The Rules Committee
Te Komiti mō ngā Tikanga Kooti

M E M O R A N D U M

TO:	Rules Committee
FROM:	Anna McTaggart, Clerk to the Rules Committee
DATE:	27 March 2023
RE:	Executive Summary of Responses to Access to Civil Justice Report

[1] The Access to Civil Justice Report was published in November 2023. Because the Report involved recommendations that differed from proposals consulted upon in some respects, particularly in relation to the proposals for the High Court, the Chair invited further submissions on the recommendation

[2] The rules committee received seven submissions from the following submitters:

- Bell Gully
- Callum Martin (solicitor)
- Community Law
- Crown Law
- Insurance Council of New Zealand
- Justin Smith KC
- New Zealand Law Society

[3] Although the Committee's focus in inviting further submissions was to receive feedback on the aspects of its proposals for the High Court which were not the subject of previous consultation, the submissions have addressed other areas of the Report.

Disputes Tribunal

Recommendation 1 – Changes in Tribunal's Jurisdiction

[4] The NZLS supports this recommendation.

[5] Community Law is pleased to see the jurisdictional cap increase. However, reiterate a comment from their 2021 submission – that there will need to be a significant increase in resourcing to reflect the increase in caseload that will accompany the increase to the jurisdictional cap.

[6] Community Law supports the suggestion that the jurisdictional increase be reviewed in 3-5 years' time.

[7] Community law agrees with the proposal to expand the kinds of claims which can be bought to the Tribunal and the orders which can be made. Community Law suggests the trimming and removal of trees should be bought within the Tribunal's jurisdiction.

[8] Community Law also agrees with the proposal to expand the types of claims that can be bought to the Tribunal and the orders which can be made. In particular, Community Law refers to bringing trimming and removal of trees within the Tribunal's jurisdiction. Community Law notes the Property Law Act 2007 would need to be amended and orders available to the Tribunal may need to be reviewed. The Tribunal would also need to retain the ability to refer any complex matters involving trees to the District Court. Community Law also refers to debt disputes, particularly between individuals, in amounts which are not worthwhile dealing with in the District Court.

[9] Community Law suggests that the increase in jurisdiction must bring an improved process for moving disputes from the Disputes Tribunal to the District Court. They suggest it would be helpful to make parties aware of the option to apply for transfer as part of initial information, or by way of a simple template. Community Law considers that parties should be able to appeal a refusal to transfer a case to the District Court.

[10] Callum Martin expresses concern about the increase of jurisdiction without the safeguard of counsel being able to provide representation to clients in higher bands. He supports the jurisdictional increase, but only if parties were given the right to appoint counsel for claims greater than $40,000.

Recommendation 2 – Appeal Rights from Tribunal Decisions

[11] Community Law agrees with this recommendation.

[12] The NZLS support this recommendation however, the one point it considers as meriting further consideration was 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, irrelevant considerations, or where the decision was plainly wrong. While this would leave room for judgment by the District Court it would discourage attempts to relitigate the whole matter on the merits. The NZLS do not consider it necessary that leave be required before an appeal can be filed, given the additional cost and delay associated this.

[13] Callum Martin supports this recommendation but noted that the availability of representation in the Tribunal for higher-value claims would reduce the probability of an appeal being lodged in such cases.

Recommendation 3 – Representation in the Tribunal

[14] NZLS support the recommendation that there be no change to the current rules regarding representation in the Disputes Tribunal.

[15] Community Law and Callum Martin both express concern about maintaining the bar on representation.

[16] Community Law observes that there may be occasions where there is a vulnerable party one side and an experienced corporate party on the other side. Community Law would like to see some flexibility and a relaxation on the absolute bar on lawyers appearing for vulnerable parties. It is suggested that consideration is given to incorporating a provision similar to s 93(3) of the Residential Tenancies Act 1986 which allows representation if it is appropriate given the complexity of the issues involved and the disparities between the parties affecting their ability to present their respective cases.

[17] Community Law suggests that the increase in the jurisdictional cap may result in an increase in the complexity of issues. Providing referees with the discretion to allow legal representation would send a strong access to justice message that power imbalances will be addressed. Community Law notes in particular, clients with limited English and literacy and clients with disabilities.

[18] Community Law also suggests it may be useful to have investigators appointed to assist with disputes, particularly in cases where parties are vulnerable and do not understand what information they are required to present as part of their claim.

[19] Callum Martin suggests that the integrity of the system may be better served with determinations being made in a more robust process with professional advocacy advancing each side's case. The new jurisdictional cap means Tribunal determinations may involve sums of money that could have a crushing impact on those affected. He is also concerned about the power imbalance between laypeople and, for example, insurers – who are better armed and resourced to advance their case.

[20] Callum Martin suggests that in higher value cases, counsel would focus the issues and lessen the power disparity. Settlement discussions could also occur with the benefit of legal advice. The presence of counsel would improve confidence in the process and may reduce appeals to the District Court. Representation is the norm in the Employment Relations Authority.

Recommendation 4 – Public Hearings and Publication

[21] The NZLS and Community Law agree with this recommendation.

[22] Community Law notes the library should be as public and user-friendly as possible and referred to issues with navigating the current database. It suggests the decisions could be divided into a number of specific categories.

[23] Community Law would like further clarity around the scope of interested academics who will have access to the internal library and suggest this should include lawyers. Community Law would also like to know whether it would be published on a database such as Westlaw and whether there will be a Tribunal librarian who can be contacted by practitioners seeking access to the internal library.

Recommendation 5 – Recovery of Filing Fees, Costs and Disbursements

[24] The NZLS and Community Law support the recommendation that costs in the Disputes Tribunal claims continue to lie where they fall, that the filing fee should be recoverable for a wholly or partly successful party and the filing fee should be subject to waiver. However, some Community Law Centres were concerned that the waiver of the filing fee could lead to frivolous claims.

[25] Callum Martin suggests that if lawyers are permitted to appear in the Tribunal for higher-level claims, discretion should be afforded to the referee to award costs. Such costs could be set at a higher standard than usual, such as when a party has needlessly prolonged the proceeding.

[26] Callum Martin suggest that s 43 of the Disputes Tribunal Act 1988 should be amended – the wording of s 43 may convey to a potential claimant that there is no entitlement to legal costs, regardless of a term of the contract which entitles the claimant to legal costs when enforcing the contract.

Recommendation 6 – Qualification of Referees

[27] The NZLS and Community Law support the recommendation that all Disputes Tribunal referees be legally qualified, with transitional provisions for unqualified referees currently in office.

Recommendation 7 – Resolving Disputes According to the Law

[28] The NZLS and Callum Martin support this recommendation. The Committee recommended that there be a slight change to s 18(6) of the Disputes Tribunal Act 1988, which currently requires that the Tribunal must "determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal right or obligation or technicalities. It was recommended that the words "where that would result in a substantial injustice" be added to the end of this provision.

[29] Callum Martin comments that it is his understanding that the reason for the restricted appeal right and the main hurdle to challenging a Tribunal decision through judicial review is the reality that the Tribunal is not bound to uphold the strict legal

rights of the party and is required to decide disputes pursuant to the substantial merits and justice of the case. Regard should be had to the effect of adding the proposed addendum on cases bought for judicial review.

[30] The ICNZ do not believe this recommendation goes far enough, particularly in light of the increase in the Tribunal's jurisdiction. ICNZ is concerned there is the potential for subjective application. It is essential that insurers can confidently draft contracts of insurance based on legal precedent and price according to the risk those provisions present. Uncertainty in an insurance context can impact on pricing as insurers must consider and account for all possible outcomes. ICNZ suggest the provision should be redrafted to require Tribunal referees to give effect to the law so there is no longer a risk of uncertainty being introduced.

Recommendation 8 – Enforcement and Recovery Process

[31] The NZLS, Community Law and Callum Martin support the recommendation that consideration be given by the District Court to finding more effective and straightforward ways for claimants to enforce a successful award and that the $200 enforcement fee imposed for collection of a Tribunal award be abolished, or at least subject to waiver.

[32] Community Law notes that the enforcement and recovery aspect of the process is a significant barrier to clients accessing justice.

[33] Callum Martin suggests filing fees be abolished for enforcement but rather be recoverable from the judgment debtor directly by the Court. He notes that applications for enforcement hearings such as financial assessment hearings are subject to long delays while they are processed by the central registry and that such processing times must be improved.

[34] He notes there is a power under s 149 of the District Court Act 2016 to require judgment debtors to open books at financial assessment but there is no provision in the improved Ministry of Justice form to request the specific documents to be produced at the hearing and there are no consequences on the judgment debtor for failing to produce those books. There is also no provision to require the judgment debtor to produce their evidence in advance of the financial assessment hearing. When a judgment debtor arrives at such a hearing with no evidence of their financial position and allege they have no or limited assets it is often necessary the hearing be adjourned so evidence can be assembled.

[35] While there are provisions under the District Court Act to present a judgment debtor with a financial statement and require its completion, this can require multiple acts of service if the judgment debtor does not comply and there are no consequences for non-compliance unless the judgment debtor fails to appear at a hearing.

[36] Callum Martin notes that the Waitematā Community Law Centre mentioned in submissions that the Disputes Tribunal could implement an enforcement plan within its decision in order to streamline the enforcement process. Callum Martin supports

such a process in the District Court, at least for debt collection. Judgment debtors should not have to jump through such a large number of hoops to get an attachment order against a judgment debtor's wages.

Recommendation 9 – Appropriate Name for Referees and Tribunal

[37] Community Law and the NZLS support he recommendation that referees be renamed "adjudicators" but that there be no change to the Disputes Tribunal's name.

District Court

Recommendation 10 – Creation of a Separate Civil Division and Appointment of a Principal Civil Judge

[38] The NZLS, Community Law, Callum Martin and Bell Gully support the creation of a separate civil division in the District Court and the appointment of a Principal Civil Judge.

[39] Community Law welcomes the suggestion that a focus of this role be dealing with the information barriers experienced by many members of the community. Going to court is incredibly daunting for most Community Law clients and straight-forward accessible information would assist people in knowing what to expect.

Recommendation 11 – Strengthen the Expertise of the Civil Registries

[40] The NZLS, Community Law, Callum Martin and Bell Gully support this recommendation.

Recommendation 12 – Part-Time Judges Should be Appointed to Assist with the Civil Workload of the Court

[41] Community Law and Callum Martin support this recommendation.

[42] Community Law notes that one of their contributors has United Kingdom experience of the appointment of barristers as part-time judges. The system has value as it allows greater flexibility and allows barristers to see cases from the point of adjudicator, as well as providing the opportunity to experience the role of judge before moving into such a position permanently.

[43] Callum Martin expresses some concern about judicial independence but is of the opinion that if conflicts are eliminated there is no reason why an experienced civil litigator should not be able to take appointments on a part-time basis. He suggests that the Committee consider whether part-time judges would be best suited to summary or interlocutory matters rather than full defended hearings.

Recommendation 13 – Inquisitorial and case management processes

[44] The Committee does not presently recommend rule changes to introduce inquisitorial processes in the District Court as the default mode of operation. The current Rules provide sufficient flexibility to permit active case management and use of inquisitorial processes where required. The Committee does propose a change to rule 7.8 to assist with efficient case management.

[45] Community Law would have liked to see a move to an inquisitorial process and is disappointed this is not recommended. Community Law suggests that some guidance and training could be implemented to encourage judges to use inquisitorial processes and flexibility in the Rules more often.

Recommendation 14 – Consider Using Disputes Tribunal to Conduct Settlement Conferences for the District Court

[46] No immediate change was recommended, but the Committee decided further consideration should be given to this proposal.

[47] Callum Martin submits settlement conferences should remain in the District Court. One benefit of a judicial settlement conference is that the judge is able to speak with an air of authority and speak to the realities of litigation. It can be a useful reality check for a party to hear the judge summarise the issues and identify possible jeopardies – it carries a gravity that advice from the party's lawyer or Tribunal referees can lack.

Recommendation 15 – Introduce Pre-Action Protocols for Debt Claims in the District Court

[48] Community Law supports the introduction of pre-action protocols for debt claims in the District Court.

[49] Callum Martin submits there will need to be more information provided regarding what these protocols would be. The immediate concern is that the cost of debt recovery would be increased for those who are already out-of-pocket because the debtor has failed to honour their obligations under a contract. He expresses scepticism about what more pre-action protocols can do to safeguard the process. The notice of proceedings already contains a fulsome description of Court processes and the consequences of failing to respond. Short of requiring a defendant to appear physically in Court it is unclear what further protocols will increase defendant engagement with the system.

High Court

Recommendation 16 – Introduce Proportionality as Key Principle

[50] The NZLS, Crown Law and Bell Gully support the recommendation that proportionality should be expressly introduced as a guiding principle in the determination and application of the procedures applied to a civil proceeding, with r 1.2 of the High Court Rules amended to this effect.

[51] Callum Martin does not oppose this recommendation but believes there could be more specificity outlined as to the effect of the inclusion.

Recommendation 17 – Witness Statements

[52] The Rules Committee recommended that the current rules for the exchange of briefs of evidence for trial be replaced by requirements:

(a) to serve witness statements shortly after the exchange of pleadings and any preliminary interlocutory applications (such as strike out) but prior to discovery and the judicial issues conference; and

(b) that such statements not be argumentative, or engage in a recitation of the chronology of events to be established by documentation at trial.

[53] This recommendation prompted the most comment in submissions. The NZLS, Justin Smith KC, Crown Law, Callum Martin and Bell Gully all commented, critiquing the recommendation to various degrees and asking for clarifying information. Most submitters did agree however, that witness statements should not be argumentative or engage in a recitation of the chronology of events to be established at trial.

[54] Where evidence is controversial and particularly if the credibility of a witness is in issue, the NZLS strongly supports the use of oral evidence directions. Under r 9.10 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 r 9.10 would be routinely considered at the pretrial judicial issues conference.

[55] Justin Smith KC expresses some concern with the recommendation that witness statements are to take the form of "will say" statements. He suggests it is unclear what a "will say" statement means, but that the name suggests they are something (dramatically) less than briefs of evidence – more summary in nature. He is concerned they will not work for many civil trials in New Zealand, particularly large and complex ones.

[56] He suggests a "will say" statement is a high-level extraction of a factual brief in the minds of most practitioners. It tends to be conclusionary – something which,

while suitable for mediations, is not suitable for trials. If "will say" statements are to be nothing more/less than proper briefs of evidence (purely factual in context and devoid of argument) then that is what the recommendation should say.

[57] Justin Smith KC notes that little of the current trial work he is currently engaged with could be coped with in this way. "Will say" statements, given their heavily reduced content and the time in which they are to be produced, will not work in longer and more complex civil disputes. On the face of it, this is not the procedure that is envisaged in practice note SC Eq 11.

[58] Justin Smith KC believes a combination of "will say" statements and supplementary evidence cannot stand in place of an adequate brief in the first place. He is also concerned about what will happen in cross-examination and wonders whether a witness who reads out a cursory "will say" statement can then be cross-examined extensively at a level of detail not dreamed of in the statement. That would entail the bulk of the witness' evidence being adduced, adversely, in cross-examination.

[59] He also suggests the abbreviated format of "will say" statements will necessarily make them conclusionary. The use of conclusionary statements is unhelpful to judges and hinders counsel. It will only lengthen proceedings.

[60] Justin Smith KC suggests that, as an alternative proposal, there should be no presumption as to discovery at all. Discovery as per the United Nations Commission on International Trade Law (UNCITRAL) should be introduced.

[61] Crown Law agree that evidence of witnesses should be directed to questions of disputed fact and that this can be achieved through adopting witness statements that are closer in format to "will say" statements.

[62] However, Crown Law is somewhat concerned about the proposed sequencing of some steps – specifically, the proposal for witness statements to be served prior to discovery. If witness statements were to be prepared after initial disclosure but prior to discovery, Crown Law considers there is a real prospect that supplementary statements will be routinely required, at least in complex cases.

[63] Crown Law submits this concern could be mitigated by allowing an extended period of time before enhanced initial disclosure by the defendant is due and witness statements are served. If sufficient time were allowed for both stages, it is more likely that most of the key documentation would be located before the deadlines for these steps have to be met. Documents would then be disclosed as part of enhanced initial disclosure or exchanged formally between parties by consent.

[64] Callum Martin is concerned this recommendation will result in more work being placed on the system. The process may work for simple, short trials, but in the context of longer and more complex proceedings, there may be many more applications to admit supplementary briefs of evidence after the completion of the discovery process. Callum Martin is concerned this will serve to front-load the cost

of litigation when that money could be better spent negotiating settlement. Parties may essentially be put to the cost of preparing for trial at a very early stage of the proceedings.

[65] While not opposed in principle, Callum Martin suggests, that if the exchange of briefs is to be done at an early stage of the proceedings, it should perhaps be on a case-by-case basis and following the first issues conference. Parties can be asked if there is any availability for settlement and failing that any reason that discovery should proceed in advance of briefs being filed. The judge can make directions accordingly at that time.

[66] Bell Gully submits that it is not clear to what extent the duty to cross-examine in s 92 of the Evidence Act 2006 may need to be examined. Bell Gully is concerned any change could result in injustice if key propositions were not required to be put to a witness in cross. Bell Gully expresses concerns about the proposal to follow the NSW Equity division practice not requiring exchange of witness statements before discovery.

[67] Their concerns are:

(a) The sequencing of witness statements before discovery is likely to lead to higher costs and greater inefficiencies in the management of civil cases.

(b) The application of SC Eq 11 in the NSW Equity Division appears to be more flexible in practice than the terms of the practice note would suggest. We believe that, if this approach is incorporated into the Rules, the same flexibility should be made explicit.

[68] They outline their concerns in further detail and discuss the practices in the NSW Equity Division before making a number of more specific submissions.[1]

Recommendation 18 – Discovery and Disclosure

[69] The Rules Committee recommended that existing discovery be changed so that initial disclosure includes adverse documents known to the party and subsequent discovery be ordered at the judicial issues conference as is necessary and proportionate for the determination of the issues in the case.

[70] Callum Martin supports this recommendation.

[71] The NZLS submits there needs to be effective enforcement of initial disclosure obligations which are often treated as a formality.

1 See from [3.4] of Bell Gully's submission.

[72] Crown Law support an enhanced initial disclosure rule and the sentiment that subsequent discovery may often not be needed.

[73] However, Crown Law notes that the proposal regarding the sequencing of steps within a new structure – initial disclosure, then evidence, then discovery – is relatively untested (albeit noting the positive feedback from the experience of the Equity Division in the NSW Supreme Court). It is hard to predict whether the whole package of proposals will have the desired effect of reducing maximalism and facilitating access to justice. Given this, Crown Law supports the idea of testing the concepts in a New Zealand context before introducing them more widely or fully.

[74] Crown Law considers a geographical-based pilot would be difficult and resource-intensive for any organisation that has a national practice. But it may be possible to introduce the proposal in stages. For example, the Committee could make changes to the rules and practices regarding enhanced initial disclosure, the nature of witness statements (and their accompaniment with a chronology), and the nature of evidence at trial as the first stage. This would mean the existing rules regarding discovery would remain largely intact, but expectations around the need for discovery would hopefully change. If the first stage is successful the Committee could look to whether to change the order of events, with witness statements coming at an earlier point.

[75] When the new High Court procedures are introduced, Crown Law considers their success in terms of reducing maximalism should be measured. Given the cultural shift required this may take some time.

[76] Crown Law also suggests that fact sheets (or similar) relating to initial disclosure should be made available so that self-represented litigants understand the extent of their obligations. There should also be close monitoring of the new rule to ensure parties receive the documents they ought to and so can progress to the next stage.

[77] Crown Law notes that the continuing obligation to give discovery under r 8.18 is linked to there being a "discovery order". If formal discovery orders are likely to reduce, the scope of 8.18 should perhaps be expanded to ensure the thrust of the rule is not lost.

[78] Bell Gully suggests that having two stages of discovery is likely to be costly and inefficient and may increase the number of disputes about initial disclosure. It may also be practically difficult for companies filing defences to conduct a quasi-discovery exercise in the 25 working day period between the receipt of the statement of claim and the filing of defences.

Recommendation 19 – Judicial Issues Conference

[79] The Rules Committee recommended that a judicial issues conference occur later in the course of the proceedings, after initial interlocutories and the service of witness statements, to review the matters in dispute, what other steps are required for

trial (including further discovery and interlocutories), the prospect of settlement and potentially to schedule trial.

[80] The NZLS agrees that judicial issues conferences do not currently achieve their intended function and should be held earlier in the process. Judges also need to be resourced to engage meaningfully in the detail of the case at that stage. The NZLS considers the time spent on preparing for and attending the pretrial conference could result in significant time savings at trial.

[81] Crow Law also supports greater judicial engagement in the identification and management of the core issues at a judicial issues conference.

[82] Other than to oppose the notion of witness briefs being required prior to the conference, Callum Martin supports this recommendation.

[83] Bell Gully supports the proposal that the judicial issues conference and any subsequent interlocutory applications be conducted by the trial judge if at all possible.

Recommendation 20 – Interlocutories

[84] The Rules Committee recommended that there be a presumption that interlocutory applications will be heard by remote means with time limits and that provision be made to allow interlocutories to be determined on the papers.

[85] The NZLS supports this recommendation subject to a right to an in-person hearing for potentially dispositive interrogatories. Crown Law and Callum Martin also support this recommendation.

[86] Bell Gully agrees in many cases it may be efficient for interlocutory applications to be consolidated. However, consolidation is not always practicable or desirable. Bell Gully questions the utility of any amendments to the Rules requiring the consolidation of all interlocutory applications that are filed after the judicial issues conference.

[87] Bell Gully does not support the proposal that there be a presumption for remote hearings of interlocutory applications. Remote hearings for contentious applications are less efficient than in-person hearings. Bell Gully questions whether there are material cost and time savings particularly for contentious applications and there may be unintended effects.

[88] Bell Gully is also concerned about the introduction of presumptive time limits for interlocutory applications. In Bell Gully's experience, presumptive limits would be too rigid.

Recommendation 21 – Expert Evidence

[89] The Rules Committee recommended that expert evidence be subject to the presumption that (a) there be one expert witness per topic per party, and (b) that there be a requirement for expert conferral before expert evidence may be led at trial.

[90] The NZLS, Crown Law and Callum Martin support this recommendation.

[91] Bell Gully submits that the order for disclosure of documents necessary for the preparation of expert evidence should be made at an early stage of the proceeding and before the exchange of witness statements. This appears to be consistent with the NSW practice and is likely to result in significant cost and time savings.

[92] Bell Gully questions the value of using moderators for expert conferences. The use of moderators adds cost and complexity and will likely make scheduling time for conferral between experts more difficult. Experts usually interact cordially and constructively, and no change is required. It may also be that introducing a quasi-trial atmosphere will be less conducive to constructive engagement between experts.

Recommendation 22 – Evidence at Trial

[93] The NZLS and Callum Martin support this recommendation. Crown Law agree there should be changes as to how evidence is received by the court at trial, through the core events being established by the documentary record, evidenced by the documents in the agreed bundle and chronologies.

Recommendation 23 – Remote Hearings

[94] The Rules Committee recommended that the practices developed during the COVID-19 pandemic, including electronic filing, document management and remote hearings become a standard part of the court's procedures.

[95] Crown Law and Callum Martin agree with this recommendation.

[96] Bell Gully agrees that the hearing practices developed during the COVID-19 pandemic worked well in the circumstances and that there are valuable learnings from this experience that can be made part of the standard practice and procedure of the High Court. However, Bell Gully considers there is value in in-person hearings for many contested applications and do not consider there should be a presumption for interlocutory applications to be heard remotely.