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**Re: Rules Committee consultation paper: *Improving Access to Civil Justice***

**1. Introduction**

- 1.1 The New Zealand Law Society | Te Kahui Ture o Aotearoa welcomes the opportunity to comment on the Rules Committee's consultation paper *Improving Access to Civil Justice*, 16 December 2019.
- 1.2 The consultation paper sets out potential reform of the rules governing civil trial procedures, to improve access to justice by reducing the costs associated with bringing civil matters to court. The Law Society agrees it is desirable to consider fundamental changes to the current civil procedure rules to facilitate access to justice, and welcomes the helpful framework provided by the reform options set out in the consultation paper. Our specific comments on the options are set out below, together with additional comments the Rules Committee may wish to consider.
- 1.3 This submission is structured as follows:
- (a) In **section 2**, we summarise the Law Society's position on the importance of access to civil justice and the key impediments to access to justice under current rules of civil procedure.
  - (b) In **section 3**, we set out our views on Proposal Four in the consultation paper, streamlining pre-trial and trial processes, where we consider that there is greatest scope for efficiencies.
  - (c) **Section 4** addresses Proposal One regarding short-form trial processes.
  - (d) **Section 5** addresses Proposal Two regarding inquisitorial processes.
  - (e) **Section 6** addresses Proposal Three and the potential requirement for summary judgment to be sought.
- 1.4 This submission does not address broader policy issues outside the scope of the Rules Committee's remit, such as class actions and litigation funding or the current civil legal aid regime, or reforming rights of audience and unbundled legal services.

**2. Summary of the Law Society's submissions**

- 2.1 The Law Society supports the fundamental importance of facilitating access to civil justice in New Zealand's courts and tribunals. In particular, we acknowledge the significance of the

“justice gap” identified by the Chief Justice,<sup>1</sup> and the concerns arising from the increasing number of self-represented litigants before the Courts.

2.2 The Law Society’s key submissions are that:

- (a) The justice gap has been slow-burning for at least a generation. Over a similar time period, civil procedure requirements have become more comprehensive. It is possible that the rules, having evolved in tandem with the changing nature of litigation (and increased number of corporate litigants), could be adding to the cost of litigation by imposing a procedural burden that may not always be necessary.
- (b) The Law Society supports a culture change to encourage and require early, substantive and flexible case management that is tailored to the nature of the issues in dispute and aims to minimise the procedural steps required to resolve them fairly and effectively. While it is important to ensure that the cost of proceedings is proportionate to the subject matter in dispute, litigants should not be short-changed because only a modest amount is at stake or, conversely, because the process has failed to protect them in a war of attrition. Bright-line triaging rules present difficulties inherent in any categorisation exercise and are not an appropriate substitute for intensive case management. Rather, early involvement by judges aimed at effective triage is required. What is needed is a judge getting fully engaged so as to create an effective way forward for resolution of the dispute.
- (c) By reducing the cost of litigation, amendments to civil procedure rules can make a significant contribution to reducing barriers to access to justice.

2.3 Further, regardless of the specific reforms that may ultimately be adopted by the Rules Committee, we consider that revisions to the rules will be an ideal occasion to modernise the civil justice system by further embracing available technologies. In this respect, we anticipate that access to justice will be assisted by further reforms enabling remote participation in court hearings or by encouraging parties to accept the determination of suitable issues on the papers or by way of telephone conferences.

#### **The importance of access to justice**

2.4 The Law Society acknowledges the barriers that currently exist to access to civil justice for a significant proportion of society. While these exist to a greater or lesser extent for all litigants, these barriers will be particularly acute for some because of their socio-economic status.

2.5 The Law Society also acknowledges the increasing number of self-represented litigants appearing before the courts who may be disadvantaged by not having the support of an independent legal advisor or representative. The Law Society respects the decision of some litigants not to instruct lawyers. However, for many, the decision to self-represent is not a genuine exercise of free will but a choice forced by cost constraints. The right to consult and instruct a lawyer is recognised as fundamental in criminal proceedings. However, devastating life consequences are also often at stake in civil cases (eg family, reputational, financial). Access to legal representation is important in all court proceedings.

2.6 The consultation paper sets out statistics regarding the small number of defended claims in the District Court, and the small proportion of those that proceed to trial. Some claims will be resolved satisfactorily by agreement prior to trial – which is appropriate and ought to be

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<sup>1</sup> Consultation paper at [5].

encouraged. However, the failure to take active steps will, in many cases, be due to access to justice barriers, including costs.

- 2.7 The Law Society's position is that access to justice is a right, not a privilege. It acknowledges that the cost of civil litigation has become prohibitive for many individuals and small to medium businesses (**SMEs**), effectively depriving them of a practical ability to enforce legal rights. The integrity of the justice system should be protected from any perception that the quality of justice is determined by financial means and socio-economic status.
- 2.8 The Law Society accepts that the value of any monetary amount in dispute is embedded in statute as a means of delineating the jurisdiction of the High and District Courts (and Disputes Tribunal). However, this mechanism has its limits and ought not to be employed in a way that would appear to favour large monetary claims – and affluent litigants – over more modest proceedings. Disputes involving large corporations are not inevitably more complex – or important – than those faced by an SME. For instance, a contractual claim worth \$150,000 can raise the same or similar issues as one worth \$1.5m; and a relatively small claim can have more existential significance for an SME than a larger claim does for a large corporation.
- 2.9 There should be incentives for all parties – regardless of means – to resolve and settle disputes without the need for a court determination. However, equally, all parties should be able to proceed to trial if attempts to settle fail. We would be concerned if some parties were pressured into sub-optimal compromise agreements due solely to cost considerations and the “worth” of their claim, as such outcomes would serve to contribute to a perception of justice as being the province of the rich and powerful.

#### **Barriers to access to justice in current procedures**

- 2.10 The Law Society considers there are a number of factors that hinder access to justice in civil proceedings in New Zealand's courts and tribunals.
  - (a) **Length of hearing** – Significant costs are likely to be generated by oral hearings, particularly long hearings. If hearings could be abbreviated, this would contribute significantly to alleviating the pressure on legal costs and court timeframes. In particular, the courts in many jurisdictions and some forms of ADR (such as arbitrations) are capable of resolving disputes without the need for trials that last several weeks or months. Possible ways of limiting the length of trials are addressed below.
  - (b) **Length of wait for hearing time and judgments** – Justice delayed is justice denied. While the courts endeavour to accommodate genuinely urgent hearings, many proceedings are pressing, but not urgent, and in many cases involve a litigant kept out of their money. In these circumstances, considerable delays in obtaining a hearing date and judgment can often result in injustice. Even prior to the COVID-19 lockdown restrictions, practitioners have reported their inability to secure relatively urgent hearings in good time and have said this can result in the need to compromise meritorious claims. The length of the hearings scheduled also contributes to the length of wait for a hearing time. The delay in waiting for a hearing date can be significantly compounded if the judgment is reserved for a significant period, together with the further timeframe for appeals.
  - (c) **Discovery process** – Despite reforms to the discovery rules in 2011, discovery remains a potentially expensive process. The burden is particularly acute for organisations, including small businesses, that host email addresses for employees or hold other extensive electronic records. In these circumstances, expensive technical support may

be required to locate potentially relevant electronic documents, and legal or litigation support costs for assessing the relevance of those documents can be considerable.

- (d) **Unnecessary case management and interlocutory steps** – Proceedings can be unnecessarily prolonged by unnecessary case management and interlocutory steps. The ability to achieve efficiencies is addressed in more detail below.
- (e) **Categorisation of proceedings** – The current definition of “complex defended proceeding” in r 7.1(4) – as one requiring more intensive case management and more than one case management conference – is not particularly helpful. It is also relatively unusual for even proceedings categorised as “ordinary” to have a sole case management conference. The measure of whether a proceeding is ordinary or complex (or even “simple”) should be the nature of the issues in dispute and the procedural steps reasonably required to resolve them. Those parameters, once identified, should then inform procedural decisions. Labels can obscure the essential exercise, which is to fit the procedure to the case. The expectation would be that the minimum or most efficient number of procedural steps needed to resolve disputed issues should, for all cases, be identified at the first case management conference and those steps will in most cases then guide the proceeding to hearing.
- (f) **Evidential requirements for contemporaneous documents** – In our experience, the courts will place particular weight on contemporaneous documents in resolving factual disputes, including in the context of summary judgment applications. However, the Evidence Act 2006 and High Court Rules 2016, in combination, provide that contemporaneous documents will be inadmissible except in specific circumstances due to the hearsay rule;<sup>2</sup> that such documents must be referred to in opening submissions or a brief of evidence to be admissible at trial;<sup>3</sup> and that any such brief of evidence referring to a document must generally be read in open court.<sup>4</sup> The requirement to ensure all contemporaneous documents satisfy these evidential requirements adds to the length of briefs of evidence and written opening submissions, and therefore of the trials themselves.
- (g) **Costs** – The Law Society envisages that changes to the cost rules could also improve access to justice, but a range of matters need to be weighed in the balance:
  - i. **Scale Costs:** One factor preventing the ability of plaintiffs to bring meritorious claims is the rules providing for the recovery of only scale costs. Lawyers are obliged to advise clients that even if their claim is successful, they will only be entitled to recover a proportion of their legal fees from the defendant, absent special circumstances.<sup>5</sup> This is despite the fact that scale costs often represent only a relatively small proportion of total legal costs – except for the simplest applications – rather than the two-thirds estimate on which Schedules 2 and 3 of the High Court Rules are based.<sup>6</sup> Scale costs may also be an insufficient deterrent to unmeritorious parties who consume unnecessary court time. Access to justice issues may be ameliorated if meritorious plaintiffs can recover their actual and reasonable legal costs from defendants; similarly, undeserving plaintiffs could be deterred if there was a real risk of being obliged to reimburse a defendant’s actual

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<sup>2</sup> Evidence Act 2006, Part 2 Subpart 1.

<sup>3</sup> High Court Rules 2016, r 9.5(4).

<sup>4</sup> High Court Rules 2016, r 9.12.

<sup>5</sup> See generally High Court Rules 2016, Part 14.

<sup>6</sup> *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [14].

and reasonable costs. On the other hand, the risk of an adverse costs award can itself act as a barrier to access to justice.

- ii. Indemnity Costs: It would be helpful if there was more certainty around consequences of rejecting Calderbank offers. The Law Society recommends a default position whereby indemnity costs are awarded against a party who rejects an offer that they then fail to improve on at trial (standard cost rules to continue up until the time of the offer); limited exceptions to this rule should apply. This situation would not run contrary to the principle that costs follow the result if the “result” in this situation is seen to be the litigation gamble. More certainty around costs consequences would encourage parties to make reasonable offers early; ensure that all offers are taken seriously when received; and afford extra protection to parties who are forced to litigate despite making reasonable efforts to settle.

### **3. Proposal Four: Streamlining pre-trial and trial processes**

- 3.1 The consultation paper outlines three specific alternative procedures in the civil justice system before setting out “Proposal Four: Streamlining Standard Pre-Trial and Trial Processes”.
- 3.2 We have addressed specific economies that may be achieved in civil procedure, and then turned to Proposals One to Three below.
- 3.3 In the experience of some practitioners consulted, the most efficient and economical manner of resolving disputes under the High Court Rules is by originating application under Part 19 or (similarly) proceedings under the Declaratory Judgments Act 1908. Similar procedures are available for judicial review proceedings. Originating applications enable prompt hearings to be obtained due to the general absence of discovery requirements, case management (if necessary) by telephone conference, few if any interlocutory applications, evidence being provided by affidavit (unless a notice to cross-examine is served), and a single set of written submissions. All these factors enable the prompt and efficient determination of such applications. Recognising that some cases will require discovery and more extensive cross-examination, access to justice may be assisted if these features of originating applications could be replicated more widely and processes streamlined where appropriate. Case management should focus on the nature of the issues in dispute and tailor processes to ensure these issues can be resolved in the fairest and most effective manner.
- 3.4 In addition, we consider that procedural efficiencies can be maximised by considering the application of more abbreviated procedures often used in domestic or international arbitrations. In the experience of contributors, tribunals in international arbitration are able to determine significant claims, often in the billions, with complex factual issues, following hearings of just a few weeks. Practitioners generally agree that those same efficiencies can be available in arbitrations of a smaller scale. A key procedural tool in arbitrations doing so is a substantive and engaged early case management process. Adopting similar procedural efficiencies in civil litigation should free up considerable court time and permit significant efficiencies in the determination of disputes; for instance, a Scott schedule identifying multiple smaller issues in dispute.
- 3.5 Alternatively, it may be worth considering the Australian practice of allowing the courts to refer some or all factual issues to referees for determination. The user-pays feature of this practice might make it more suitable for larger commercial cases (although this is an assumption and should be tested). However, as the evidential component of these

proceedings is often lengthy, referrals-out could see more court time and resources becoming available for the benefit of other civil litigants.

### **The Law Society's favoured approach**

- 3.6 The Law Society considers that procedural reforms should be applied to all cases, rather than piecemeal or with different default rules for different proceedings. The procedures should be sufficiently flexible to permit departures from the default procedure in appropriate cases.
- 3.7 The general approach favoured by the Law Society is as follows, drawing considerably on the options canvassed in the consultation paper:
- (a) A judge (or one of two judges)<sup>7</sup> could be assigned to each proceeding to enable early identification of the issues and ensure effective case management. The first case management conference should involve the parties and their counsel where possible. The practitioners consulted considered the practice of agreed first case management conference memoranda seeking orders by consent could detract from the robust identification and prioritisation of issues. Counsel or parties at a case management conference could present what is termed, in international arbitration, a “Kaplan opening” setting out the persuasive basis of their case. This should be helpful to the court in identifying the key issues in dispute between the parties. It would also assist with resolving pre-trial steps, including the joinder of parties, the state of the pleadings, costs categorisation, discovery categories and disputes.
  - (b) Pleadings could generally be filed together with relevant supporting witness evidence, in the form of either an affidavit or witness statement. This is similar to originating applications or applications for declaratory relief, as well as proceedings where summary judgment is sought and arbitration proceedings. We anticipate it will permit the early identification of issues. It may also deter the filing of unmeritorious proceedings.
  - (c) The case management conference should be able to address outstanding interlocutory applications promptly, including addressing whether discovery orders should be granted, leave given to call expert evidence, or whether to grant leave to cross-examine witnesses. The court could be encouraged to resolve interlocutory applications promptly at a case management conference, or on the papers, or via a priority fixture (potentially by telephone conference).<sup>8</sup> The court may exercise case management powers such as striking out pleaded factual allegations that are irrelevant to the legal basis of a claim and would be disproportionate to litigate.<sup>9</sup>
  - (d) The hearsay rule should be relaxed to permit documents produced by the parties in a timely fashion to be admissible as of right, without the need for them to be annexed to an affidavit. Issues as to the veracity or reliability of documents should be raised promptly but can often be addressed as a matter of weight rather than admissibility. This change may require amendment to the Evidence Act 2006. This point is well-made

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<sup>7</sup> We understand that the practice of the English Commercial Court is to assign two judges to be responsible for a case, in order to accommodate judicial demands and absences. In the New Zealand context, this could include a Judge and Associate Judge.

<sup>8</sup> For example, r 7.36 (Application for summary judgment to be heard in open court) may be amended to permit summary judgment applications to be heard and determined at a case management conference.

<sup>9</sup> See the recent high-profile decision of the English Chancery Division in *HRH The Duchess of Sussex v Associated Newspapers Limited* [2020] EWHC 1058 (Ch), striking out parts of a pleading that were inadequately particularised and contained legally irrelevant allegations of dishonesty or bad faith.

in the consultation paper's discussion of "Changing the Presumptive Mode of Giving Evidence".<sup>10</sup>

- (e) In relation to discovery, unless there is a justifiable basis for general discovery (for instance where there are allegations of fraud or genuine issues of credibility)<sup>11</sup> we support initial discovery, supplemented by a limited and more focused form of tailored discovery that is aimed at the issues identified as being in dispute rather than the subject matter of the pleading as a whole. Any party requesting discovery would be expected to:
  - i. show the connection between the discovery sought and any identified issue in dispute; and
  - ii. satisfy the court that there are reasonable grounds to believe that disclosure of the documents sought exist and are reasonably necessary to reduce or inform the issues in dispute.
- (f) The courts of England and Wales permit expert evidence only with leave.<sup>12</sup> The Civil Procedure Rules (**CPR**) say that "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings".<sup>13</sup> A requirement to justify the need for expert evidence at an early stage may achieve significant efficiencies. (In one of New Zealand's longest civil trials, significant time was required to accommodate the evidence of over 40 experts reading their briefs of evidence, some of which were 400 to 500 pages long; the case consumed 156 sitting days before being settled at mediation).<sup>14</sup> The courts may also wish to give consideration to making greater use of their powers to engage a court-appointed expert, or receiving expert evidence concurrently via the "hot tub" procedure.<sup>15</sup> Early identification of disputed issues would help identify the need for, and scope of, any expert evidence.
- (g) Most interlocutory applications should be able to be determined on the papers or following a brief hearing by telephone. The practitioners consulted also queried whether there should be greater scope to resolve pre-trial matters as part of the case management process, without the need for a formal application. This could involve the filing of a memorandum, or memoranda, followed by the timetabling of affidavits and a hearing or papers determination. For lower level disputes the time and cost (including the filing fee) can be disproportionate.
- (h) Parties should be encouraged to reach consensus on a statement of agreed facts. This requirement could be supported by costs consequences. However, for this to operate,

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<sup>10</sup> Consultation paper at [49] to [51].

<sup>11</sup> Note however that, even when no or limited discovery is ordered, parties could still be required to swear or affirm that they are unaware of any other documents that could potentially affect the resolution of any issues in dispute or potentially change or increase the scope of any issues in dispute.  
<sup>12</sup> CPR 35.4.

<sup>13</sup> CPR 35.1.

<sup>14</sup> See T Weston & S Foote "Reflections on a marathon trial" [2010] NZLJ 213. After 156 sitting days, the article suggests that only 36 of 61 witnesses had been called.

<sup>15</sup> See for example Civil Justice Council *Concurrent Expert Evidence and 'Hot-tubbing' in English Litigation since the 'Jackson Reforms – A Legal and Empirical Study'* (25 July 2016): <https://www.judiciary.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf>. For additional commentary on how better use can be made of experts, with particular reference to access to justice issues and the approach proposed by Justice Kós, see S Alexander "Expert evidence: Time to lift the game" (March 2017), available at: [https://www.aminz.org.nz/Attachment?Action=Download&Attachment\\_id=758](https://www.aminz.org.nz/Attachment?Action=Download&Attachment_id=758).

agreed statements of fact would likely need to be timetabled before briefs. Once parties have done their briefs, the need to agree facts is reduced as the relevant evidence is in briefs (at present).

- (i) At a hearing, the court should be able to impose limits on the length of opening or closing submissions and cross-examination. In international arbitration, a ‘chess clock’ procedure can be adopted allocating – in advance – the time that each party may spend on particular submissions or witnesses or an aggregate allocation of time for each party to present their case.<sup>16</sup> While this approach would not need to be applied with complete rigour in the New Zealand context, it does highlight the ability of a tribunal to allocate time for steps at a hearing without detracting from the requirements of natural justice and procedural fairness.
- (j) As canvassed in the consultation paper,<sup>17</sup> we favour a general presumption that, where it can, witness evidence should be given by affidavit (or alternatively by a signed but unsworn witness statement), and that this evidence should be taken as read at hearings. Witnesses should give oral evidence about issues in dispute only when that evidence is contentious and needs to be tested by cross-examination. More time should be invested in determining these bounds as part of the case management process. This could greatly reduce hearing time and the burden placed on witnesses.
- (k) It may also be appropriate to require a party or their solicitor to provide a “statement of truth” verifying their belief in the accuracy of matters in pleadings. A similar process is contemplated under English procedural rules, and may discourage untenable allegations.<sup>18</sup>

3.8 The Law Society considers that these steps, somewhat similar to those canvassed by the consultation paper and New Zealand Bar Association, would achieve considerable efficiencies and reduce barriers to access to justice.

3.9 We address other options canvassed in the consultation paper below.

#### **Replacing briefs of evidence with “will say” statements**

3.10 The consultation paper raises the possibility of replacing briefs with “will say” statements.<sup>19</sup>

3.11 While the difference in terminology is not important – the CPR uses the term “witness statements” – the key issue is the appropriateness of revising the substantive requirements for written briefs or statements.

3.12 The Law Society does not consider that factual written briefs raise particular access to justice considerations, subject to the following qualifications:

- (a) Frequently, written briefs can and should be shorter. Briefs should not be submitted primarily to string together documentation that can be read by a court or duplicate the role of submissions.
- (b) The presumption that a witness should read out their brief of evidence in full adds unnecessarily to the cost and length of trial.

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<sup>16</sup> See *Williams & Kawharu on Arbitration* (2<sup>nd</sup> ed, 2017) at [11.16.16](b).

<sup>17</sup> Consultation paper at [49] to [51].

<sup>18</sup> CPR Part 22.

<sup>19</sup> Consultation paper at [43].

- (c) Expert briefs have a particular tendency to be voluminous, partly to fulfil the Code of Conduct requirements such as setting out the experts' detailed calculations, matters relied on and/or material assumptions.<sup>20</sup> However, issues with expert briefs can be better addressed by limiting expert evidence, for example by requiring the court's leave to call an expert and encouraging concurrent expert evidence.<sup>21</sup>
- (d) We naturally agree that briefs should be in the witness's own words.

3.13 Briefs of evidence are important in setting out the evidence of each factual witness necessary to support the pleaded causes of action. Prolivity in briefs is sometimes a potential by-product of their importance – the consequences of failure to support a material element of a cause of action are severe, whereas the court is readily able to disregard less materially relevant portions of a witness's evidence.

#### **Changing discovery obligations**

3.14 We respectfully agree with the Committee's concern that the costs of discovery remain disproportionately high, notwithstanding the 2011 reforms.<sup>22</sup> While the 2011 reforms narrowed the range of discoverable documents, this was effective in reducing cost only to a point. Part of the problem may be that the new rules are themselves complex and not always easy to navigate.

3.15 The expense of discovery continues to increase due to the exponential growth of electronic communications and data generated by many organisations in both the public and private sector; a similar point has been noted by the Australian Law Reform Commission.<sup>23</sup> The party *producing* discovery will still be obliged to locate and assess a vast number of documents, regardless of the test for discovery applied, even if the party *receiving* discovery has fewer documents to review following a targeted discovery. This is notwithstanding the increased availability of document databases that would make it simpler for parties receiving discovery to carry out key word searches and other filters to identify truly relevant documents.

3.16 Further consideration should be given to a default position of "disclosure only" or more limited targeted discovery orders.

#### **Changing the presumptive mode of giving evidence**

3.17 The consultation paper asks whether changes are appropriate to the presumptive mode of giving evidence.<sup>24</sup>

3.18 The Law Society supports the potential reform of these rules.

3.19 In our view, a number of changes could be made in order to reduce the length of briefs of evidence and hearing time:<sup>25</sup>

- (a) The presumptive mode of evidence should be changed to evidence being taken as read, subject to oral evidence directions in appropriate cases.<sup>26</sup> Oral evidence should be confined to issues in dispute. Witnesses may also be given the opportunity to provide a

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<sup>20</sup> High Court Rules, Schedule 4.

<sup>21</sup> See paragraph 3.7(f) above.

<sup>22</sup> Consultation paper at [54].

<sup>23</sup> As noted by the Australian Law Reform Commission *Discovery in Federal Courts* (ALRC CP 2, November 2010) at [3.56] to [3.60].

<sup>24</sup> Consultation paper at [49].

<sup>25</sup> At paragraphs 2.10(a) and (f).

<sup>26</sup> Under r 9.10.

brief oral summary of their evidence (for say 5 to 10 minutes)<sup>27</sup> to ensure the court has an opportunity to hear directly from the witness, that the witness has an opportunity to ‘warm up’ prior to cross-examination, and for a witness (especially a party) to feel their views have been heard by the judge.

- (b) Documents that are produced in a timely fashion should be admissible as of right. They should not need to be referred to in briefs of evidence or opening submissions once they are in the common bundle. We anticipate such documents will often be more useful to the court than witness statements. As noted above, this may require some amendment to the hearsay rules in the Evidence Act 2006. Parties could retain the right to object to evidence for reasons of authenticity or other grounds of inadmissibility, but we anticipate that any objections should be raised promptly.
- (c) Where evidence is taken as read, the court requires additional time to read and assimilate written briefs in advance. We understand that in the English Commercial Court – where witness statements are taken as read – it has been a common practice in long trials to sit for only four days a week. Friday (for example) can be set aside for the judge and the parties to read witness statements for the coming week.

3.20 The Law Society does not support changes that would change the presumptive mode of evidence in civil proceedings to oral evidence elicited during evidence-in-chief.<sup>28</sup> However, the Law Society supports the continued ability of the court to make oral evidence directions under r 9.10 and considers this should be done more frequently. While special considerations apply to the criminal jurisdiction where this is the default process, the judge in a civil trial can rapidly read and assimilate the pertinent aspects of witness evidence. Evidence-in-chief is also a problematic process that can easily involve the witness forgetting to cover a material element of a cause of action – an oversight that could produce significant injustice in civil proceedings.

#### **Providing for greater judicial control of hearings**

- 3.21 As noted above, the Law Society supports further powers being granted to impose time limits during trials.<sup>29</sup> We agree this could enable more effective use of hearing time and reduce the length of trial. As noted above,<sup>30</sup> a ‘chess clock method’ is often used in arbitration. This can be done in a way that does not interfere with natural justice or procedural fairness.
- 3.22 The Law Society does not necessarily agree that more rigour is required when setting fixtures, for example by requiring affidavits justifying a particular fixture length.<sup>31</sup> Such estimates are, in our experience, necessarily impressionistic and involve counsel’s best estimate. Even experienced counsel may, with the best of intentions and after careful thought, genuinely err in their estimates. We consider that requiring affidavits to support hearing estimates will add unnecessarily to the cost of proceedings. The estimated length of hearings may be better tested by discussion with the court at a case management conference or pre-trial conference with the benefit of a list of proposed witnesses.

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<sup>27</sup> Under the “hot tub” procedure for concurrent expert evidence, the experts’ briefs are also taken as read but they can provide a brief oral summary of their position for the Court.

<sup>28</sup> As is the case in the Courts’ criminal jurisdiction.

<sup>29</sup> Consultation paper at [61].

<sup>30</sup> At paragraph 3.7(i).

<sup>31</sup> Consultation paper at [3].

### **Increased use of electronic filings/ remote hearings**

- 3.23 We consider efficiencies may be made by facilitating electronic filing and remote hearings (whether by telephone or AVL). The High Court (COVID-19 Preparedness) Amendment Rules 2020 have introduced a number of amendments to facilitate these steps. It is likely many of these reforms will remain beneficial following the end of COVID-related restrictions.

### **Reducing judgment length**

- 3.24 Although outside the scope of the Rules Committee's consultation, we note that some judicial systems have encouraged briefer judgments in order to reduce reserved judgments and the time taken to finally resolve disputes.<sup>32</sup>
- 3.25 For example, in order to reduce the burden on the court, in particular the appellate courts, and the time for which judgments are reserved, the English Court of Appeal has at times used a "short form judgment". This is said to be appropriate for an appeal which "raises no issue of law, precedent or other matters of general significance and the relevant facts and documentary material are set out in the judgment under appeal and are not in dispute".<sup>33</sup> In such cases the judgment under appeal may be affirmed relatively briefly.

## **4. Proposal One: Introduction of short form trial processes**

- 4.1 As noted above, the Law Society supports amendments to simplify trial procedures in appropriate cases, subject to its preference that a single default rule apply to all cases. We prefer a single default rule for all proceedings that can be departed from where appropriate, rather than different default rules for different types of civil claims.
- 4.2 We consider the key advantages of the forms of short trial procedure canvassed in the consultation paper to be as follows:
- (a) Case management by a single judge (or one of two allocated judges) throughout. We agree it is desirable for a single judge to case manage a proceeding throughout, where possible. In view of this measure being introduced on the Commercial Panel, and the New Zealand Bar Association's proposal to adopt this measure for small cases, the Law Society considers there are advantages in introducing this measure more generally.
  - (b) Limiting discovery. We agree that many proceedings may be amenable to more limited discovery, whether discovery is highly targeted or entirely unnecessary.
  - (c) Determinations on the papers. We agree most interlocutory applications could be determined on the papers, or with the benefit of a brief telephone hearing, shortly after the filing of the written submissions.
  - (d) Pre-trial conferences. We agree it is desirable to have a pre-trial conference (by telephone or otherwise) with the allocated trial judge to address any pre-trial interlocutory issues.
- 4.3 However, we do have some concerns with other suggestions:

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<sup>32</sup> See for example D Mortimer "Some Thoughts on Writing Judgments in, and for, Contemporary Australia" (2018) 42 MLR 274, in particular the section "Can Judges Write More Succinctly and Should They?".

<sup>33</sup> As it was described in *BS (Congo) v Secretary of State for the Home Department* [2017] EWCA Civ 53, [2017] 4 WLR 45 at [1].

- (a) The New Zealand Bar Association proposal contemplates that its short form procedure would be applicable to some cases but not others. This raises issues as to where the line is to be drawn between different procedures. It may also mean that some helpful and desirable efficiencies will not necessarily be applied to more complex cases, for example witness evidence being taken as read.
- (b) Limits on the length of pleadings and witness statements or affidavits. In our experience, well-drafted pleadings and witness statements will often fall within the various page limits discussed, and in the minority of cases where they exceed the posited page limits there are good reasons for doing so. Issues with over-long pleadings and statements may be more acute in cases of self-represented litigants. Imposing page limits may cause further time to be spent addressing issues of leave to exceed page limits than they resolve. Further, the failure to plead an alternative cause of action due to space restraints may cause injustice if a court were ultimately to find that a claim failed on pleading grounds.

## 5. Proposal Two: Introduction of inquisitorial processes

5.1 The Law Society has some concerns in relation to the consultation paper's summary of potential inquisitorial processes.

- (a) The inquisitorial process would represent a radical change to the status quo. While we do not suggest it should be dismissed on this basis alone, the impact of any changes should be given very careful consideration.
- (b) The inquisitorial processes adopted by the Hon Sir Graham Panckhurst QC appear to have been well-suited in its particular context, with the significant commonality of legal and factual issues, and insurers, across different insurance claims arising from the Canterbury earthquakes. We assume this meant the tribunal and lawyers would be familiar with and able to quickly identify the key issues. The same benefits would not necessarily be available to tribunals dealing with a wider range of factual and legal issues.
- (c) The process proposed by the Hon Justice Kós envisages the use of a court-appointed assessor. This may raise resourcing issues for the Ministry of Justice and may be best considered together with resources available for civil legal aid.
- (d) It is not clear the extent to which hearings and determinations in an inquisitorial process would continue to be open to the public and any impact on the principle of open justice.
- (e) While there may be arguments for or against restricting appeals generally, these are not unique to inquisitorial processes and appeals can be restricted with or without adoption of an inquisitorial process. There may in fact be stronger arguments for permitting appeals in an inquisitorial system where the court has a greater discretion to adopt its own view without the benefit of full argument on the issues.

5.2 The potential requirement for a judge to seek both consensual (i.e., mediated) and adjudicative resolution raises difficulties. The authors of *Williams & Kawharu on Arbitration* consider the difficulties with the "med-arb procedure" and note the conflicting nature of the roles of a mediator and an arbitrator.<sup>34</sup> In particular, should a facilitated settlement fail, a decision-maker will be obliged to put to one side confidential information and without prejudice proposals put forward during the "facilitated" procedure, and to refrain from

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<sup>34</sup> *Williams & Kawharu on Arbitration* (2<sup>nd</sup> ed, 2017) at [1.1.12].

expressing preliminary views. On the other hand, parties may be reluctant to make concessions that could colour the judge against them. We understand it is for this sound reason that judicial officers who preside over a Judicial Settlement Conference are excluded from determining substantive issues in the same proceeding.

- 5.3 We support exploring ways to achieve some of the advantages of the inquisitorial procedure, such as early case management and identification of the issues, but consider that these may be best achieved through alternative means.

## **6. Proposal Three: Requirement to seek summary judgment**

- 6.1 The Law Society does not favour Proposal Three.
- 6.2 Lawyers will generally advise their client to seek summary judgment where they consider such an application has a reasonable prospect of success.
- 6.3 Unless the test for summary judgment is relaxed<sup>35</sup> – and we do not sense any appetite for this amongst the profession or judiciary – this option would therefore require litigants on both sides to incur the further time and expense of a potentially unmeritorious application and hearing and place undue demands on the court system.
- 6.4 Further, claims for non-liquidated damages are generally not suitable for summary determination because issues such as quantification, mitigation, contribution and contributory negligence will be relevant.
- 6.5 The Law Society also has some concerns about reliance on the “ordinary” or “complex” categorisations, which are somewhat difficult to apply and where even ordinary proceedings would generally require more than one case management conference.<sup>36</sup>
- 6.6 We consider the potential benefits of this option noted in the consultation paper,<sup>37</sup> including early clarification of the issues and assessment of evidence, may be best achieved through more intensive early case-management as identified above. In place of a summary judgment hearing, many proceedings may be suitable for an early substantive determination based on the affidavit evidence filed, with oral evidence restricted to contentious evidence that is relevant to issues in dispute and needs to be tested by cross-examination.

## **7. Conclusion**

- 7.1 The Law Society is grateful for the opportunity to provide feedback on the reform options and if the Committee has any questions, we would welcome the opportunity to provide further feedback. The convenor of the Law Society’s Civil Litigation and Tribunals Committee, Daniel Kalderimis, can be contacted through the Law Society’s Law Reform Adviser, Nilu Ariyaratne ([Nilu.Ariyaratne@lawsociety.org.nz](mailto:Nilu.Ariyaratne@lawsociety.org.nz)).

Yours faithfully



Tiana Epati  
**President**

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<sup>35</sup> High Court Rules, r 12.2.

<sup>36</sup> Notwithstanding the definition in r 7.1(3).

<sup>37</sup> Consultation paper at [40].