

27 February 2023

Anna McTaggart
Clerk to the Rules Committee
c/- Wellington High Court
Wellington

By email: RulesCommittee@justice.govt.nz

Tēnā koe Anna,

Re: Feedback on Improving Access to Civil Justice Report

1. Introduction

- 1.1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to submit on the Rules Committee Report *Improving Access to Civil Justice* (the **Report**).
- 1.2. The Law Society is conscious the Rules Committee has previously undertaken extensive consultation, and has therefore focused its submission on those parts of the proposals that have arisen for the first time in the latest report, and particularly those concerning High Court procedure.
- 1.3. In providing this feedback, the Law Society acknowledges the significance of the Report, and thanks the Rules Committee for the work undertaken to date. We believe the Committee's proposals will genuinely enhance access to civil justice, and we look forward to engaging with the Committee on implementing these reforms.
- 1.4. This submission has been prepared with the input of the Law Society's Civil Litigation and Tribunals Committee.¹

2. Disputes Tribunal

- 2.1. The Law Society agrees the Disputes Tribunal performs an important function in facilitating access to justice for smaller disputes, and this function should be expanded and made more accessible. It therefore supports Recommendations 1 to 9, with one caveat.
- 2.2. The Law Society's reservations concern Recommendation 2 on appeal rights. By a majority, the Rules Committee recommends no change to existing appeal rights (limited to procedural

¹ More information about this Committee can be found on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/civil-litigation-and-tribunals-committee/>.

unfairness) for claims up to \$30,000 and a general right of appeal to the District Court for orders between \$30,000 and the new limit (by agreement) of \$100,000.

- 2.3. The Rules Committee’s proposal for a two-tier appeal system was supported by the Law Society in its earlier submission of 2 July 2021.² The Law Society also suggested a requirement that higher value disputes be determined according to the law and with the power to award costs, although it does not consider those proposals essential.
- 2.4. The one point the Law Society considers could merit further consideration is for the available grounds of appeal for higher value claims being limited to the matters identified at paragraph 75(c) of the Report – error of law or principle, (ir)relevant considerations or, where the decision was “plainly wrong”. While this would leave room for judgement by the District Court, it would discourage attempts to relitigate the whole matter on the merits. We do not consider it is necessary that leave be required before an appeal can be filed, given the additional cost and delay associated with this.

3. District Court

- 3.1. The Law Society agrees with and supports the proposals to revitalise and reinforce the District Court’s civil jurisdiction. The Law Society considers that the proposals have the potential to contribute meaningfully to increasing the role of the District Court’s civil jurisdiction.
- 3.2. The Law Society notes that the Report proposes significant reforms to High Court procedure. The Rules Committee concludes that the District Court Rules remain generally fit for purpose.³ We understand that is because the 2014 Rules already provide for streamlined processes focussed on proportionate resolution such as presumptive judicial settlement conferences and different modes of trial (short, simplified, and full). However, to the extent High Court processes are proposed to be modified with the objective of reducing cost/increasing access to justice, and those processes are reflected in the District Court Rules, the District Court Rules may need to be modified to mirror the new High Court processes. Maintaining as much consistency as possible between the High Court and District Court Rules will also save litigants and practitioners on the time and cost involved in following and advising on the rules of Court as they engage across jurisdictions.

4. High Court Reforms

- 4.1. The Report recommends various changes to High Court procedure to facilitate the efficient resolution of disputes and discourage a maximalist approach to civil disputes. The Law Society agrees with the Rules Committee’s concerns about the cost and complexity of civil litigation in the High Court and the need to do something about it. It is also conscious that the Rules Committee has received a number of submissions on these issues already.
- 4.2. The Law Society supports a number of the recommendations set out in the Rules Committee’s report, including:

² Law Society submission on *Rules Committee further consultation paper: Improving Access to Civil Justice* (2 July 2021) at [3.5] (copy available here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/l-Rules-Committee-Improving-Access-to-Civil-Justice_further-consultation.pdf).

³ At [116].

- a. Recommendation 16 (proportionality). The Law Society previously supported this proposal.
 - b. Recommendation 18 (requiring adverse documents to be disclosed as part of initial disclosure). The Rules Committee has noted the challenges involved and that the system relies heavily on trust that practitioners will take their obligations seriously. There needs to be effective enforcement of initial disclosure obligations which are more often treated as a formality.
 - c. Recommendation 19 (judicial issues conferences). The Law Society agrees that judicial issues conferences are not currently achieving their intended function, and they should be held later in the process. Judges also need to be resourced to engage meaningfully in the detail of the case at that stage. The Law Society considers that time spent on preparing for and attending a pretrial conference could result in significant time savings at trial.⁴
 - d. Recommendation 20 (interlocutories). The Law Society previously supported this reform, subject to a right to an in-person hearing for potentially dispositive interrogatories.
 - e. Recommendations 21 (expert evidence) and 23 (remote hearings and electronic case management). The Law Society previously supported these proposals.
- 4.3. The Law Society generally supports Recommendation 17 (witness statements) and Recommendation 22 (evidence at trial). We understand and acknowledge the goal of these proposals and the continued frustration on the part of the judiciary, the profession and litigants about the way facts are determined in the High Court.
- 4.4. A valuable supplementary approach to addressing the issues canvassed in the Report would be to have the scope and manner of evidence to be given at trial addressed at a pretrial judicial issues conference. This would enable counsel and the judge to:
- a. Address questions of admissibility;
 - b. Identify the factual matters that are in dispute;
 - c. Address what witnesses' evidence can be taken as read (see below), or read out, or be led orally depending on the state of the brief;
 - d. Address the extent to which the evidence is contentious; and
 - e. Consider whether the credibility of a witness is in issue.
- 4.5. Rules 9.10(1) and (2), which require parties to bring controversial facts to the attention of the Court after chronologies of fact have been filed, could also be adapted as part of this approach. The Coroners Practice Note on the conduct of inquests also contains some comparable requirements that could be adapted for this purpose.⁵ Any consequential

⁴ For example, a full day conference that identifies the witnesses that are required and how their evidence will be led, what evidence needs to be resubmitted or led orally, and how the documentary record would be addressed could save much more than one day's hearing time for a long trial.

⁵ *Coroners Practice Note: The conduct of inquests (2016/01)* at [15], <https://coronialservices.justice.govt.nz/about/practice-notes/the-conduct-of-inquests-201501/>.

changes to the trial process arising from the reduced reference to documentary evidence in witness testimony will need to be carefully considered when this recommendation is implemented.

- 4.6. The Law Society has also previously supported the proposal that non-contentious evidence in witness statements be taken as read, as this approach has considerable potential to free up trial time.⁶ However, where the evidence is controversial and, particularly, if the credibility of the witness is in issue, the Law Society strongly supports the use of oral evidence directions under Rule 9.10(3). Such directions could include that a witness read out certain parts of their statement in court or that evidence in chief be elicited orally. The expectation would be that the need for any directions under Rule 9.10 would be routinely considered at a pretrial judicial issues conference, along with the issues referred to in paragraph 4.4 above.

5. Next steps

- 5.1. We are grateful for the opportunity to provide feedback on the report. If the Rules Committee has any questions, or if further discussion would assist, please feel free to contact me via Law Society Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Yours faithfully



David Campbell
Vice-President

⁶ Above n 2, at [5.25].