

Delivering Justice for All

A vision for New Zealand Courts and Tribunals

RECOMMENDATIONS AND NZLS RESPONSE

PART 1: ACHIEVING ACCESS

Recommendations

A. Legal Information

R1 A state agency should have lead responsibility for developing an integrated and coordinated legal information strategy that assists the entire community when dealing with the court system.

⇒ NZLS agrees with this recommendation. It feels that the Ministry of Justice would be an appropriate agency to take responsibility for the strategy outlined in this recommendation.

R2 State agencies responsible for legislation that creates public rights and duties should be required to produce, distribute, review and update information that will assist lay people to understand those rights and duties. This should be an explicit requirement when new legislation in that category is passed.

⇒ NZLS agrees with this recommendation.

R3 Responsibilities of the lead agency or agencies in relation to legal information should include the following elements:

- advising Government in relation to an integrated legal information strategy, including specific initiatives that require new funding, (possibly by working with the Justice Sector Information Strategy project)
- maintaining an accessible database of up to date legal information prepared from a lay user's perspective in online, written, aural or visual formats, along the lines of the online catalogue of law-related information currently being developed by the Legal Services Agency
- maintaining an accessible database of where and how to obtain up to date legal information (such as from websites, Citizens Advice Bureaux, Community Law Centres, courthouses, libraries, 0800 numbers or professional organisations), prepared from a lay user's perspective along the lines of the online catalogue of law-related information currently being developed by the Legal Services Agency
- taking an active role in ensuring this information is available nationwide in visible community outlets including courthouses, Citizens Advice Bureaux, libraries, Community Law Centres, and other community centers
- taking an active role in promoting public awareness of the existence of the information and of information outlets in ways appropriate to different audiences (eg, posters, community radio, training information provider staff, and preparing training materials), building on initiatives the Legal Services Agency already has underway
- liaising with other government agencies, the law profession, information providers and community groups to identify where and how deficits in the provision of information occur
- taking an active role to assist other agencies and organisations with the provision of new information by identifying potential funding sources and providers, and advising on effective communication methods
- leading new initiatives to enhance the delivery of useful legal information, for example, by providing training information or by developing self-help kits for some types of case.

⇒ NZLS agrees with this recommendation. It considers that a coordinated approach must be taken to avoid duplication of information and that current distributors of information (such as libraries) should be adequately funded to ensure free access to accurate legal information for all members of the public. NZLS also believes that consideration must be given to the needs of minority groups, ensuring that legal information is delivered using the most effective modes of communication.

R4 The Ministry of Justice should take the lead in providing information about court proceedings, in leaflet and electronic form, and within the courthouse.

⇒ NZLS agrees with this recommendation

R5 The Ministry of Justice should pilot the use of an information service or helpdesk in courthouses, where trained staff can answer general questions about court proceedings, help people find their way, provide access to general legal information and suggest where people can obtain individual, initial legal advice.

⇒ NZLS agrees with this recommendation. The use of an information service or helpdesk in courthouses is worth exploring provided great care is taken to ensure that the public using the service understands its purpose and its limits. The utmost care should be taken to ensure that the staff who are providing the assistance have appropriate training and strictly limit their advice to general questions about court proceedings, providing advice on access to general legal information and guiding people on where they can obtain individual, initial legal advice.

⇒ NZLS is very supportive of recommendations 1-5. It considers that the dissemination of accurate and easily understood information about the law, legal services and Court processes is essential to the effective functioning of the Court system. NZLS believes that to create a user-friendly system there must be a co-ordinated approach to the delivery of legal information to the public via various media. People are best served by being adequately informed of the processes of the Court, and where to get proper help.

B. Initial Legal Advice

R6 A state agency should have the lead responsibility to create and maintain a national network for the provision of initial legal advice.

⇒ Refer to response for recommendation 7

R7 The responsibilities of the agency should include:

- advising Government in relation to an integrated initial legal advice network, including specific initiatives that require new funding
- ensuring there are options for people to obtain initial legal advice face to face or by some other method where questions can be asked and answers given, such as telephone or internet
- ensuring state-funded legal advisers are qualified and experienced in the particular legal areas where they give advice, or properly supervised by senior lawyers with those attributes
- establishing reasonable times and expectations for initial interviews with the objective of clarifying the available options and next step for the client
- working with the legal profession to explore possibilities for offering 'unbundled' legal services.

⇒ NZLS believes that lawyers play an important and relevant part in educating consumers, providing knowledgeable advice about processes and potential outcomes and guiding people through a variety of problems. This is a primary function of the legal profession and is equally as important as the lawyers' role as an advocate in court. The concept of legal professional privilege has been carefully built up to enable such advice to be given in a strictly confidential situation. Proper legal advice cannot be given in a 15-minute time slot; the suggestion that it can be is reminiscent of Law Help. Law Help was an attempt to provide free legal advice to people in 10min time slots. The system failed as increasingly these time

allocations had to be exceeded and it was no longer viable for lawyers to provide this service. NZLS believes that emphasis should be placed on the delivery of good initial legal advice.

The services proposed in recommendations 6 and 7 are already being undertaken to some extent, by Community Law Centres. The expansion of the network of Community Law Centres would seem therefore to be the most suitable method to ensure a national network for the provision of initial legal advice. NZLS supports the work being done by these organisations and believe that recognition of their work should be given, in particular by the setting up of more Law Centres and the provision of appropriate funding. However, there is a problem with access to Community Law Centres in that they are only located in larger centres, rural areas in particular may not see the benefits. NZLS suggest that Legal Outreach Programmes should be promoted in areas that do not have access to CLC's.

NZLS also considers that Legal aid for the provision of initial legal advice is a good idea. It would be beneficial to simplify the application process for legal aid so that it would be feasible for lawyers to provide initial legal advice to those eligible.

C. Representation

R8 The police should be obliged to inform people in their custody of the existence of the Police Detention Legal Aid Scheme.

⇒ NZLS agrees with this recommendation. NZLS considers that notice to an accused that she or he may consult a lawyer must make it clear that a lawyer can be provided then and free of charge

R9 People charged with a criminal offence should receive a minimum standard of representation and advice about their rights and options, including:

- advice (by appointment) before the day the case is first called in court
- representation for the first call of the case
- advice and continuity of representation for any further matters arising during the administrative phase of the case including disclosure, remand, plea, status hearing and (if relevant) jury trial election and bail
- continuity of representation where a guilty plea is entered.

⇒ NZLS agrees with the principles outlined in this recommendation. However, it is concerned that some of the ideas may be unworkable due to time and budget constraints (such as advising a client before the day the case is first called into Court).

R10 The duty solicitor scheme should be reformed, or a new scheme developed, to ensure these minimum standards are achieved for those who would otherwise be unrepresented.

⇒ NZLS agrees with the principles outlined in this recommendation. Unrepresented litigants are a drain on the Court system, generally cases involving unrepresented litigants take longer to be resolved and consequentially increase the costs of proceedings for both parties. NZLS suggests that research into the impact unrepresented litigants have on the Court system would be beneficial. There is already mounting evidence that the growing number of unrepresented litigants in Australian courts is causing real difficulty and delay, is operating to the disadvantage of represented parties, and causing additional burdens on court staff and judges. Judges often struggle with how much they should assist those who are unrepresented in proceedings before them, and where the line should be drawn. NZLS supports any attempt to decrease the numbers of unrepresented litigants.

R11 Community Law Centre lawyers should be able to represent their clients, without demonstration of unmet legal needs, provided there is no double dipping of state funding.

⇒ NZLS feels that some, but not all Community Law Centres (CLC) have appropriate staff to justify this recommendation. It agrees that CLC staff who are appropriately qualified should be able to be selected as a preferred provider, but that in all cases they must meet the required standard. There should be no separate standard for community law centre staff. This assumes that the community law centres have the capacity to meet this workload. NZLS notes that currently CLC lawyers who are admitted may appear for anyone who

wishes to instruct them. If the aim of this recommendation is simply to allow CLC staff to undertake legal aid work, NZLS is not sure there is a justification for this.

R12 Legislation should establish a presumptive right, within limits controlled by the presiding judge, for unrepresented litigants in court to have assistance from:

- a supporter, such as a kaumatua or elder in the litigant's community, who could address the court on behalf of the litigant at sentencing in summary criminal cases, or within limits to be decided by the judge in other proceedings
- a 'friend', who may sit beside the litigant in court, take notes, make suggestions, give advice to the litigant, and propose questions and submissions which the litigant may ask or make (a McKenzie Friend).

⇒ NZLS opposes this recommendation. It contends that the current system works adequately and to extend this any further would be to venture into hazardous waters. Currently there is provision for a "McKenzie Friend" to assist an unrepresented litigant in Court proceedings. "McKenzie Friends" do not have a right of audience and are there to assist not to represent the litigant. Provision also exists for the Court to hear from a Kaumatua or elder at sentencing. Recommendation 12 takes this practice much further and NZLS does not support such an extension.

NZLS does not believe that it should be a presumptive right to have assistance and that it should remain at the discretion of the Court. To have a presumptive right would be problematic in that unrepresented litigants would begin to expect too much from their lay advocate and see it as an alternative to legal advice/representation from a legal professional. Lawyers are Officers of the Court and the lawyer's duty to act in the best interests of his or her client is subject to an overriding duty to the court or the tribunal concerned, as set out in Rule 8.01 and its commentaries, Rules of Professional Conduct for Barristers and Solicitors, 6th edition. The duties upon lawyers are important protections for the client and for the court. No obligation to adhere to a code of ethics exists for "supporters".

R13 Where lay advocates are permitted in specialist tribunals, the tribunal should be able to stipulate the level of knowledge or experience that is a prerequisite to a general right of audience.

⇒ NZLS supports this recommendation.

D. Costs

R14 Accessibility and simplification in order to reduce costs to the public should be recognised as a priority in all law reform initiatives, including changes to court practice and new legislation.

⇒ NZLS agrees with this recommendation.

R15 A report on the direct and indirect compliance costs to the public of new legislation should be required by Government as a matter of course.

⇒ NZLS agrees with this recommendation.

R16 Amendments should be made to the Rules of Professional Conduct that place specific requirements on the amount of information lawyers must give. The following minimum information should be provided to clients

- At the first meeting or contact the client should be given:
 - the name of the lawyer responsible for the conduct of the matter
 - details of the methods of costing, billing intervals and billing arrangements (which should include itemised billing)
 - information setting out the disclosure obligations of the lawyer
 - a statement specifying the external and internal avenues available for complaints about lawyers' conduct or fees.

- Before the lawyer's services are retained by a client, or as soon as reasonably practicable afterwards, either:
 - a written estimate should be given for the work, which should not be exceeded without the consent of the client (the estimate should include, so far as practicable, all likely costs involved including disbursements and court filing fees)
 - if it is not practicable to give an estimate, the solicitor should either explain why and give a forecast within a possible range of estimates or give the best possible information about the cost of the next stage or stages of the matter
 - alternatively, the client should be able to state their budget, which should not be exceeded without their consent
 - the lawyer should be required to explain the possible outcomes of the matter and their likely effect on cost (including the amount the client would likely recover in the event of success, the likely extent of the client's liability to pay the opponent's costs in the event of failure).
- As the matter progresses:
 - The lawyer should keep the client up to date about costs, including court fees incurred or likely to be incurred, lawyers fees, disbursements and liability for the other party's costs. This means delivering interim bills and notifying the client in writing about any changes in circumstances that will affect costs. The extent to which this would be appropriate will depend on the level of the claim – the amount of time preparing bills should not be disproportionate nor increase cost for the client.

⇒ NZLS rejects this recommendation. The Society has been very supportive of the client care provisions under the Lawyers and Conveyancers Bill 2003. It is anticipated that the Client Care Rules developed under this Bill will provide information for the clients in regards to costs, without being as prescriptive as Recommendation 14. The provision of such information should be a matter of professionalism, rather than a legal requirement. The list in the report prescribes too many classes of information. There must also be room for exceptions, for example where the client agrees, or where advice is provided under urgency.

R17 Failure to adhere to these standards should lead to censure of the practitioner in question, and should be capable of amounting to misconduct or conduct unbecoming a barrister or solicitor.

⇒ NZLS disagrees with this recommendation because of the standards described, rather than the principle.

R18 Law firms should be required to operate an internal complaints handling procedure.

⇒ This suggestion has some merit but needs to be seen in the context of the Client Care Rules to be developed.

R19 The Ministry of Justice website should provide, with explanatory notes, information on all the costs of going to court, including the cost recovery scales. A brochure setting out this information should be sent in response to the filing of a statement of claim and statement of defence.

⇒ NZLS would support this recommendation, so long as the explanation was such that it did not set up unrealistic expectations of recovery.

R20 The New Zealand Law Society, or an independent body, should assume responsibility for providing independent comparative costs information for consumers on legal fees.

⇒ NZLS resists this recommendation. This should not be the role of the NZLS (the Consumer Institute currently does this), and it bears no relation to professional standards. The Society considers that it is dangerous to promote the idea that cheaper is better. Encouraging the public to shop around for the cheapest legal services does not promote the dissemination of quality legal advice/representation.

R21 The Ministry of Justice should undertake further research into alternatives to legal aid, such as contingency legal aid funds, for funding or supporting litigation.

⇒ *NZLS is not opposed to contingency fees in principle, but believes that contingency funding is no substitute for adequate funding of legal aid. The initial funding of a system would be required from Government. It would need to be administered. It would be better to fund legal aid properly and to recover from proceeds of proceedings.*

R22 There should be ongoing evaluation of the effect of court fees on court usage.

⇒ *NZLS supports this recommendation. It contends that the high cost of Court fees often acts as a barrier to Court usage. In order to generate increased access to justice action must be taken to reduce costs for the Court user.*

R23 The availability of a waiver of court fees should be publicised in a way that is likely to reach unrepresented litigants.

⇒ *NZLS agrees with this recommendation.*

E. Encompassing Diversity

R24 The Ministry of Justice should investigate:

- the designation of staff as liaison officers or facilitators to assist groups with particular access issues arising from their ethnicity, disability or any other special concerns, and to advise the court about ways to improve services for these people
- staff training to assist people with special needs for assistance with court processes.

⇒ *NZLS does not disagree with this recommendation, although it does have concerns over how it will be achieved.*

R25 The Ministry of Justice should develop a national policy for the hiring of interpreters, including setting minimum qualifications, standards, and other requirements.

⇒ *NZLS agrees with this recommendation. The Society feels that the Ministry of Justice should fund interpreters properly (whether for someone who is a non-English speaker, or has impaired hearing), not only to appear in court, but also to assist at lawyer's offices. This should be for criminal, or legally aided civil matters. NZLS believes that an interpreter must, in all circumstances, be properly qualified.*

R26 In accordance with the New Zealand Disability Strategy, the Ministry of Justice should review court facilities from the perspective of all types of impairment and experience of disability, to determine specific measures that will improve access to justice for people with disabilities.

⇒ *NZLS agrees with the above recommendation.*

R27 The treatment of victims should be enhanced by implementation of two measures, previously recommended by the Law Commission:

- there should be discretion for all witnesses to be screened while giving evidence, or to give evidence on video, where need is established, regardless of the nature of the crime
- victims should have access to separate rooms at all courts.

⇒ *NZLS considers that the status quo is adequate in regards to the screening of witnesses. Special rules already exist for witnesses who are children or victims, but these are exceptions and not normal or standard procedure. Potentially screening witnesses on the basis of their preference contradicts the principle of the ability of an accused to face her or his accuser. NZLS feels that these are important aspects of a fair trial.*

NZLS does agree with the second bullet point of this recommendation.

R28 When implementing recommendations that will improve access and support for people coming to court, the Ministry of Justice should include consideration of the diverse needs of minority groups, including their particular concerns about:

- access to useful information
- provision for support people in court proceedings
- alternatives to mainstream criminal justice processes.

⇒ NZLS supports recommendation 28 with the proviso that there is one standard of justice for all participants, from which there is no derogation.

PART 2: OUTSIDE THE COURT

Recommendations

A. The Place of Alternative Criminal Justice Processes

R29 A set of guiding principles should be adopted for alternative criminal justice models operating outside the direct supervision of the court, with such legislative amendment as necessary to ensure they protect the rights and interests of victims and defendants.

⇒ *NZLS agrees with this recommendation*

B. Infringements and Minor Offences

R30 One statutory framework should be developed to regulate the establishment of infringement offence schemes and procedures.

⇒ *NZLS agrees with this recommendation. However, increased use of infringements should not occur until there is a system which requires the proper collection of information, leading to infringements being able to be adequately enforced.*

R31 Penalties for infringement offences should be reviewed to ensure that there is proportionality between the behaviour being regulated and the penalty imposed.

⇒ *NZLS supports this recommendation*

R32 The minor offence regime should be examined to determine whether some minor offences should be reclassified as infringement offences, or removed from the statute books altogether.

⇒ *NZLS supports this recommendation*

C. Police Warnings and Formal Cautions

R33 A new formal police caution process should replace the current police diversion process with legislative amendments to permit the changes to be implemented.

⇒ *NZLS supports moves for greater consistency and clarity, however it does not believe that the proposed formal caution system will fill the gap between offences serious enough (and with sufficient evidence) to prosecute, and those for which no court-ordered punishment should be handed out (as happens with diversion). NZLS suggests that instead of discarding the old system and starting over, the existing system could be retained and improved upon. It is possible that the loss of diversion will see a rise in the number of prosecutions pursued for matters, which would otherwise have been diverted, and are seen as too serious for a formal caution. Diversion involves the community and its loss would be contrary to the theme elsewhere in this report of making the system responsive to the community.*

D. Restorative Justice

R34 Policies, including funding policies should be developed for the operation of restorative justice programmes under the Sentencing Act 2002 and Victims' Rights Act 2002 that ensure high standards of accountability, consistency, equity and transparency.

⇒ *NZLS agrees with this recommendation.*

R35 Regulations should be developed to provide for best process standards in the provision of restorative justice programmes and the monitoring and enforcement of offenders' plans prior to sentencing.

⇒ NZLS is generally in favour of restorative justice.

E. State Mediation Services

R36 One organisation should take responsibility for coordinating all state-managed mediation services to ensure they remain accessible and meet high standards.

⇒ NZLS considers it is important that any mediation service should have a degree of independence from both the Courts and the Government. The Society supports the idea of establishing a panel of mediators who are appropriately qualified and experienced, and have access to continued training and education. NZLS considers the Weathertight Homes Mediation Service to be a good model.

R37 Mediation should be available through the coordinated service for a small fee, to parties with general civil disputes under \$50,000.

⇒ NZLS considers that it is important to ensure that mediation is accessible to everyone (even those with limited means). The cost of mediation should be kept at a minimum, in order to make it an affordable and viable alternative to Court proceedings. The State has an interest in the efficient resolution of dispute and this should be kept in mind when establishing the level of fees for mediation.

F. Court-Mandated Mediation

R38 There should be a presumption that cases filed on the standard case management track in the proposed Primary Civil Court and the High Court will go to mediation before the 13th week after filing.

⇒ NZLS agrees with the Law Commission's view that mediation should "become part of the general culture of civil litigation" (paragraph 150 Report). It is supportive of any alternative dispute resolution process (e.g. mediation, arbitration, counseling) being made available to the public at large. The Society rejects any proposal to make mediation compulsory. While judges should ensure or encourage mediation if they consider that it would constructively resolve the dispute; the decision to use a mediation service should be the parties'.

R39 The judge should have discretion to excuse parties from mediation, or to allow the parties to delay mediation.

⇒ NZLS disagrees with the proposal to make mediation compulsory (refer recommendation 38). However, if it was to become compulsory the Society would support this recommendation and suggest that the Courts discretion to consider mediation may take a form similar to that laid out in s159 of the Employment Relations Act 2000.

R40 A multi-disciplinary working group of mediation practitioners, lawyers, policy-makers and trainers should oversee the implementation of court-mandated mediation and advise on:

- the qualification level required for mediators to be placed on the court list.
- a code of ethics and review or complaints procedure.
- rules for privilege and confidentiality, mediator immunity and good faith of the parties in the mediation.

⇒ NZLS considers that a mediation service must be independent, while liaising closely with the Courts to ensure ready access. Mediators should be independent from both the Court and the Government. To ensure public confidence, members of the panel of mediators should be of the highest quality, with appropriate experience. The Society supports proposals outlined in the bullet points above, and is very firm on the importance of quality control of any mediation service.

R41 Parties should be free to choose their own mediator or to use one contracted by the Ministry of Justice.

⇒ NZLS concludes that if the Commission's recommendation for Court-mandated mediation is accepted, the

way in which the mediation services are delivered needs to be very carefully considered. In particular the Society is strongly opposed to any institutionalised Court mediation service in the general Courts, such as exists, for example in the Employment jurisdiction and Environment Court. NZLS believes it is very important that the mediators should be independent of the Court, and independent of the Government. The Weathertight Homes Mediation Service would be a good model for the court mediation service. The mediators are chosen from a panel of qualified and experienced mediators, are independent contractors, and are paid a daily fee.

The Society agrees that parties should be free to choose their own mediator from a panel of mediators; and should also be able to agree to engage a mediator who is not on the panel. In that event the parties would be responsible for the payment of that mediator's individual fees.

R42 Parties using a mediator contracted by the Ministry of Justice should pay an additional fee set at a level that protects access to justice, in accordance with established principles for setting civil court fees. The fee should be a percentage of the relevant setting down fee.

⇒ NZLS disagrees with the Ministry of Justice being involved in the contracting of mediators. However, if this proposal were to go ahead NZLS would like to reiterate that the cost of mediation should be kept at a minimum, in order to make it an affordable and viable alternative to Court proceedings. It disagrees strongly, however, that Court fees should be set on a percentage basis..

R43 Waivers available for court fees should also apply to mediation fees.

⇒ NZLS agrees with this recommendation

R44 Judges should be able to order the parties to an appeal to attend mediation prior to the hearing.

⇒ NZLS does not strongly object to this but feels that a court should have confidence in the correctness of its own decision. Inserting a mediation mechanism creates an extra delay for a successful litigant enforcing a decision.

PART 4: COMMUNITY COURT

GENERAL COMMENT

⇒ *The NZLS comments that the recommendations relating to the proposed new Community Court, if implemented, will effect very significant changes to present Court structures and the way justice is delivered. The Society is supportive of the Law Commission's intentions, however it feels they can be achieved without structural reform and at a lower cost. NZLS contends that the case for restructuring is not convincing. The report identifies the need for better resourcing of Courts and for simpler/clearer processes, yet it fails to consider whether addressing those issues might avert the need for the major reforms proposed.*

NZLS rejects the proposed creation of the Community Court. If the District Court processes are simplified and the Disputes Tribunal is given increased jurisdiction, greater access to justice could be simply achieved without fundamental changes to the present Court structure. It is critical that urgent attention be given to simplifying the processes of the District Courts and, to that end, as an urgent first step in the line with the Report's recommendation (Recommendation 100) there be an established body to redraft the rules of court. NZLS believes that unless the District Courts rules and processes are simplified, its work will continue to decline. It contends that adequate resources must be given to the District Courts to ensure Judges have appropriate secretarial and research assistance; NZLS see no reason why District Court Judges should not receive the same support as High Court Judges presently do. NZLS concludes that resources should be concentrated on improving the present structures, not on the creation of new structures.

Recommendations

A. Establishing the Community Court

[NB: Recommendations 45-53 are found under Primary Courts at page 28 of this paper]

R54 A Community Court should be established at the same level as the other Primary Courts to deal with the high volume, less serious, criminal and civil cases currently heard in the District Court.

⇒ *NZLS does not support the establishment of the Community Court. NZLS contends that the innovations proposed for the Community Court can be done in the existing District Courts system. There is no need to create a separate structure with added costs. NZLS considers that the existing Court structure has the ability to work effectively, but it needs to be better resourced. The Society believes if the District Courts processes are simplified and the Disputes Tribunal is given increased jurisdiction, greater access to justice could be simply achieved without fundamental changes to the present Court structure.*

R55 The court should have original jurisdiction over all cases heard summarily with a possible maximum penalty of 10 years' imprisonment, and should hear the preliminary hearings of indictable offences. The court should hear civil disputes up to a value of \$50,000.

⇒ *NZLS rejects the establishment of a new Community Court (refer general comment and recommendation 54). NZLS would have serious concerns, if this were to go ahead, about the proposal to have one Court, the Community Court with civil jurisdiction only up to \$50,000, sitting at the same level as the Primary Civil Court with jurisdiction up to \$500,000 (as recommended by the Commission), with the same rights of appeal.*

R56 The Community Court should be a specialist court with its own principles, style and processes.

⇒ *Refer comments on recommendation 58*

R57 Principles should be developed, in consultation with community representatives, to guide the ongoing operation of the Community Court, and be included in the founding legislation.

⇒ *Refer comments on recommendation 58*

R58 The principles should reflect the need for each Community Court to be accessible and responsive to its community, to deal effectively with criminal behaviour, to provide early clarification of issues and understandable processes for those with cases in the Community Court and to be a portal for general information and advice for all court jurisdictions.

⇒ *NZLS is alarmed at the suggestion in Recommendations 56-58 that there be different courts with different standards. All courts should have a national system with one standard of justice for all participants from the District Courts through to the Supreme Court.*

B. The Court and its Community

R59 A national advisory group with community representatives should be established to advise on the development and implementation of the Community Court concept.

⇒ *NZLS reiterates that it does not support the creation of the Community Court. However, if the Court were to be established NZLS would support the above recommendation. But the consultation should not be repeated with local groups, thus leading to the development of separate systems in different area of New Zealand.*

R60 The Ministry of Justice should seek advice from Māori leadership as to how appropriate Māori representation should be achieved at a strategic level.

⇒ *Refer to recommendation 65*

R61 Each Community Court should have a Community Court Consultation Group, with a membership that represents the community where it is situated.

⇒ *Refer to recommendation 65*

R62 Each Community Court should employ one or more Community Liaison Officers with responsibility for maintaining a two-way dialogue with the community and court users.

⇒ *Refer to recommendation 65*

R63 Each Community Court Consultation Group must include representatives of local iwi and hapū.

⇒ *Refer to recommendation 65*

R64 Judges and staff should work with the Community Court Consultation Group in an ongoing relationship, to enhance the effectiveness of the court's processes and practice for persons who attend the court who are Māori; or from ethnic and cultural minority and disability groups.

⇒ *Refer to recommendation 65*

R65 One of the Community Liaison Officer's core functions should be to establish formal and enduring relationships with local marae, runanga and urban entities.

⇒ *These recommendations (60-65) relate to earlier recommendations which the NZLS has largely disagreed with, but it wishes to comment further that it believes there should be one standard of justice and procedure for all participants. Advice should be sought from all of New Zealand's interest and/or ethnic groups, and effort must be made to consult with appropriate people within those groups. Altering court procedure or standards to accommodate the ideas of community groups can create bias against minorities within that community, and in addition can cause serious problems where a person accused of committing an offence in that area comes from another community altogether.*

C. Criminal Processes in the Community Court

R66 Current work to reform and streamline the criminal list process should be given high priority.

⇒ *NZLS supports this.*

R67 The responsibility for scheduling cases set down for hearing in the criminal list court should lie solely with the court registry.

⇒ *Refer recommendation 68*

R68 The police should vary the dates on which defendants released on bail or summons following arrest are required to make their first appearance in court in order to maintain an even volume of court appearances, when this is possible.

⇒ *NZLS agrees with recommendations (r67-68) if they were applied to the District Court. It suggests that matters should be staggered throughout the day, and that any accused in custody should retain the right to be brought before the court at short notice, or be granted bail.*

R69 The requirement for police to swear informations laid in court should be abolished, and informations should be able to be transferred electronically to courts by police.

⇒ *The NZLS opposes this recommendation and asks why police should be able to begin proceedings in an electronic manner when no other party can. A desire for convenience should not override considerations of justice.*

R70 A court officer should be responsible for the court record, which should be read and signed by the judge at the end of each appearance.

⇒ *The NZLS agrees with this recommendation.*

D. Civil Processes in the Community Court

R71 There should be simple, understandable and widely available information about the Community Court and its processes.

⇒ *The NZLS considers that effective dissemination of information to the public about the Courts and their processes is important at every level.*

E. Claims under \$50,000

R72 Civil processes in the Community Court should be simplified to ensure that they facilitate access to justice and are proportional to the amount in dispute.

⇒ *Refer comments for recommendation 73*

R73 A simplified; two-stage process should be implemented for civil claims under \$50,000 with the following features:

- proceedings should be started by filing a pre-printed 'claim form', a list of up to five documents and a list of up to five witnesses
- notice served on the defendant should include an information pack and a pre-printed 'defence form'
- the defence form must be filed and served within 21 days
- the pre-printed forms should be signed by the parties as a statement of truth
- a 'case assessment conference' should take place within 30 days of the filing of the defence
- if parties do not settle at the conference, the judge should complete a 'directions summary' form, for the trial
- the trial should take place within 90 days and should be heard by a different judge
- at the trial the judge should have the power to ask questions and to seek and receive such evidence as they see fit.

⇒ *NZLS considers that any reasonable proposal to simplify processes in the civil sphere should be supported. NZLS continues to disagree with recommendations to establish a Community Court but it would support a similar simplified process, as suggested in recommendations 72 and 73, if it were applied to the District Courts. The Society would like to reiterate that it has concerns about the proposal to have one Court, the Community Court with civil jurisdiction only up to \$50,000, sitting at the same level as the Primary Civil Court with jurisdiction up to \$500,000, with the same rights of appeal. The proposals will mean there are two forms of justice being conducted at the same level. NZLS feels that altering a judge's role from impartial to inquisitorial is such a fundamental change that it should not be included as a minor bullet point at the end of recommendation 73, but should have its own quite separate and public proposal.*

R74 Parties to proceedings in the Community Court should not have a right to general discovery.

⇒ *NZLS feels that this is a deceptively substantial recommendation that requires further discussion. To have no right to general discovery will greatly downgrade people's claims. There was some suggestion that the converse be proposed: that a judge has the discretion to limit discovery, rather than there be a presumption that it not take place. The Society did note, however, that general discovery is hugely expensive. The majority of the cost is absorbed in compiling the list, so could there be a general right to inspect all relevant documents, but not to obtain a list of them. This is occasionally done in practice.*

R75 Cases should be able to be transferred to the proposed Primary Civil Court, either on application to a judge warranted to sit in that court, or by order of a Community Court judge.

⇒ *NZLS reiterates that it does not support the proposed Community Court however if it were to proceed then the NZLS does not disagree with this recommendation*

F. Claims to recover civil debt

R76 The summary judgment procedure should not be available for claims under \$50,000 heard in the Community Court.

⇒ *The NZLS considers the abolition of the summary judgment procedure would be a retrograde step. Its introduction led to a remarkable reduction in the number of cases with doubtful or spurious defences. The summary procedure enables cases without tenable defences to be quickly brought to an end.*

R77 Default judgment should be able to be entered within 21 days of service on the defendant on any claim for a specified amount of money.

⇒ *NZLS supports the reintroduction of the default judgment procedure. It is a simple procedure and, relatively speaking, inexpensive.*

G. Disputes Tribunal and Tenancy Tribunal

R78 The Disputes Tribunal and Tenancy Tribunal should operate as the Disputes and Tenancy Divisions of the Community Court.

⇒ *Refer comments for recommendation 79*

R79 All proceedings in the Disputes Tribunal should be recorded so that a transcript is available if a complaint is made or an appeal is sought.

⇒ *NZLS is not opposed to either of the above recommendations but considers that much more needs to be done. NZLS considers that the current systems of these tribunals should be retained but that they should be expanded upon.*

- *Disputes Tribunals should decide matters according to law.*
- *Adjudicators should be lawyers or have legal qualifications.*
- *Parties should have the option of legal representation when both parties to the dispute agree.*
- *The Disputes Tribunals jurisdiction could then be increased from its present maximum of \$7,500 (\$12,000 by consent) to \$20,000. This would decrease the workload of the District Court.*
- *Parties to Disputes Tribunal hearings should have the right to appeal Disputes Tribunal decisions on matters of law, but not fact.*
- *The simplicity of the processes in the Disputes and Tenancy Tribunals should be retained. Adequate specialist staff should support the Disputes and Tenancy Tribunals, not only during hearings, but also with administrative matters.*
- *Disputes Tribunal hearings should be open to the public.*

H. Community Justice Officers

R80 A single judicial officer, known as a Community Justice Officer should exercise the current jurisdictions of the Community Magistrate, Justice of the Peace (in the exercise of their judicial functions), Disputes Tribunal Referee and Tenancy Adjudicator.

⇒ *NZLS reiterates that it does not support the establishment of the Community Court, and advocates for retention and improvement of the current system. However, if the proposal for the Community Court goes ahead, NZLS does not disagree with this recommendation, but the Community Justice Officer must be legally qualified.*

R81 Each Community Justice Officer should be warranted to sit in one or more of these jurisdictions, depending on their skills and experience.

⇒ *NZLS supports the concept of specialisation of judicial officers but considers that such specialisation need not occur until District Courts level.*

R82 The summary criminal jurisdiction of Community Justice Officers should be the same as that currently exercised by Community Magistrates.

⇒ *See R80*

R83 The qualification for Community Justice Officers should be either:

- experience in practice as a barrister or solicitor or overseas equivalent, or
- capability, by reason of special knowledge or experience, of performing and exercising the duties, functions, and powers of one or more of the Community Justice Officer jurisdictions.

⇒ *NZLS considers that use of Community Justice Officers (or Magistrates, JP's and referees if the current system is retained) is an effective way to cover a vast amount of lower level work. However, the Society believe that sometimes the lower level cases can raise very complex issues and therefore require the judicial officer to be legally qualified. NZLS considers that any judicial officer must have the appropriate knowledge for the level of decision making and must have access to continued training and legal education. The Society takes the position that all Judicial Officers should be legally qualified and experienced in order to retain public confidence in the Courts decisions. NZLS considers this is of particular importance in light of its recommendation for the Disputes Tribunal to decide cases on matters of law not just fact.*

R84 Community Justice Officers should be appointed for a fixed term of five years, with the option of reappointment, but not beyond the age limit that applies to permanent judicial officers.

⇒ *NZLS reiterates its rejection of the Community Court proposal. However, if the proposal were to go ahead NZLS would agree with this recommendation.*

R85 A common rate should be paid to Community Justice Officers, set at a level that fairly reflects the importance of their judicial role and the significant volumes of civil and criminal cases they handle.

⇒ *Subject to the comments in regards to recommendation 84, NZLS supports this recommendation.*

R86 Community Justice Officers should be able to be appointed to sit on a part-time basis.

⇒ *If Community Justice Officers were to be introduced, NZLS would support this recommendation.*

PART 3: COURT STRUCTURE

A. Primary Courts

R45 The following nine courts should be collectively termed the Primary Courts:

- Community Court
- Primary Civil Court
- Primary Criminal Court
- Family Court
- Youth Court
- Environment Court
- Employment Court
- Māori Land Court
- Coroners' Court.

⇒ *The NZLS sees the creation of the proposed Primary Civil/ Criminal Courts and the Community Court as being unnecessary. What is more important is to simplify the current processes; ensure that sufficient resources are devoted to the existing processes; and ensure our Courts are appropriately staffed and adequate support is given to our judicial officers. NZLS considers that while there is a need for specialisation in certain spheres, it must be remembered New Zealand is a small country. Especially at the lower courts level, taking into account such matters as the far flung nature of New Zealand, it is important that those holding the position of District Court Judge are warranted to hear most criminal and civil matters. The creation of the proposed Primary Civil/ Criminal Courts, the Society believes, will in practice lead to Judges with Primary Civil/ Criminal Court warrants being resident only in major centres and visiting smaller centres only when required. NZLS considers that it is important that Courts be seen as part of their communities.*

R46 The judges of the Primary Courts (excluding the Coroners' Court) should be tenured Primary Court judges warranted by the Attorney-General to sit in a particular court or courts.

⇒ *NZLS is not opposed to specialisation of Judges but feels that such specialisation could be effective in the current court system without the increased cost of restructuring.*

R47 Each court should be headed by a Chief or Principal Judge, or Coroner, with responsibility for leadership and advocacy of the jurisdiction, judicial rostering, and oversight of law reform, emerging problems and court procedures.

⇒ *In light of NZLS resistance to the creation of the new Community Court and the Primary Civil/Criminal Courts this recommendation is not applicable. However, if such courts were established oversight by a chief/principal judicial officer is desirable.*

R48 A Chief Primary Court Judge, together with the judicial heads of each Primary Court, should have responsibility for overseeing the Primary Courts and coordinating their respective interests through a Primary Courts Consultative Council.

⇒ *See R47*

B. Appeals

R49 The first appeal from a Primary Court should be a general appeal to the High Court, on both fact and law, as of right, with the exception of the first appeal from the Māori Land Court, which is to the Māori Appellate Court.

⇒ *NZLS has a considerable problem with this recommendation. It was proposed that the Environment Court should be elevated to a status equivalent to, but not part of, the High Court and saw the Employment Court having the same standing – with a right of appeal to the Court of Appeal and then to the Supreme Court.*

NZLS accepts that if the Law Commission structure is accepted as a whole then the case for elevating the Environment Court beyond the primary courts is difficult to sustain. Since Environment Court hearings are regularly appeals from a Council decision, this recommendation gives in effect two rights of appeal on fact and law and with the Supreme Court two further appeals on law, albeit with leave. There should not be five tiers in the appeal system.

The Society is opposed to the appeal to the High Court from the Environment Court being on both facts and law. There are already considerable criticisms of the time that RMA matters take to reach their conclusion and introducing a right to appeal on the facts to the High Court rather than just on a point of law has the potential to delay matters further. A right of appeal on the facts also favours the deep-pocketed appellant, such as a trade competitor.

NZLS would also like to reiterate that the proposals to have one Court, the Community Court with civil jurisdiction only up to \$50,000, sitting at the same level as the Primary Civil Court with jurisdiction up to \$500,000, with the same rights of appeal is not supported. The proposals will mean there are two forms of justice being conducted at the same level, one by an apparently specialist Civil Court (the Primary Civil Court) and another by the Community Court with limited civil jurisdiction, but with the same rights of appeal to the High Court.

R50 Further appeal from the High Court should be on a matter of law only and should require leave of the Court of Appeal.

⇒ With consideration for the comments above (r49), NZLS does not disagree with this recommendation. The Society considers that, beyond the Environment Court and the Employment Court there should be no right of appeal on fact.

R51 Applications for leave to appeal should be heard by the receiving court.

⇒ NZLS agrees with this recommendation.

R52 The High Court should have primary responsibility for maintaining consistency in the application of legal principle, supervising the operation of other courts and the exercise of administrative power – functions which derive from its role as an appellate court, and the court responsible for judicial review.

⇒ NZLS agrees with this recommendation

R53 The Court of Appeal should be a strong, intermediate appellate court with sufficient time to give adequate consideration to the complex and significant cases that come before it.

⇒ NZLS agrees with this recommendation and believes that the number of Court of Appeal judges should be increased. NZLS points out that the facilities/ physical resources already exist for increasing the number of Court of Appeal judges.

PART 5: PRIMARY COURTS

A. Primary Criminal Court and Criminal Processes

A1. Primary Criminal Court

R87 The Primary Criminal Court should sit as a separate court within the Primary Court structure, headed by a Principal Judge, and with judges warranted for that jurisdiction.

⇒ *NZLS reiterates that it disagrees with the restructuring proposed and prefers the retention of the current system.*

A2 Allocating work between the Primary Criminal Court and the High Court

R88 The middle band of criminal offences should be abolished.

⇒ *NZLS does not object to the middle band procedure, providing it is applied consistently throughout the country.*

R89 The High Court should retain exclusive criminal jurisdiction for a defined group of offences. All other cases not in the jurisdiction of the Community Court should be heard in the Primary Criminal Court.

⇒ *NZLS repeats that it does not support the proposed restructuring, but if it were to occur NZLS would not disagree with this recommendation.*

R90 The defined list of offences heard in the High Court should be based on the seriousness and complexity of offending. Legislation should be introduced after consultation with the judiciary, the police and the legal profession.

⇒ *NZLS supports consistency and would support this proposal were middle branding to be abolished. The consultation with the judiciary, police and the legal profession is important.*

R91 There should be a means of transferring cases from the Primary Criminal Court to the High Court in exceptional circumstances, based on extraordinary matters at issue in the particular case.

⇒ *See R 88*

A3 Criminal jury trials

R92 The threshold for an accused's right to elect a jury trial should be limited to offences regarded as 'serious' by today's standards.

⇒ *Refer recommendation 94*

R93 New Zealand should adopt the standard in the Canadian Charter of Rights and Freedoms 1982, and provide a right to trial by jury for cases with a maximum penalty of five years' or more imprisonment.

⇒ *Refer recommendation 94*

R94 The prosecution as well as the accused should be able to apply for trial by a judge without a jury for offences with a maximum penalty of less than 14 years' imprisonment, where the case is likely to exceed four weeks or 20 sitting days.

⇒ NZLS opposes these recommendations (r 92-94) and prefers the status quo. An accused must enjoy the fundamental constitutional right to be tried by his or her own peers for all but for the most minor offences. The complexity of the case, rather than the length of trial, should be the test for whether the prosecution can apply for trial by judge alone - the length of a trial is capable of manipulation. The Society acknowledges that a trial before a judge alone might, in some circumstances, provide a greater opportunity for justice by saving of time. However in complex cases, where there is the risk that a jury will not understand the issues, there is an obligation on counsel to clarify. If these recommendations are to be adopted, there must be widespread consultation, and preferably a separate Law Commission Report or Royal Commission of inquiry. The Society is concerned that cost is being given paramount consideration, to the detriment of fundamental rights and freedoms, which are recognised both in New Zealand's legislation and its international commitments.

A4 Reforms in progress

R95 There should be urgent implementation of the legislative reforms relating to criminal jury trials, currently planned to be introduced to Parliament in 2004, which aim to:

- enable juries to be more representative and competent
- allow majority verdicts of 11 jurors
- minimise the use of preliminary hearings at which witnesses give oral evidence
- standardise prosecution disclosure and provide for some defence disclosure.

⇒ These issues are included in the Criminal Procedure Bill currently before the House, and subject to specific submissions. The criminal trial reforms are superficially attractive but problematic to make fair and workable.

B. Primary Civil Court and Civil Processes

B1. Primary Civil Court

R96 A Primary Civil Court should sit as a separate court, forming part of the Primary Court structure, headed by a Principal Judge. The work of the court should be undertaken by Primary Court judges warranted to hear civil cases.

⇒ NZLS repeats that it supports retaining and improving the status quo in regards to the Court structure.

R97 The upper limit of the Primary Civil Court's jurisdiction should be \$500,000.

⇒ See R99

R98 The Primary Civil Court and High Court should share jurisdiction concurrently for cases up to \$500,000.

⇒ See R99

R99 The provisions for transfer of cases between the Primary Civil Court and the High Court should remain unchanged.

⇒ NZLS has concerns in respect to Recommendations 96 –99, about the effect of the transfer of so much of the jurisdiction of the High Court to the Primary Civil Court. The proposal to increase civil jurisdiction to \$500,000, while of itself not opposed by the NZLS, needs further research. It needs further research to assess its impact on the High Court's work and, more particularly, the ability of the Primary Civil Court –

the District Courts by another name in its civil jurisdiction – to cope with the increased workload. NZLS would rather than efforts were made to improve existing systems, than see resources committed to new structures that struggle to cope with newly allocated areas of jurisdiction.

B2 Case management in the Primary Civil Court and High Court

R100 A suitably constituted body should undertake a project to redraft the rules of court, with the following aims:

- clarity and simplicity of language
- proportionality of procedure
- enhancing access to justice for all citizens.

⇒ NZLS strongly supports this recommendation. It believes that the unduly complex and prescriptive rules structure is a fundamental obstruction blocking access to justice. It compares the almost rudimentary rules that govern the conduct of arbitration under the 1996 Arbitration Act with the complex rules in the District and High Courts. Yet very significant and complex disputes are routinely dealt with by arbitration without difficulty. The parties, in cooperation with the arbitrator are generally able to conduct the disputes in a coherent and cost efficient way. Much of the cost and complexity of litigation in the Courts stems from the structure of the rules. NZLS considers that the public should be encouraged to utilise the Court system and to enable this, court procedures must be simplified and costs minimized. Despite opposing the creation of a stand-alone Primary Civil Court and a new Community Court NZLS supports any reasonable proposal to simplify the processes of the lower courts in their civil jurisdiction and the urgent establishment of a body to simplify the present Court rules and its processes as envisaged by Recommendation 100.

R101 Seminars or other training should be offered on a regular basis for judges, managers, court staff and the profession, to enhance the effectiveness of case management.

⇒ NZLS supports this recommendation.

R102 The case management rules for the High Court, as contained in the High Court Rules, and recently amended by the High Court Amendment Rules 2003, should be adopted in the Primary Civil Court, and in the interim, in the District Court for cases over \$50,000.

⇒ NZLS believes (in regards to Recommendations 100-102) a critical step must first be taken, before resources are devoted to the establishment of the proposed Primary Civil Court. That critical step is contained in Recommendation 100; that is the establishment of a body to urgently redraft the present High Court and District Courts rules. The rules have grown far too complex. Use of the Court system will continue to decline unless urgent steps are taken to simplify processes and that can only be done by removing the complexities of the present rules. Major cases are heard outside the system by arbitrators. That has much to do with the simplicity of that process, its accessibility and its ability to determine disputes promptly. Arbitration is not necessarily cheaper. With the recent increases in Court fees and the award of costs, especially in the High Court, the cost of the use of the Court system to the parties involved may be not much different from use of the arbitration process. Parties to civil disputes have the right to an efficient system of justice particularly when they are paying an ever-increasing portion of the costs involved. Effects of simplification of the existing systems processes should be considered prior to consideration being given to restructuring.

R103 Case management conferences should also be used to explore possibilities for settling the dispute.

⇒ NZLS agrees with this recommendation.

R104 A second case management conference should take place as a matter of course in Primary Civil Court and High Court standard track cases when no attempt to mediate a solution has been made.

⇒ *NZLS does not disagree with this recommendation but believes that there should be an ability to apply to waive this requirement*

R105 Unless the judge deems it unnecessary, parties should be required to attend the second case management conference if they have not been to mediation.

⇒ *NZLS agrees with this recommendation. However, consideration should be given to the additional costs that will be incurred by the parties*

R106 If the parties mutually agree, and the judge consents, they should be able to tailor a regime responsive to the needs of their case instead of following the standard case management track. This regime should be subject to court management.

⇒ *NZLS agrees with this recommendation, noting that the parties are the instigators of this “alternate track”.*

B3 Other civil process issues in the Primary Civil Court and High Court

R107 The Rules Committee should give urgent consideration to the introduction of a ‘wasted costs’ rule.

⇒ *The “wasted costs” recommendation involves disciplinary matters. It is more appropriate that the New Zealand Law Society deal with such matters, rather than the High Court.*

R108 The rules relating to offers should be extended to include offers before cases are commenced.

⇒ *NZLS does not disagree with this recommendation*

R109 The consequences of failing to accept an offer where the other party (the offeror) does better than the terms of the offer should be set out explicitly in the rules, including the possibility of full indemnity costs, but leaving the court discretion to avoid any injustice that might result.

⇒ *NZLS does not disagree with this recommendation.*

R110 We restate the recommendations made in our 2002 report on *General Discovery* and seek their early implementation.

⇒ *The implementation of this particular recommendation, in the absence of a general overhaul of the Court rules, risks the possibility of a continuation of the present ad hoc process of responding to perceived inadequacies of Court rules, when the real problem is that those rules should be revisited generally.*

C. Family Court and Youth Court

R111 The Family Court and Youth Court should sit as separate courts, forming two distinct parts of the Primary Court structure, each headed by a Principal Judge. Work in each court should be done by warranted judges.

⇒ *NZLS agrees with the recommendation that the Family Court and the Youth Court should remain separate, each continuing to be headed by a Principal Judge. All work in each court should be done by warranted judges.*

D. Environment Court

R112 The Environment Court should sit as a separate court as part of the Primary Court structure, headed

by a Principal Judge. Work in the court should continue to be done by warranted judges.

⇒ *NZLS agrees with the recommendation that the Environment Court should remain sitting as a separate court within the current court system.*

R113 There should be a general right of appeal – on matters of fact as well as law – from decisions of the Environment Court to the High Court. A further appeal should lie to the Court of Appeal with the leave of that court.

⇒ *The NZLS disagrees strongly with this recommendation see comments on recommendations 49 and 50.*

E. Employment Court

R114 The Employment Court should remain a specialist court.

⇒ *NZLS agrees with this recommendation.*

R115 The Employment Court should sit as a separate court as part of the Primary Court structure, headed by a Chief Judge. Work in the court should continue to be done by warranted judges.

⇒ *NZLS supports the retention of the current Employment disputes process.*

R116 There should be a right of general appeal from the Employment Court to the High Court, on matters of fact and law. There should be a further appeal to the Court of Appeal with leave, on matters of law only, and to the Supreme Court as at present.

⇒ *NZLS disagrees with this recommendation. The disadvantage of the change proposed is that employment matters, particularly personal grievances, could be heard twice in bodies of roughly comparable status. While not a court, and specifically not required to permit cross-examination, the Employment Relations Authority is a type of judicial forum.*

If the work of the Employment Court relating to grievances (primarily elections under section 179 of the Act) were transferred to the Primary Court level then potentially, an aggrieved party could appeal from that decision to the High Court then to the Court of Appeal and (by leave) to the new Supreme Court. This will be difficult to justify.

NZLS sees the Employment Court as already closer in status and jurisdiction to the High Court than to the District Court. Its jurisdiction relating to judicial review and its work in relation to strikes and lockouts or to hear proceedings founded on torts resulting from strikes or lockouts (section 187(h)) are more closely related to the jurisdiction of the High Court than they are to the District Courts. While it is important that parties to an employment relationship can have access to low level speedy and efficient justice it is also important that, when the occasion demands it, they can have access to a court where judicial review and the issuing of injunctions forms a regular part of the court's business.

It is perceived that placing all of the Employment Court's present jurisdiction in the Primary Court level it may possibly achieve the objective of speedy and efficient justice but would not, particularly in relation to judicial review and collective action matters, result in these matters receiving the quality of judicial determination that they require. That work is more fittingly undertaken by the High Court. Refer also to NZLS comments on recommendations 49 and 50.

R117 Applications for judicial review of decisions of the Employment Court should be heard in the High Court, rather than the Court of Appeal.

⇒ *NZLS agrees with this recommendation if the proposed restructuring occurs.*

F. Māori Land Court and Māori Appellate Court

F1. Jurisdiction and structure

R118 The jurisdiction of the Māori Land Court should be increased to include all disputes involving communal Māori assets.

R119 The Māori Land Court should be a separate court within the Primary Court structure, headed by its own Chief Judge, and with judges warranted for that jurisdiction.

R120 Māori Land Court judges should be able to appoint pū-wananga (experts in tikanga Māori and whakapapa) and others with relevant skills to assist, as full members of the court, in particular cases.
⇒ *The NZLS does not disagree with recommendations 118-120 subject only to its opposition to the proposed establishment of a Primary Court Structure.*

F2. Appeal rights

R121 The Māori Appellate Court should be the forum for deciding any disputed issue of tikanga in all court litigation.

R122 Appeals from an opinion of the Māori Appellate Court on tikanga should be capable of challenge only in the Supreme Court, and if leave to appeal is granted. This recommendation is not supported by Law Commissioners Ngatata Love and Frances Joychild, who consider decisions of the Māori Appellate Court on matters of tikanga should be final.

⇒ *NZLS believes that decisions of the Maori Appellate Court on matters of tikanga should be final.*

R123 The present right of appeal from the Māori Land Court to the Māori Appellate Court should be retained.

⇒ *NZLS agrees with this recommendation.*

R124 All determinations of the Māori Appellate Court, other than on tikanga, should be subject to an appeal to the High Court, rather than the Court of Appeal and should continue to be subject to judicial review. This recommendation is not supported by Law Commissioners Ngatata Love and Frances Joychild, who consider there should be only a right of appeal on a question of law to the Supreme Court from the Māori Appellate Court, although judicial review should remain in the High Court.

⇒ *The NZLS thinks that this recommendation needs further discussion and consultation. On balance it tentatively supports the status quo.*

G. Coroners' Court

R125 The coronial jurisdiction should be exercised through a Coroners' Court, forming part of the Primary Court structure and headed by a Chief Coroner.

⇒ *NZLS supports retention of the status quo, with the appointment of a Chief Coroner.*

R126 There should be a general right of appeal to the High Court from a coroner's findings.

⇒ *The Coroners' Court itself has been the subject of new legislation, the Coroners' Court Act 2004. Under the new legislation there will be permanent appointments to the position of Coroners. NZLS accepts the Report's recommendation that there should be a general right of appeal to the High Court from a Coroner's findings.*

Concluding Remarks

⇒ *The introduction of yet a further Court in the form of the Community Court is not supported. The Society considers that the procedures of the existing Court structure can readily be modified to incorporate simple and straightforward litigation procedures for the more elementary and lower value cases, which might otherwise be seen as suitable for the Community Court civil jurisdiction. Little is said in the report about the efficient running of the Court system itself. It is axiomatic that an efficient Court system requires competent qualified and properly motivated staff to operate the facilities. An area not touched on in the report, is the necessity to provide a properly remunerated and well-structured career system for the Court staff to ensure that the best calibre people are available to promote the efficient running of the Court system. NZLS considers that many of the Report's recommendations are sensible, viable and relatively easy to implement, even on an incremental basis and that collectively, the result will be a more user friendly Court system, but this should occur within the current structure.*

PART 6: HIGH COURT AND COURT OF APPEAL

A. The High Court

A1. Criminal jurisdiction (*recommendations 88–91 are covered earlier in Part 5*)

A2. Civil jurisdiction

R127 The High Court should retain exclusive or predominant jurisdiction in the following areas: civil cases over \$500,000, judicial review, arbitration, trusts and administration, admiralty, intellectual property, insolvency and probate.

⇒ NZLS supports the thrust of this recommendation. It would like to reiterate that before any major structural changes are undertaken, the impact of the increase in jurisdiction of the lower courts to \$500,000 and its consequent effect on the High Court should be first examined.

R128 Panels of judges should be established in the High Court to allow a degree of specialisation at both first instance and on appeal, without detracting from the generalist nature of the High Court as a whole.

⇒ NZLS considers that, given the size of New Zealand and the limited pool of Judges (when compared for example, with England where there was specialisation), the extent of specialisation in New Zealand has to be limited or it could lead to one or two judges trying every case in a particular area. It is however appropriate for Judges to try matters within their particular area of expertise. NZLS concludes that the recommendation that a panel of Judges be established to allow specialisation is a good compromise.

R129 The Commercial List should be discontinued and commercial cases managed within the general civil system. Complex cases should be assigned to a judge and managed on an individual listing basis.

⇒ NZLS believes there is no problem in discontinuing the commercial list as long as any alternative maintains the same flexibility and rate of turnaround.

R130 A small group of appropriately skilled, tenured Primary Court judges should be warranted to exercise the Office of Master of the High Court, as well as being warranted to hear cases in the Primary Civil Court

⇒ The NZLS considers that this recommendation is unnecessary. It appears to be an attempt to give Masters of the High Court tenure. As they are now Associate Judges and have tenure this recommendation is not required. However, if the recommendation was in fact intended to create an Office similar to that of the Masters of the High Court in the lower level courts because of the extension of the Court jurisdiction to \$500,000 then this should be something that is considered, if and when the proposed restructure occurs.

Supervisory jurisdiction: appeal and review (*recommendations 49 and 52 are made and discussed in Part 3*)

R131 Appeals from Primary Criminal Court jury trials should go to a bench of three High Court judges in the High Court, with the potential for further appeal to the Court of Appeal with leave.

⇒ NZLS has problems with this recommendation. It considers that requiring a bench of three judges to hear appeals from Criminal Court jury trials will put the High Court under pressure. The current criminal division system in the Court of Appeal effectively has two High Court judges sitting on these appeals. If the intention is to reduce the workload of the Court of Appeal then there are other ways of doing this, including appeals to the High Court, but not necessarily to a bench of three. This matter needs to be looked at again in conjunction with any decision relating to the threshold for trial by jury.

R132 Appeals from the Community Court should go to one High Court judge.

⇒ *NZLS reiterates that it does not support the development of the Community Court.*

R133 Subject to specific exceptions, there should be a presumption that two High Court judges will hear all other appeals, including appeals from the tribunal structure.

⇒ *NZLS does not disagree with this recommendation in its totality. However it does consider tribunal proceedings should be appealed to the District Courts if they are to be decided on matters of law. Appeals from both the Environment Court and the Employment Court should be appealed directly to the Court of Appeal on a point of law only.*

B. Court of Appeal

R134 The Court of Appeal should no longer hear:

- appeals from jury trials in the proposed Primary Criminal Court
- appeals from the Employment Court or applications for judicial review of Employment Court decisions
- appeals from the Māori Appellate Court.

⇒ *Refer comments on recommendation 116,124 and 131*

R135 The Court of Appeal should always include one High Court judge on secondment. The secondment should be for a sufficient period to make it meaningful and useful for both courts, perhaps three or four months at a time.

⇒ *NZLS supports this recommendation.*

PART 7: TRIBUNALS

A: A Coherent Framework for Tribunals

A1. Unified tribunal framework

R136 Most of New Zealand's tribunals should be integrated within a unified tribunal framework. Rationalisation of tribunals, their membership and processes should occur incrementally.

⇒ *NZLS agrees that most of New Zealand's Tribunals should be integrated within a unified tribunal framework similar to the VCAT model as outlined in the report. Rationalisation is needed.*

R137 The following bodies should be excluded from the new structure: the Waitangi Tribunal, the Securities Commission, the Commerce Commission, the Takeovers Panel, the Abortion Supervisory Committee, the Privacy Commissioner, the Employment Relations Authority, the Mental Health Review Tribunal, the New Zealand Parole Board, the Disputes Tribunal and the Tenancy Tribunal.

⇒ *NZLS consider that while the report is silent on this matter, tribunals dealing with disciplinary matters of the professions (such as doctors, lawyers and accountants) should also be excluded from the new structure.*

R138 Future tribunals should be established only in accordance with principle and in conformity with fixed guidelines. Unless exceptional circumstances exist, new tribunals should be integrated into the unified structure.

⇒ *NZLS agrees with this recommendation*

A2. Judicial leadership

R139 The unified tribunal structure should have a President, who is a Primary Civil Court judge, together with two legally qualified deputies.

⇒ *NZLS agrees with this recommendation, although that judge would be a District Court Judge in NZLS's view.*

R140 Legislation should vest the President with the role of recommending to Government how particular tribunals can be merged, grouped or rationalised within the tribunal structure.

⇒ *NZLS agrees with this recommendation*

R141 The structure should build up a core of experienced tribunal members, who should sit in more than one of the constituent tribunals. The other members of tribunals should be people with particular skills and expertise in the specific areas.

⇒ *NZLS agrees with this recommendation*

A3. A neutral administrative base

R142 To ensure independence exists and is seen to exist, the Ministry of Justice should administer all the tribunals in the unified structure.

⇒ *NZLS agrees with this recommendation*

B. Appeal Rights

R143 Appeals from tribunals within the unified framework should be to an appellate panel, made up of the President or Deputy President, a member of the tribunal in question, and a member from another tribunal.

⇒ *Refer to comments on recommendation 145*

R144 Appeals should be on matters of fact and/or law, depending on the primary statute, which creates the particular tribunal.

⇒ *Refer to comments on recommendation 145*

R145 Any further appeal should be by leave to a full bench of the High Court, on a matter of law only.

⇒ *NZLS accepts there should be a general right for appeal from most Tribunals. However, it considers that decisions of a tribunal established under the VCAT model may be appealed to the District Courts and thereafter to the High Court on a question of law. NZLS see no need to create a specialist unified appellate panel.*

PART 8: OPEN JUSTICE

A. The Principle of Open Justice

A1. Family Court

R146 Family proceedings that are currently closed to the general public should remain closed.

⇒ *Refer comments on recommendation 151*

R147 The court should have discretion to permit the attendance at family proceedings of support persons requested by a party.

⇒ *Refer comments on recommendation 151*

R148 Accredited news media representatives should be permitted to attend family proceedings.

⇒ *Refer comments on recommendation 151*

R149 There should be no restrictions on the reporting of family proceedings (other than those involving children or domestic violence) unless the court orders otherwise.

⇒ *Refer comments on recommendation 151*

R150 In cases involving children or domestic violence, the media reporting of proceedings should be permitted, but details that would identify those involved in the proceedings must not be published unless the leave of the court is obtained.

⇒ *Refer comments on recommendation 151*

R151 If leave of the court is sought, the court should not require a draft of the news report to be submitted for approval as a condition of leave to publish identifying details being granted.

⇒ *NZLS has the following comments on Recommendations 146 to 151.*

The Care of Children Bill as reported from the Justice and Electoral Select Committee on 28.6.04 essentially incorporates recommendations 146 to 150. NZLS has previously agreed with these recommendations in principle. In its submissions to the Select Committee it reiterated its support for more openness of the Family Courts on the grounds of transparency and for educational purposes but only in conjunction with provisions that would continue to protect the identifies of vulnerable parties. The Society supported provisions allowing reporting of family court proceedings but only provided there would be no relaxation of the test 'that publication should only be permitted if the public interest outweighed private interest'.

NZLS notes however that the practical issues that would arise from the Law Commission's recommendations, and now from the Care of Children Bill, if it is enacted in its present form, still remain. Whilst the NZLS welcomes the opening up of the Family Court, as expressed in the provision of the Bill some of its reservations about the practicalities of how these provisions will operate in practice have not been addressed. These are:

R148- Accredited news media representatives

- *NZLS expresses serious reservations about this recommendation in relation to Domestic Violence and Guardianship (Care of Children) Act matters because of the vulnerability of the people involved.*
- *The word 'accredited' would require a precise definition.*
- *Responsibility for 'accrediting' a news media representative would need to be taken by a body or person with the implied costs, administration and input of time. Is this a judicial function or administrative function?*
- *On what criteria would the decision to accredit a news media representative be made?*

- *What limits, if any, would there be on the number of accredited media representatives permitted to attend a hearing?*

R149 - Reporting of family proceedings

- *The term ‘reports of proceedings’ requires a definition - the fundamental role of the Family Courts is to hear and decide disputes. Should reporting be restricted therefore to final defended hearings only or would details from mediation conferences and settlement conferences be reported?*
- *Would just the decision of the Judge be reported or could the evidence given by the parties and witnesses, both orally and by affidavit be included?*
- *Will this include the content of reports by counsel for the child, psychologists and other specialists?*
- *What could be reported, if anything, in a case where evidence included restricted aspects such as children and domestic violence, and non-restricted aspects, such as, relationship property and trusts?*
- *If the presumption is to be reversed and proceedings could be published unless the court orders otherwise, then the criteria for that decision would need to be carefully spelt out by Parliament.*

Closing the Court

- *There may have to be a consequential amendment to the current legislation to allow the Family Court to have an open court and closed court as the High Court currently does.*

A2. Youth Court

R152 Proceedings in the Youth Court should remain closed to the general public.

⇒ *NZLS supports this recommendation. Special consideration needs to be given to the vulnerability of youth.*

R153 Accredited news media should be allowed to report on Youth Court proceedings and judgments so long as all identifying information is removed.

⇒ *NZLS supports the removal of all identifying information from news media if reporting is allowed. NZLS consider that research needs to be conducted, prior to reporting, on the psychological impact of public dissemination of private information. NZLS contends that often even though the name of the individual is concealed, their identity can be deduced by other identifiers. Research needs to be undertaken to understand the impact of this (for example on youth suicide rates).*

R154 The Youth Court should not require a draft of the news report to be submitted for approval prior to publication.

⇒ *The existing section 438 provides that no report should be published except with leave of the Court. This had developed into a protocol whereby Judges review a draft of any report. Overwrought headlines are damaging to the viability and operation of the Youth Court, and fair and balanced reports are essential. Recommendation 154 should be expressed thus: ‘the Youth Court may require a draft...’*

A3. Name suppression in criminal cases

R155 Publication of identifying details of a person charged with an offence before they appear in court should be prohibited unless the person consents.

⇒ *NZLS agrees with this recommendation*

R156 After a person is charged, there should be a general presumption that publication of their name or

identifying particulars should be prohibited until the substance of the case is gone into by the court. Exceptions should be made in certain circumstances.

⇒ *NZLS see problems with this proposal. It has previously been tried and was very problematic. The status quo, vesting a discretion in the Judge, is flexible and responsive to changes in community values but robust enough to protect the vulnerable.*

R157 Where a request for name suppression of a victim in criminal proceedings is made, that request should be granted unless it would not be in the interests of justice to do so.

⇒ *NZLS supports this recommendation.*

B. Civil cases

R158 Where practicable, the public should have access to routine civil procedural matters that are currently heard ‘in chambers’.

⇒ *NZLS fundamentally agrees with the theme of open justice. However, it disagrees with the proposals to “open” “Chambers” hearings. NZLS believes that especially in the commercial sphere of litigation, the growth of use of private arbitrators and mediators has as much to do with the participants’ wish to have their disputes resolved privately, as with their wish for promptness. At present Chambers hearings are not open to the general public, but presiding Judges normally do not restrict access to judgments on interlocutory matters. The Society contends that given that the State court system is a public system, to which access should be encouraged, a balance has to be struck between the public interest in knowing what is happening in our Courts and its participants’ wish to retain some confidentiality at least during the preliminary stages of proceedings. That fundamental role will be undermined if procedural arguments are open to the public. Whether or not information should be given about those matters can be left to the good sense, as it is now, of the presiding Judge.*

It is often during the procedural part of a case that the issues will be defined. With the definition of issues it is more likely that cases will be settled between the parties or by, for example, mediation. In any event important rulings on significant procedural matters are generally made public. Further, the proposals will present logistical difficulties – many Chambers “hearings” these days are conducted by telephone or, effectively, by memoranda filed by parties to which the public does not now have a general right of access – access is at the discretion of the Registrar of the Court, or, ultimately a Judge. It is accepted, as it is by litigants, that once a substantive hearing begins, the principle of open justice, subject always to a Judge’s direction to the contrary, must apply.

R159 The proceedings of the Disputes Tribunal should be conducted in public, with discretion for the referee to restrict access or reporting only when the public interest requires it.

⇒ *NZLS agrees with the opening up of Disputes Tribunal proceedings.*

C. Note taking in court

R160 The public should be able to take notes in a courtroom, subject to the general right of any judge to control conduct in their court.

⇒ *NZLS agrees with this recommendation.*