to their preparation were not enforced better or observed and complied with to a better degree that their usefulness would not be seriously improved. However, to prefer unsigned 'will say' statements over signed written briefs for all witnesses would probably be a backwards step in the pursuit of justice.
75. Existing Rules 7.8 and 9.10 appear to be provide flexibility for directions proportional to any given case being prepared for trial. In effect, they allow for directions for will say statements and for oral evidence and thus permit appropriate directions in any given case. So, is there a need to pass new Rules?
76. Further, current Rules 9.55-9.56 should enable primary documentary evidence to be produced by affidavit and if used more often should result in costs savings. As partFour recognises, the same applies with Rule 9.5(4), allowing a document in the common bundle to be automatically received into evidence when referenced in submissions. Hence, cost-efficiency improvements

do not necessarily require rule changes of the type proposed for briefs alone in our view. As indicated above, perhaps simply more judicial direction about what be presented by affidavit evidence would be of more help.

77. Thus, a focus on more timely pre-trial directions for collation and finalising of the primary bundle, and directions for evidence on non-key issues through affidavit evidence or depositions are likely to achieve better cost-savings. Even though documents may be produced earlier in the process than currently the norm the bundle can of course be supplemented, if necessary, at a later point nearer to trial.
78. One time-consuming and expensive aspect involves the need for written briefs to be cross-referenced to page numbers and document ID numbers in the bundle of exhibits prepared for trial. This is often a particularly time-consuming process for briefs. Especially trying to correlate the briefs for opposing parties. It is worse of course when a witness needs to give evidence covering a volume of documentary exhibits. Any improvements on this process would likely assist in reducing costs to litigants in that it would reduce counsel's time in preparation. Is there a better way?
79. Further, where affidavits are produced in advance of the hearing, as distinct from either 'will say' statements or briefs, then it should not be necessary for a witness to be present to read the affidavit aloud in the witness box. If the witness is to be available for X-X on the affidavit then all that is required, is for the witness to confirm the affidavit is in fact their affidavit. Surely the same can apply to a signed brief.
80. It may be that briefs should not be required for all witnesses and all types of evidence required for trial. But better use can be made of the existing rules to achieve this. This might be achieved with greater cost-savings in conjunction with better use of the rules for depositions, for affidavits, and for directions for oral evidence to be given on key issues.
81. We consider briefs should remain as a default position and continue wherever affidavits will not suffice, and where oral evidence is not directed. Otherwise there may be even more cost to litigants through use of unsigned 'will say' statements. Such a procedure is just as likely to contribute to more 'part-heards' and/or appeals and re-hearings in the pursuit of justice and the need for a fair hearing.
82. In many cases, if not most, briefs are considered by many lawyers as useful and probably save hearing time for many ordinary cases of short to mid-length trial duration. They require more time in preparation before the hearing, but that work also brings a focus to the evidence in detail together with the documents, and often leads to a more efficient hearing. It also often leads to more serious consideration of settlement prior to trial. It sometimes leads to the need for a late adjournment, thus saving a wasted 'part-heard'. Adjournments can be sought and justified where necessary to achieve a fair hearing where evidence disclosed by the other side in a formal brief is more clearly set out in a way not indicated previously in the pleadings or any interlocutories.
83. It would probably be more helpful and cost effective if there were more routine pre-trial conferences where objections to inadmissible evidence in briefs is determined well in advance

of commencement of the trial. We consider that if trial judges were more active in advance of a hearing in dealing with trial directions including ruling on such issues as objections to inadmissible evidence rather than leaving such issues for the hearing would do more to help achieve costs savings.

84. Without pre-trial rulings on issues such as objections to inadmissible evidence, another party is obliged to prepare a response just in case the court allows what appears to be inadmissible evidence, by stating it will attach whatever weight might be considered appropriate. There is an acknowledged risk at present of judges deferring ruling on such issues until the trial itself. However, if the Rules regarding objections to inadmissible evidence, not only in briefs but also in affidavits were better utilised then cost savings would likely result. Of course, the ability to have such objections dealt with pre-trial relating to unsigned witness statements is much more problematic. Issues such as inadmissible evidence included in signed written briefs is a major contributing factor in expanding briefs due to the need for corresponding expanded reply briefs.
85. Specific comments re - 'Will Say' statements - as set out in item 1 in appendix 1 of Part Four - relating to the situation in Western Australia:
- (a) While the procedure explained seems at first sight to be worth serious consideration, we consider it may have a serious flaw. While it appears it might achieve the aim of avoiding "trial by ambush" in the procedure explained and may not be as time consuming as preparing and dealing with formal briefs surely it cannot be right that a witness cannot be subject to X-X if they depart from the Will Say statement? We consider it must logically follow that if a witness deviates from a 'will say' statement then there should be a right to X-X on the prior 'will say' statement. Nor should such a right' to X-X be subject to first having to apply for leave to do so.
 - (b) Other parties will have prepared for the hearing on the basis of the 'will say' statement. If departed from that may place them at a serious disadvantage. Ambush is thus still possible as well as the risk of perception of an unfair trial.
 - (c) It should not be necessary to make an oral application for leave to cross-examine on it. Rather, there should be a right to do so. All that is required is for a simple statement by counsel to the trial judge that in light of evidence now given by a witness departing (or deviating) from a prior 'will say' statement, it will be necessary to X-X on the 'will say' statement.
 - (d) Discretion may perhaps be left to the trial judge to disallow such X-X if it is considered unnecessary. It might, for instance, be unnecessary where a departure or deviation is slight or trivial. Some brief questioning of a witness might quickly clarify the reason for any deviation – eg, if it arises as a result of an error about a minor point.
83. Re: item 3 of appendix 1, which concerns the procedure followed in NSW requiring evidence to be given by affidavit unless the court provides otherwise. Apparently, there is some flexibility in that part of a witness' evidence may be given by a witness affidavit and directions can be

given in respect of different questions of fact or witnesses. This may be a useful addition to our current procedure but whether it will simply serve to complicate the procedure and increase time and costs involved is doubtful.

Achievement of the four goals

84. Does the proposed WA or NSW 'will say' format:
- 84.1 Mean lower legal fees? Maybe not. It is doubtful such initiatives are needed to speed up hearings. But a shorter trial should be a cheaper trial.
 - 84.2 Make things easier for litigants? It is doubtful that replacing signed briefs with "will say" statements will make things easier for litigants and especially unrepresented litigants. Unsigned will say statements are not as useful in preparing for trial as briefs and may result in more time involved during trial rather than less.
 - 84.3 Speed up determinations? It is difficult to see this procedure will significantly speed up the court process overall. It might transfer time spent in preparation to extra time spent during the trial or involved in post-trial applications for rehearing or more appeals.
 - 84.4 Adapt to the complexity of the action? It is difficult to see that this would improve the flexibility that exists already in the current Rules. It may add to the complexity during the trial.

Alternative suggestions for more radical reform? Better use of Depositions hearings, directions for affidavits, pre-trial bundles of documents, pre-trial rulings on issues such as 'admissibility' and directions for oral evidence?

85. A more radical reform which may achieve far more in terms of cost savings for trial time and for litigants would be to consider modelling our trial preparation on US court processes of pre-trial 'depositions'. We do not mean 'adopting' the US system but perhaps adapting it and utilising it. More research than we have had time for would be needed to consider this fully. However, it may be an advantage for the evidence of many witnesses being taken and deposed in advance of trial. The taking of depositions can and does involve the opportunity to X-X.
86. It is always evidence preparation that consumes significant time in preparing for and conducting a trial, and thus this part of the overall process contributes to significant costs. The costs are expanded where many documents are to be produced. This can also be a tedious part of any trial.
87. We have useful procedures for taking witnesses' evidence before trial under Part 9 – sub-part 2 of the rules. This can be sought at present for various reasons including witness unavailability at time of trial. Evidence can be taken before a judge or a registrar.
88. This process under Part 9 sub-part 2 could be amended and expanded quite beneficially perhaps. It would in our view offer greater possible cost-saving gains than 'will say' statements being preferred over briefs. The value of deposing evidence of a witness may be enhanced and significant if it took place before a judge (especially the assigned trial judge) who can rule on any inadmissible evidence or unfair X-X questions during the process.

89. The taking evidence prior to trial may also avoid the situation where a plaintiff witness provides a brief of evidence, but that brief is not formal evidence until read in court. However, because the other parties have been served with the brief in advance of trial, they will often need to include a response in their own brief to respond to expected evidence the plaintiff's witness has raised. However, if a plaintiff's witness is not called, or the brief is changed or supplemented during trial it means the defendant's evidence is not in line with the plaintiff's evidence and even more time is consumed to deal with this. .
90. Key witnesses could also be deposed on issues of credibility in such a pre-trial depositions process. However, depending on the case and what is considered appropriate at pre-trial directions, it might be better in any particular case to leave credibility witnesses to give oral evidence at trial. Existing rules for possibility of pre-trial directions should be sufficient to achieve this. It may lead to only the witnesses on key credibility points taking up hearing time.
91. Evidence on quantum and expert issue might also be dealt with at depositions. However, it will depend on the particular case of course. But, again, existing rules can cater for this.
92. All witnesses on peripheral non-credibility issues and those concerning routine production of documents could be deposed thus saving time and costs.
93. Greater use of affidavits is another alternative to be considered on peripheral issues. Witnesses could then be made available at the hearing for X-X on their affidavits if called on.
94. Evidence given early and with the opportunity for X-X may well lead to more cases being settled before trial, as well as shorter trials for those that go ahead. This is what we understand is the case in the US.
95. There is also the prospect of better use of Rules relating to Notices to admit facts and/or documents. Such items could be dealt with at pre-trial conferences more effectively perhaps with greater cost savings.
96. The possible pre-trial evidence-taking process through depositions hearings may also assist self-represented litigants who may not present their evidence well at trial. They may be shy at public speaking and therefore not come across well, and the inside of a courtroom is usually daunting for any litigant. There may be an intangible benefit for them in being able to state their narrative in a less austere environment – under oath, and subject to X-X of course.
97. But overall, we consider better use of current rules should be encouraged. We also consider there is underutilised flexibility in the current rules which, if administered with more judicial input, would probably achieve greater gains in cost efficient hearings for all concerned. If so, this would obviate the need for more significant rules reforms. But if there is to be reform then serious consideration should be given to a depositions system similar to the process we understand operates in the US for pretrial deposing of witnesses. More research on this system and how it might be adapted usefully in ours would be appropriate in our view.

Proposed reform to change discovery obligations

98. Many counsel practising regularly in our courts do not find great difficulty or cost problems with the current rules on discovery. Is there a need for any serious reform in the rules, especially when reform is just as likely to lead to greater costs due to greater complexity? It may well be that in the case of the few very long, complex trials that discovery procedure is a serious problem but we suggest for the vast majority or ordinary cases the current flexible Rules are acceptable.
99. Reform of the rules on discovery should not be driven by the requirements of complex high-end litigation where cases often involve serious sums of money that justify greater preparation. Such cases are more likely to involve a multitude of factual and legal issues, multiple parties and a plethora of relevant background documents. In general, the current rules can, and often do, accommodate most cases and allow for special directions on a case-by-case basis for the more complex and important cases as well.
100. It is important to observe that in many instances a thorough disclosure of all relevant documents is necessary to achieve justice for the parties so any reform to curtail the obligations of parties to disclose relevant documents is likely to increase risk of an unjust result. For instance, sometimes it is not the documents disclosed that are as important but rather the absence of documents which were expected. It may be that after proper disclosure under the current rules, the absence of documents tend to disprove an issue of alleged fact or a claim or simply damages the credibility of a party or witness. So, disclosure of all relevant documents should remain the default position for most cases. The rules allow for tailored and specific discovery where appropriate.
101. Thus, the existing rules allow for flexibility on a case-by-case basis: targeted disclosure or confined categories of documents are often the subject of directions. The rules appear to be working and the need for reform is questionable. Generally, creating more rules results in greater complexity which in turn involves more time and more cost to parties and quite often also to the court.
102. If the discovery procedure is to be reformed, a closer examination of the current pilot scheme in England (Appendix 2) would appear to be a useful formula. It may need or benefit from some modification for NZ.
103. In the event reform of discovery rules is considered further it seems sensible for: the pursuing party to make initial disclosure at the earliest possible opportunity; then for opposing parties to respond to disclose any further or additional documents not already disclosed in initial discovery. But there should be a requirement for all parties to acknowledge and identify in their list the documents they too have in the possession, power or control even where they duplicate those in the initial discovery. All parties should follow a sequence as directed by the court and parties should then have an opportunity to seek further document disclosure via a CMC. An applicant seeking directions for more discovery can be expected to justify and explain reasons for the further discovery. Directions orders can follow as may be required or appropriate. However, our current Rules allow for the process of seeking further discovery.

Case management through to trial?

104. We consider it desirable for the court to continue with case management directions through to trial. The rules themselves do not need to be changed to achieve that but greater judicial involvement through more CMCs, issues conferences and pre-trial conferences will result. However, the added advantage is likely to be that the overall duration of a case in the system and before being heard would be shortened – and thus so too would costs.

Achievement of the goals re part four?

105. Do the suggested reforms in part four:

105.1 Mean lower legal fees? It is anticipated that the reforms will not bring about lower fees.

105.2 Make things easier for litigants? This is very doubtful.

105.3 Speed up determinations? It is difficult to see the proposed changes speeding up the court process. However, greater judicial involvement through more CMCs and pre-trial directions would likely assist to shorten the case duration overall.

105.4 Adapt to the complexity of the action? It is difficult to see that any specific benefits over and above what is available in the current Rules will result.

General remarks

106. One fundamental driver behind the consultation paper is identified as the “justice gap”, the perceived symptom of which is litigants appearing in person¹ before courts instead of being represented by a lawyer (a person enrolled as a barrister and solicitor, and holding a current practising certificate).²

107. The fundamental gap in access to legal services is financial inability to fund the obtaining of legal advice from a lawyer prior to bringing, or defending, proceedings in the civil courts. The phenomenon is not new.³ Many people are still (120 years later) excluded from accessing the courts due to financial imbalance between the parties to a dispute.

108. The CP has a narrow focus, namely, how to amend the rules of practice and procedure to reduce the cost of resolving proceedings lodged in the courts. The analogy is where a medical practitioner identifies a symptom and looks at the available treatments instead of dealing with what is causing the symptom.

109. The legal costs problem is much wider than the symptom of unrepresented litigants. Any party to a civil dispute must consider the cost of initial legal advice, which is necessary before that person can either ask the court to determine rights or resist the claims of an initiator of court proceedings or reach a realistic settlement out of court. The legal work generating that initial cost will include an assessment of the facts and applicable law, the likely costs of litigation, the risk of failure, the time involved in getting the matter heard, the time and cost of any appeals, and the

¹ Rules Committee Discussion Paper, paragraph 5.

² Lawyers and Conveyancers Act 2006, section 6, definitions of barrister, lawyer, reserved areas of work.

³ An Irish judge is reputed to have said (about 1900) that justice in England is open to all “like the Ritz Hotel”. The meaning of that comment being that the more money you have the better your access to the legal system.

affected person's financial resources. The "justice gap" effectively arises where even that preliminary exercise is beyond the means of a person involved in a civil dispute, which is before the rules of court apply (being upon the lodging of a proceeding.)

110. If the reason for inability to buy legal assistance is in any way attributable to court practices and procedures, such a situation would conflict with New Zealand's overriding commitment to the rule of law.⁴
111. Lawyers are sometimes blamed for the cost of civil disputes. The media appears to give publicity to anyone who says lawyers are expensive and those who advocate for 'free' services. It has been suggested lawyers should have an "aspirational" goal of 35 hours of free services each year, though no similar services levy is to apply to other professions, or skills, or trades. That symptoms-based approach looks at the foot of the cliff, not at the reasons why legal services are unaffordable. The Rules Committee has the power to re-shape the current court processes to allow judges to devote their time to hearing and determining civil disputes, as presented to them by the parties.
112. The law is not a factory process for opening and closing files with minimal interference from witness evidence, and both evidential and substantive law.
113. Some argue that the various rules changes over the years have tended to force judges into the role of being auxiliary legal managers of files. Those that make this argument contend that the function of a judge is to judge - ie, to hear and determine disputes. And that the function of a lawyer is to represent the client through legal advice, communications with the opposing lawyers, ensuring compliance with the relevant rules and procedures, and representation (oral and written) at the hearing by a judge of a proceeding. And the function of Ministry of Justice staff is to perform administrative functions that support the disposal of a proceeding by the judge.
114. The introduction of case management extended the range of work done by judges presumably in the belief that judge time and skills were necessary to ready a dispute for the core function of hearing and determination.⁵
115. Some argue that if the rules for every court were pruned of every function performed by judges, except for hearing and determining the pleaded disputes, a great deal of time for hearing and decision writing would become available. The corresponding burdens on counsel would be removed and cost to the litigants would shrink correspondingly.
116. Some suggest that there may be procedures in the rules that waste judge time, but which should be the responsibility of the lawyers acting for the parties - for example, defining issues.
117. The CP focus on the pressures on courts (the availability of judges, courtrooms and court staff), and on the public perception that lawyers are too expensive, some argue that together obscure

⁴ Senior Courts Act 2016, section 3(2): *Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.*

⁵ High Court Rules 2016, Part 7, Subpart 1 Case Management and Schedule 5 (Matters for consideration at case management conference).

the sole purpose of courts being to have litigants heard by a judge, who then authoritatively determines the dispute.

Separation of powers

118. Some lawyers hold the view that judges are not part of the executive branch of government, but few New Zealanders would see judges as both separate from, and independent of, the ministry. The recently created Criminal Cases Review Commission,⁶ is to take over the Governor-General's functions relating to the exercise of the Royal Prerogative of Mercy in respect of alleged miscarriages of justice in criminal cases. The new commission is to be based in Hamilton for the expressed reason that "It is important the CCRC is independent from the big bureaucratic and judicial centres, Auckland and Wellington."⁷ Some lawyers argue that when the public and litigants see the judiciary so closely involved in palpably administrative work of litigation there is a real risk of failure to distinguish between the two mutually exclusive divisions of power.

119. The committee recognises there are some lawyers who contend that the removal of the judiciary from involvement in what is essentially administrative preparation of proceedings for hearing and determination would have a treble benefit:

- 119.1 increase of judicial hours available for hearing and determination (the sole reason for judges);
- 119.2 reduction of time spent by lawyers in satisfying administrative processing demands (a significant cause of cost);
- 119.3 clarity for litigants and the public as to the existence of the doctrine of separation of powers (maintenance of public confidence in the rule of law).

Changes to practices and rules – possibilities

120. It is suggested that existing rules for processes need to be individually justified by being critically assessed for:

- 120.1 necessity for determination of proceedings;
- 120.2 opportunity cost in judicial time;
- 120.3 cost in lawyers' time (at actual charge-out rates, not costs- schedule rates, which are reputed to be only two-thirds market rates);
- 120.4 cost in court staff time;
- 120.5 administrative costs (management of files, registers, communications, data usage, IT costs, court security costs, and all other identifiable inputs of funding court premises and court staff).

121. Rules should be deleted or reduced where they do not facilitate the "just, speedy, and inexpensive"⁸ hearing and determination of proceedings as the law requires.

122. The further statutory requirement for improving the existing rules of court is that they facilitate the administration of justice.⁹ Arguably, this is not construed to justify any court process or

⁶ Criminal Cases Review Commission Act 2019, in force on 1 July 2020.

⁷ Media release 21 February 2020, Justice Minister Andrew Little.

⁸ Senior Courts Act 2016, section 145(a).

⁹ Senior Courts Act 2016, section 145(b).

practice that makes it uneconomic for a party to a civil dispute to obtain the authoritative determination of that dispute by a judge.

123. Some lawyers hold the view that those rules and processes that might be in need of abolition, or radical improvement, include:

- 123.1 case management (abolish);
- 123.2 multiple chronologies of facts and partisan chronologies (abolish);
- 123.3 expert witnesses (cost consequences of partiality and advocacy);
- 123.4 affidavit evidence, and written briefs (restrict);
- 123.5 costs orders (remove the discretion, so a mechanical calculation);
- 123.6 leave to appeal (make appeals an automatic right);
- 123.7 summary judgment (abolish).