RULES COMMITTEE —
TE KOMITI MŌ NGĀ TIKANGA KOOTI

Drafting Instructions for changes to the High Court Rules

9 February 2024

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Introduction

[1] This document contains the Rules Committee's drafting instructions to the Parliamentary Counsel Office for amendments to the High Court Rules 2016 (the Rules) to implement the proposed changes outlined in the Rules Committee's Improving Access to Civil Justice Report (the Report).[1] It is prepared in a manner that further explains the Committee's reasons for the changes and may be considered as a guide to understanding their purpose. Each of the Committee's recommendations relating to the High Court from its report will be set out, with the proposed rule changes then described.

[2] By way of summary the Committee has decided to make the following changes:

(a) Reformulating the objective of the rules as set out in r 1.2, in a way that introduces proportionality as a guiding principle.

(b) Replacing briefs of evidence with "witness statements" to be filed near the outset of a proceeding under standard directions (unless the Court directs otherwise).

(c) Expanding initial disclosure to encompass "known adverse documents" with any further discovery (now renamed disclosure) by agreement, or as ordered at the new judicial issues conference, and abolishing the existing rules for standard and tailored discovery as a consequence.

(d) Establishing standard directions to apply unless otherwise directed by the Court prior to the judicial issues conference and repealing most of the existing case management rules.

(e) Establishing a new rule requiring the parties to cooperate in relation to the procedural steps required for a proceeding.

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[1] Rules Committee | Te Komiti Mō Ngā Tikanga Kooti *Improving Access to Civil Justice* (November 2022) (the Report).

(f) Establishing the requirement for the judicial issues conference, and the standard agenda for that conference.

(g) Amending the rules to enable interlocutories to be determined on the papers, and otherwise potentially by remote means, with time limits. The exception to this will be a presumption that specified interlocutory applications of greater importance will be heard in person, because they are potentially dispositive (such as summary judgment and strike outs).

(h) Making an experts' conference compulsory, allowing such a conference to be convened by a non-expert, and introducing a presumption of one expert per topic.

(i) Creating new rules for evidence at trial, namely:

(1) Adopting new rules for the documentation to presumptively come in by means of chronologies prepared by each party (rather than through the witness statements).

(2) Creating a new rule regulating how objections to admissibility to documentary evidence are to be dealt with.

(3) Allowing witness statements to be taken as read.

(4) Introducing a rule that clarifies whether a party is required to put propositions to witnesses in cross-examination.

[3] As outlined in the Committee's Report, the overall objective of these changes is to reduce unnecessary and disproportionate costs from being incurred, and to promote procedures that place greater emphasis on identifying and resolving the key issues in the proceedings. To be successful these changes will require a cultural shift. Parties will need to concentrate on narrowing the issues to those that are truly necessary rather than expanding, investigating and arguing all possible points. The rules are a means to that end. In particular:

(a) Discovery is being replaced by a disclosure regime which requires the key documents in the case to be disclosed at the outset, with further disclosure by agreement and with further disclosure orders only made if truly necessary. The objective is to remove the significant burden of large-scale discovery exercises which overseas experience suggests may not be necessary for the just and efficient disposal of proceedings.

(b) A greater focus on narrowing the case to the key issues is intended. This is to be promoted by a judicial issues conference, to be held for all defended proceedings, where the parties are to identify what the key issues are, how they can be most efficiently addressed, whether matters can be resolved, and other similar issues.

(c) In addition, the evidence the parties are seeking to rely on is to be served close to the commencement of the proceedings, after initial disclosure, and before the judicial issues conference. This is not only to assist with the earlier identification of what the issues actually are but is also intended to reduce the unnecessary advocacy in lengthy briefs of evidence that are too often observed under the current regime.

(d) Changes to rules for adducing evidence at trial are then directed at placing primacy on the documentary record for establishing the facts, and reducing the reliance on the lengthy evidence of witnesses in the form of commentary or advocacy on such documentation.

Recommendation 16: Introducing proportionality as key principle

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.[2]

[4] The Committee initially considered that this proposal was best achieved by adding the words "by proportionate means" to the existing r 1.2. After some discussion, the Committee considered whether to seek to emulate the more elaborate rule set out in the English and Welsh rules.[3] Some aspects of this formulation were seen as appropriate, and the Committee attempted to adapt this rule for the New Zealand context. However the proposed adapted rule raised some concerns. For these reasons the Committee has decided to revert to the original proposal referred to above. But the Committee invites PCO to continue work on a fuller formulated proposed rule 1.2, and if appropriate any such formulation can be brought to the Committee's attention for consideration.

[5] A new definition of "overriding objective" as meaning "the objective specified in rule 1.2" should then be inserted into rule 1.3. As will be explained later in this document, the proposed rules include greater express cross-referencing back to this objective, particularly when a discretionary decision of the Court is involved.[4]

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2 The Report, above n 1, at [43].

3 This can be found at PART 1 - OVERRIDING OBJECTIVE - Civil Procedure Rules (justice.gov.uk).

4 There are other similarly worded objectives in s 145 of the Senior Courts Act 2016 and r 1.3 of the District Court Rules.

Recommendation 17: Witness statements and expert evidence

The current rules for the exchange of briefs of evidence for trial be replaced by requirements:

- *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.*
- *That such statements not be argumentative, or engage in the recital of the chronology of events to be established by documentation at trial.*[5]

[6] This is a key aspect of the Committee's recommendations. It relates to factual witness statements rather than expert evidence. It adopts an approach first adopted by the Equity Division in New South Wales. Requiring witness statements to be filed near the commencement of the proceeding has the following key advantages:

(a) The witness will need to provide evidence based on their own recollections, and at the outset when their memory is fresher.

(b) The witness statements will not be prepared by reference to extensive documentation provided by the other parties and made available under disclosure orders.

(c) The statements will be prepared without being formulated in response to the arguments that have developed during the course of the proceedings. This will reduce the advocacy that can be involved in the preparation of witness statements.

(d) It will allow the parties to understand their own case, and the case of the other side more fully so that the true issues in dispute are better understood at a much earlier stage.

[7] As indicated, requiring such evidence to be filed at the outset was a feature of the reforms in New South Wales in 2012. At the time the reforms were considered

5 The Report, above n 1, at p 45.

controversial and led to some opposition by elements of the profession, but are now well-established and are reported as having been "effective in reducing cost and delay".[6] The service of evidence prior to any discovery also occurs in other jurisdictions, albeit with more flexibility. As the Committee reported it has most recently been introduced in Singapore.[7] It is the approach used for some commercial arbitrations,[8] and is also available in the Federal Court of Australia. [9]

[8] While the New Zealand Law Society (NZLS) supported the proposal, other submissions opposed the Committee's proposals on the basis that it will front load costs and lead to a proliferation of applications to admit supplementary witness statements.[10] Crown Law also noted that the proposals are untested. The Committee does not agree that these concerns outweigh the advantages of the proposals, and it notes that similar concerns were initially expressed in NSW and proved to be unwarranted. A witness does not need to see all the other side's documents before they put forward what their evidence is. The Committee considers that arguments for the status quo tend to illustrate the problem of evidence being formulated with undue advocacy, and with witnesses adjusting evidence to best advance their case in light of documentation, rather than providing their actual recollection of facts in issue.

[9] Two other issues emerged from the submissions on this recommendation in the Committee's report — the precise form of the statements, and the existence and scope of the exception to the requirement for the evidence to be so filed near the outset.

Form of witness statements

[10] The Committee's recommendations referred to the evidence so served as being "closer in format to the former 'will say' statements that were once common in civil litigation".[11] The submission from Justin Smith KC, who was otherwise generally

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6 At [183].
7 At [184].
8 See for example the UNCITRAL Arbitration Rules, Arts 20, 21 and 27.
9 Under [8.21] of the Federal Court of Australia Case Management Handbook the parties and the Court should consider whether "… the parties should be required to serve outlines of evidence (including expert evidence) prior to discovery".
10 Submissions of Callum Martin (Saunders Robinson Brown) at [4.2] and Bell Gully. See [14] below.
11 Report, above n 1, at [189].

supportive of the earlier service of witness statements, opposed the recommendation that the evidence be in the form of "will say" statements. It is noteworthy that the NSW requirement is for the filing of affidavits. The Federal Court of Australia requirements refer to considering the service of "outlines of evidence" before discovery.[12]

[11] The Committee agrees that there is ambiguity as to what requiring "will say" statements would actually involve. It may be interpretated as being only an abbreviated document that indicates what the witness will say by way of oral evidence. It would be undesirable for witness statements to be abbreviated in this way. The statements should be in a form that can be accepted at trial as the evidence of the witness "as read". The reason for initially referring to the statements being closer to "will say" statements was to emphasise the need for the written evidence to be focussed, not argumentative, and to involve the witnesses' actual factual evidence based on their recollection of events rather than a traversal of documents. The Committee considers that the requirement to serve the evidence at the outset, coupled with the requirements in the existing r 9.7 (quoted below), will be sufficient to achieve this objective. It nevertheless recommends that there be a change of terminology from "briefs" to "witness statements" to emphasise that there is to be a change, and to reflect the expectation that the evidence will no longer be as long, adversarial, or based on the recitation of documents as has been the case in the past.

[12] The rules about the contents of witness statements in the existing r 9.7 are otherwise generally consistent with the Committee's recommendations. The problem is that the rule is often observed in the breach. The timing for the service of witness statements currently provided for by r 9.7(2) will need to be altered so that they are served at the beginning of the proceedings after the service of pleadings (subject to the exceptions referred to below). The Committee also distinguishes between witness statements and expert evidence, in part because the timing rules for each should differ. The overall timing of requirements in the proposed new rules is addressed at [43]–[46] below. The Committee has decided to implement changes to the current rule along the following lines (changes showing in marking up):

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12 See above at n 9.

9.7 Requirements in relation to ~~briefs~~witness statements

~~(1) In this subpart, brief, in relation to the evidence of a witness to be called by a party, means a written statement setting out evidence proposed to be given by that witness.~~

~~(2) The date by which the parties must complete and serve briefs upon each other, simultaneously or sequentially, must be determined by the court at a case management or issues conference, having regard to the needs of the case.~~

(~~3~~1) Whether or not some evidence is directed to be led orally, ~~the brief~~ a witness statement is a statement from a witness that ~~must~~ contains the testimony intended to be taken from that witness on that subject.

(~~4~~2) Every ~~brief~~witness statement must—

(a) ~~must~~ be prepared in a manner that is consistent with the overriding objective:~~.~~

(b) ~~must~~ be in the words of the witness and not in the words of the lawyer involved in drafting the ~~brief~~witness statement:

(c) ~~must~~ not contain evidence that is inadmissible in the proceeding:

(d) ~~must~~ not contain any material in the nature of a submission or be argumentative:

(e) ~~must~~ avoid repetition:

(f) ~~must avoid the recital of the contents or a summary of documents~~must avoid reciting or summarising the contents of documents or the documentary record to be received by the court under r 9.5:[13]

(g) ~~must~~ be confined to the matters in issue and, in the case of a fact witness, to those issues on which the witness can assist the Court by giving evidence on the basis of their personal knowledge~~.~~:

(h) ~~[Revoked] must~~ be able to be received by the Court as the evidence of the witness, and should be signed by the witness with a statement that the evidence is true and correct:[14]

(~~5~~3) If the ~~brief~~ witness statement does not comply with the requirements of subclause (43) the court, prior to or during the trial, may direct that it not be read in whole or in part, and may make such order as to costs as the court sees fit.

(~~1~~4) Witness statements must be served at the time required by the standard directions in rule 7.1 unless further time is given by a judge under r 7.1(a).[15]

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13 See [56]–[68] below for new rules about chronologies and documents received as evidence.
14 See [75] below in relation to the application of perjury.
15 See [18]–[44] below for new timetabling.

(~~6~~5) A party intending to call a person as a witness must, if that person has not provided a ~~brief~~ witness statement,—

(a) serve a notice on the other parties to the proceeding informing them that the party intends to call the person as a witness; and

(b) include the following information in the notice:

(i) the name of the intended witness:

(ii) the steps that have been taken to obtain a brief from the intended witness:

(iii) the reasons for the intended witness not providing a brief:

(iv) an explanation of the relevance of the evidence of the intended witness:

(v) details of the evidence that the party expects the intended witness to give.

(~~7~~6) At the trial or hearing, the person called as a witness must give his or her evidence in accordance with rules 9.10 and 9.12, subject to any directions that the court may give or any terms or conditions that the court may specify.

(~~8~~7) The party serving a ~~brief~~ witness statement or a notice under subclause (~~6~~5) must, as soon as practicable after the ~~brief~~ witness statement or notice is served, advise the Registrar of what the party has served, on whom it was served, and the date of service.

Exceptions

[13] A further issue arises in relation to the Court's ability to direct that the witness statements be served at a later stage in some cases. As the Committee noted in the Report, there will be cases where it is necessary to allow some additional disclosure of documents before the service of witness statements.[16] The New South Wales provisions allow for the later service of evidence in "exceptional circumstances". Commentary on that rule indicates that the requirement for exceptional circumstances is not applied strictly and is approached in a pragmatic way.[17] The other regimes that have been referred to, including both the Federal Court of Australia and Singapore, adopt a flexible approach.

16 The Report, above n 1, at [187].

17 D Hammerschlag *Hammerschlag's Commercial Court Handbook* (2nd ed LexisNexis, Australia 2022) at [20.26.12].

[14] Submissions made to the Committee referred to the meaning of "exceptional circumstances" and identified case law which indicates that what is required is not circumstances which were unique, unprecedented or very rare, but rather circumstances that were unusual or out of the ordinary, or simply circumstances that necessitated disclosure.[18] That is consistent with the NSW approach as the Committee understands it.

[15] The Committee considers that the exceptions allowed in NSW will likely assist the application of the exception in the proposed rule. There will plainly be cases where it would be appropriate for the statements to be served later — for example in a case involving allegations of fraud. There may be other situations where more extensive disclosure or other procedures (such as interlocutories) may be appropriate before witness statements are served, such as in very complex commercial cases. The Committee agrees that it may not be necessary for there to be "exceptional circumstances" before the Court directs that a later provision of witness statements is appropriate, and the less stringent interpretation of this requirement as adopted in New South Wales reflects this.[19] On the other hand it is important to ensure that there is a good reason to depart from the requirement, and that the exception does not allow a departure from the requirement too easily so that the whole point of the change is not undermined. The Committee considers that the test for exceptions should be based on establishing that the overriding objective in r 1.2 would be better achieved by later service of evidence.

[16] There is then an issue with whether the Court should allow supplementary witness statements. Rule 9.8 currently allows "supplementary briefs" at the discretion of the Court. The Committee considers that the substance of this rule should be maintained, and that the test for allowing such supplementary witness statements would again be that allowing them would mean that overriding objective in r 1.2 is better achieved. It considers it should be possible for the Court to so permit

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18 *Leighton International v Hodges* [2012] NSWSC 458 at [20]; *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913 at [17]; *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 89 at [15]–[17]; *Pharmacy Guild of Australia v Ramsay Health Care Ltd* [2019] NSWSC 1045 at [230]; *Owners Strata Plan No 70335 v Walsh Bay Finance* [2013] NSWSC 1623 at [9]–[10].

19 See D Hammerschlag, above n 17, at [2.26.13] for a list of cases where exceptions were allowed.

supplementary witness statements at the judicial issues conference or at a later stage. But it has decided against a standard rule to allow for supplementary witness statements as it considers that supplementary statements should only be contemplated as a matter of exception when there are good reasons to allow them.

Expert evidence

[17] Currently expert evidence is simply timetabled at case management conferences. The Committee considers that this should continue to be the practice, and in particular the question of expert evidence will be a matter to be addressed at the judicial issues conference. All parties should be prepared, at the judicial issues conference, to discuss the nature of expert evidence they intend to bring. This is discussed further below.

Proposed timetable rule

[18] In response to the submissions made by Crown Law, the Committee agrees that the service of witness statements should occur after initial disclosure of key documents (addressed below). The Committee considers that the new rule should accordingly be along the following lines:

> **9.1A Exchange of witness statements and expert evidence**
>
> (1) Witness statements of the factual evidence that the party wishes to rely on at trial must be served at the time required by the standard directions in rule 7.1 unless further time is given by the Court under r 7.1(2).[20]
>
> (2) All such witness statements must meet the requirements of rule 9.7.
>
> (3) Statements of the expert evidence that a party wishes to rely on at trial must be served at the time and in accordance with any other directions ordered at the judicial issues conference.

[20] See [41]–[45] below for the proposed new timetable rules which involves the statements being provided after pleadings have been exchanged and initial disclosure has been provided.

Recommendation 18: Discovery and disclosure

That existing discovery rules be changed so that:

- *Initial disclosure includes adverse documents known to the party*
- *Subsequent discovery be ordered at the judicial issues conference as is necessary and proportionate for the determination of the issues in the case.*[21]

[19] The amendments to the rules governing disclosure/discovery are another important part of the Committee's changes. The initial disclosure of key documents and the early filing of evidence will require the parties to identify the issues that are truly in dispute at an early stage in the proceeding. This will reduce the need for an extensive discovery exercise involving the search for, and disclosure of volumes of documentation that are in large part not truly necessary for the fair disposition of cases.

[20] This recommendation will require changes to sub-pt 1 of pt 8 of the Rules. Part 8 regulates discovery and inspection, and includes the obligation to provide initial disclosure under r 8.4. Part 8 should be renamed "Disclosure, inspection and interrogatories" rather than the existing "Discovery and inspections and interrogatories" and sub-pt 1 should be renamed "Disclosure and inspection" to emphasise the change in approach.[22]

Initial disclosure

[21] The initial disclosure obligation in r 8.4(1) requires disclosure of documents referred to in the pleading and any additional principal documents that the party has used when preparing the pleading and on which the party intends to rely. The Committee's recommendation requires the additional disclosure of "known adverse documents". Expanding the categories of initial disclosure required will likely reduce the arguments for more extensive disclosure later in the proceedings.

[22] This category of known adverse documents is similar to the concept already referred to in r 8.7(b) and (c) in relation to standard discovery which requires

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21 The Report, above n 1, at p 49.

22 It may, however, be appropriate to add a definition that provides that "disclosure" is to be regarded as "discovery" as referred to in s 132 of the Evidence Act 2006.

disclosure of documents "that adversely affect that party's own case" and "documents that support another party's case". But it also picks up the concept of "known adverse documents" referred to in the new rules in England and Wales. The new Practice Direction 57AD is part of an elaborate set of disclosure rules that has been adopted in that jurisdiction following a pilot. The Committee has decided not to adopt an elaborate regime of this kind, however. It considers such a detailed and prescriptive set of rules may generate unnecessary argument about the interpretation and application of such rules. It considers it preferable to try and keep the rules themselves as simple as possible, and intends that they be formulated in a manner that contemplates cooperation rather than mechanical adherence to prescribed requirements. The definitions given to "known adverse documents" under the new English rules are nevertheless of assistance. Practice Direction 57AD provides:

> 2.7 Disclosure extends to "adverse" documents. A document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed Issues for Disclosure.
>
> 2.8 "Known adverse documents" are documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse.
>
> 2.9 For this purpose a company or organisation is "aware" if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation.

[23] These rules have been interpreted to require the party to engage in a "check" but not a "search" for such adverse documents,[23] and the Committee considers this to be an important distinction. This limitation responds to Bell Gully's concern in submissions that requiring disclosure of known adverse documents would amount to a quasi-discovery regime for corporations. The Committee considers that even the above provisions are too elaborate for the New Zealand environment, and a simpler formulation would achieve what is required. For example, the existing reference in

[23] *Castle Water Ltd v Thames Water Utilities* [2020] EWHC 1374 at [11].

r 8.7 to adverse documents has not required a more elaborate definition, and the Committee does not understand there to have been any ambiguity or uncertainty in the application of this rule. The Committee considers that awareness of a document should, in this context, extend to a belief that the document may well exist, even if the party is not, without checking, sure of the position. The Committee also considers that the disclosure obligation should be verified by affidavit to ensure that parties understand and comply with the obligation to disclose such material. It has decided that the existing rule be should changed in the following way:

8.4 Initial disclosure

(1) After filing a pleading, a party must, unless ~~subclause (2) applies~~the Court directs otherwise, serve on the other parties, at the same time as the service of that pleading, a bundle verified by an affidavit complying with r 8.15 consisting of copies of—

(a) all the documents referred to in that pleading; ~~and~~

(b) any additional principal documents in the filing party's control that that party has used when preparing the pleading ~~and~~ or on which that party intends to rely at the trial or hearing~~.~~; and

(c) known adverse documents.

(1A) Known adverse documents are documents known to a party that contain information adverse to their case or which support the case of an opposing party.

(1B) Knowledge in subclause (1A) exists if the party~~, or any person associated with the party who is directly in the events~~

(a) knows that the document exists; or

(b) has good reason to believe the document exists.

(1C) A party must take reasonable steps to check for documents to which subclause (1B)(b) applies.

~~(2) A party need not comply with subclause (1) if~~

~~(a) the circumstances make it impossible or impracticable to comply with subclause (1); and~~

~~(b) a certificate to that effect, setting out the reasons why compliance is impossible or impracticable, and signed by counsel for that party, is filed and served at the same time as the pleading.~~

~~(3) A party acting under subclause (2) must, unless the other parties agree that initial disclosure is not required, or that a longer period is acceptable, apply~~

~~for a variation of that requirement within 20 days of the service of the relevant pleading.~~

(~~4~~2) If a party fails to comply with subclause (1)~~ or (3)~~, a Judge may make any of the orders specified in rule 7.48.

(~~5~~3) Despite subclause (1), a party does not need to disclose any document in which the party claims privilege or that a party claims to be confidential.

(~~6~~4) Despite subclause (1), a party does not need to disclose any document that either—

(a) is the subject of a claim of public interest immunity; or

(b) is reasonably apprehended by the party to be the subject of such a claim.

(~~7~~5) Despite subclause (1), a party does not need to include in a bundle served by that party any document contained in a bundle already served by any party or any document attached to an affidavit already filed in court.

(~~8~~6) The bundle of documents may be served either electronically or as a bundle of copies in hard copy form.

(~~9~~7) If an amended pleading is filed prior to the making of a discovery order, this rule applies to that amended pleading if it either—

(a) refers to documents not referred to in any earlier pleading filed by the party who files the amended pleading; or

(b) pleads additional facts.

Further disclosure

[24] As summarised in the Committee's Report, the experience in New South Wales was that the earlier provision of evidence has had the result that more extensive discovery was not required, "and never was".[24] It also ensures that further disclosure is a far more disciplined exercise which focuses on documentation that is truly necessary for the determination of the proceeding. Commentary on the NSW approach also refers to the appropriateness of cooperation between the parties, and their counsel in this respect. In light of these considerations the Committee has determined:

(a) That a specific rule should apply, in light of the duty of cooperation, to regulate requests for specific information apart from initial disclosure, including prior to the judicial issues conference.

[24] The Report, above n 2, at [183].

(b) That any further disclosure then be ordered at the judicial issues conference, and that the existing rules for general and tailored discovery be repealed.

[25] As to the first point, the Committee considers that it would be advantageous to introduce an express rule requiring the parties to cooperate in relation to any particular disclosure which is required, in addition to the initial disclosure. The current rules contain a duty to cooperate in r 8.2. The Committee considers that it should be amended so that it focuses on the specific disclosure now contemplated, and that a separate rule be introduced concerning requests for particular documents.

[26] The cooperation rule should accordingly be amended along the following lines:

8.2 Co-operation

(1) The parties must co-operate to ensure that the processes of ~~discovery and inspection~~ disclosure ~~are~~is —

(a) appropriately focused and proportionate to the subject matter of the proceeding; and

(b) facilitated by agreement on practical arrangements.

(2) The parties must, when appropriate,—

(a) consider options to ~~reduce~~ focus the scope ~~and burden~~ of ~~discovery~~disclosure; and

(b) achieve reciprocity in the electronic format and processes of ~~discovery and inspection~~disclosure; and

(c) ensure technology is used efficiently and effectively; and

(d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

[27] And in terms of the request for additional disclosure the Committee has agreed to a rule along the following lines:

Cooperation in relation to further disclosure

(1) A party may request that specific documents be disclosed to that party by another party if the party has good reason to believe the documents exist, that they are relevant and material, and such documentation has not been provided by way of disclosure.

(2) A party receiving a request for further disclosure in accordance with (1) must respond to that request in accordance with the duty of cooperation provided for in r 8.2, and provide such disclosure unless there are good reasons not to.

[28] The question of further disclosure can then be addressed at the judicial issues conference. The existing more elaborate rules for different types of discovery, including general discovery and tailored discovery, can be repealed and replaced by the following more general rule which could be located around r 8.18:

Further disclosure orders

(1) The parties may agree on any further disclosure that is to be provided.

(2) Notwithstanding (1), the Court may order that further disclosure be made by a party at the judicial issues conference or at any other stage.

(3) The Court will order such disclosure if satisfied that such disclosure is in accordance with the overriding objective.

(4) Such disclosure orders may require the filing and service of an affidavit of documents in accordance with rr 8.15 and 8.16.

[29] The Committee considered whether the rules should continue to refer to the concepts of general or tailored discovery but do not consider that this would be advantageous as it would mean that the parties may revert to existing practices. The Committee has consciously referred to "disclosure" rather than "discovery" to emphasise the need for greater focus. But the disclosure the Court can order could amount to what is presently general discovery if the Court was persuaded that this is needed in the circumstances of a particular case.

[30] It will be necessary for the parties to understand that there are still obligations in relation to disclosure that will be enforced. These obligations will apply to the initial disclosure obligations, and then in relation to any further disclosure orders made by the Court. The current rules have separate provisions dealing with enforceability in relation to discovery (r 8.33) and other interlocutory requirements (r 7.48). The Committee considers that the more elaborate power in r 7.48 should be available in relation to the disclosure obligations and that the rules should be amended along the following lines:

7.48 Enforcement of ~~interlocutory order~~s ~~and other requirements for disclosure~~or requirements

(1) If a party (the party in default) fails to comply with an interlocutory order or any requirement imposed by or under subpart 1 of Part 7 (~~case management~~judicial issues conference), or Part 8 (disclosure~~, inspection~~ and interrogatories) a Judge may, subject to any express provision of these rules, make any order that the Judge thinks just.

(2) The Judge may, for example, order—

(a) that any pleading of the party in default be struck out in whole or in part:

(b) that judgment be sealed:

(c) that the proceeding be stayed in whole or in part:

(d) that the party in default be fined, ordered to do community work, or committed to prison under section 16 of the Contempt of Court Act 2019:

(e) if any property in dispute is in the possession or control of the party in default, that the property be sequestered:

(f) that any fund in dispute be paid into court:

(g) the appointment of a receiver of any property or of any fund in dispute.

(3) An interlocutory order may only be enforced by the following (in accordance with subpart 4 of Part 2 of the Contempt of Court Act 2019):

(a) an order imposing a fine or community work:

(b) a warrant committing the person to prison:

(c) a sequestration order.

8.33 Enforcement of order

(1) ~~The requirements of Part 8 may be enforced under r 7.48.~~If a party fails to comply with an order or any requirement imposed under this part, a Judge may enforce it under r 7.48 (with any necessary modifications).

(~~1~~2) ~~A discovery order or other~~ An order made under this subpart may be enforced under subpart 4 of Part 2 of the Contempt of Court Act 2019 against any person who is required to comply with that order.

(~~2~~3) This rule does not limit or affect any power or authority of the court to punish a person for not complying with a court order.

[31] The current rules also contain very elaborate machinery concerning discovery and inspection. Given that the purpose of the reforms is to significantly reduce the time and cost involved in the extensive discovery exercises, and to focus instead on

the key documents that are truly necessary for a case, the Committee considers that much of this machinery should be repealed. The very existence of the number of prescriptive rules places too much emphasis on discovery, and leads to elaborate arguments that can be engaged in under each of the rules. Simpler and more direct rules, with a greater emphasis on cooperation, can lead to the truly necessary disclosure being provided by parties in accordance with the Committee's changes.

[32] In terms of the current rules provided for in sub-pt 1 of pt 8, the Committee considers that the following rules can be repealed:

(a) Rule 8.1 — Interpretation — which defines standard and tailored discovery and what a discovery order is.

(b) Rule 8.5 — which contemplates discovery orders at the first case management review, and which provides that the Court must make a discovery order unless the proceedings can be justly disposed of without any discovery. The new approach is effectively in substitution of this presumption.

(c) Rule 8.6 — which provides the two kinds of discovery (standard or tailored).

(d) Rule 8.7 — which prescribes what standard discovery is.

(e) Rule 8.8 — which prescribes what tailored discovery is.

(f) Rule 8.9 — which sets out presumptions to be applied in relation to when tailored discovery will be ordered.

(g) Rule 8.10 — which prescribes what the obligation to give tailored discovery is.

(h) Rule 8.11 — which discusses the memoranda relating to discovery that must be filed before the first case management review.

(i) Rule 8.12 — which prescribes the discovery orders that can be made.

(j) Rule 8.14 — which prescribes the extent of a search that must be undertaken in relation to a discovery order.

(k) Rule 8.17 — which provides for an ability to apply for variation of a discovery order.

[33] Much of the machinery for the obligations in relation to discovery is set out in sch 9. Schedule 9 will remain relevant in circumstances when the Court orders that disclosure be given. Part 1 of sch 9 should be amended along the following lines:

(a) Its heading should now read "Disclosure considerations and listing and exchange protocol".

(b) It should refer to a disclosure rather than discovery, and to targeted disclosure orders rather than tailored discovery.

(c) There should be consequential amendments along the same lines contemplating targeted disclosure orders, and what must be reviewed before seeking them, and how the listing exchange protocol applies.

[34] We recommend that the following rules in this pt 8 would be retained (subject to amendment to refer to the new "disclosure" obligations, rather than the more "discovery" obligations):

(a) Rule 8.2 — the duty of cooperation (as amended above).

(b) Rule 8.3 — the duty to preserve documents (amended to contemplate the documents potentially disclosable in the proceedings rather than the more general concept of discoverable documents, and not limited to known adverse documents — ie. a litigation hold on document destruction will still be required).

(c) Rule 8.4 — initial disclosure (amended as above).

(d) Rule 8.13 — the solicitor's discovery obligation (amended to refer to disclosure obligations rather than discovery orders).

(e) Rule 8.15 — the affidavit of documents (amended to contemplate the disclosure obligations, rather than the discovery orders).

(f) Rules 8.16 — which provides for the schedule, including the form of the schedule, of the list attached to the affidavit of documents. Rule 8.16(5) could be amended to exclude the need to list documents that can reasonably be assumed to be in the possession of all parties (at present the Rules only exclude mutual correspondence).

(g) Rule 8.18 — the continuing obligation of discovery (amended to be a continuing obligation to provide disclosure of documents falling within r 8.4, including known adverse documents).

(h) Rule 8.19 — allowing the Court to make an order for particular discovery (amended to contemplate the Court being able to order particular disclosure be provided).

(i) Rule 8.20 — allowing pre-commencement discovery (amended to be disclosure).

(j) Rule 8.21 — allowing particular discovery (now disclosure) against a non-party.

(k) Rule 8.22 — concerning the costs of providing discovery (now disclosure).

(l) Rule 8.23 — requiring an incorrect affidavit to be amended.

(m) Rule 8.24 — which regulates who swears affidavits of documents.

(n) Rule 8.25 — regulating challenges to privilege or confidentiality claims.

(o) Rule 8.26 — concerning Crown documents and the public interest.

(p) Rule 8.27 — concerning inspection.

(q) Rule 8.28 — concerning inspection of privileged and confidential documents.

(r) Rule 8.29 — concerning inspection arrangements.

(s) Rule 8.30 — concerning the use that can be made of discovered documents (now disclosure). Rule 8.30(4) could be adjusted to make it clear that the implied undertaking extends to documents provided by way of initial disclosure, or agreed/ordered further disclosure.

(t) Rule 8.31 — concerning the effect of failure to include a document in an affidavit of documents.

(u) Rule 8.32 — involving the notice to produce documents or things.

(v) Rule 8.33 — concerning the enforcement of a discovery order under the Contempt of Court Act 2019 as amended above.

[35] There is a final point to make about these proposed changes. The existing prescriptive rules concerning discovery are the enemy of pragmatism and they become, for some, an excuse not to cooperate. It is important to emphasise that these prescriptive rules around discovery are being replaced by the obligation to cooperate to agree proportionate disclosure. It may also be necessary to increase judicial involvement to ensure counsel are focused on this requirement. In order for the emphasis on cooperation to be meaningful, counsel need to know that there will be consequences for those who do not depart from the old ways. Breach of the rules relating to proportionality and cooperation will have costs consequences in the same way as the breach of other rules. In other words, the changes are not just aspirational — they will be backed up with judicial resource and sanction. In the implementation phase, when the changes are introduced, it will be necessary to signal the magnitude of the changes as it will need to involve a re-think on "discovery" from litigators.

Changing the procedures so that they involve issue identification and disclosure at an early stage will be a significant change for many. The existing obligation of cooperation in the rules is presently honoured in the breach. For these amendments to be effective it is necessary to signal that this approach needs to change.

[36] This change in emphasis will also be important in relation to the judicial issues conference — addressed next — as it will now be of central importance to the conduct of a proceeding in place of the prescriptive case management regime.

Recommendation 19: Judicial issues conference

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 a trial.[25]

[37] This is another key aspect of the Committee's changes. It contemplates a comprehensive judicial issues conference which will effectively replace the existing case management conferences set out in sub-pt 1 of pt 7 of the Rules. The object of a judicial issues conference is that there be a comprehensive review of what the issues in the case actually are, what further disclosure or other orders are necessary for the fair disposition of the case, what the requirements for the trial will be and other related matters. The earlier focus on identifying what the key issues actually are may also facilitate the earlier resolution of cases.

[38] To effectively implement this recommendation, the Committee considers that two changes are required:

(a) that a rule concerning the judicial issues conference, and its requirements, is implemented; and

(b) that the initial case management conference, and the elaborate rules about case management conferences, be replaced by a standard direction to take place prior to the judicial issues conference.

Judicial issues conference

[39] In terms of the rule for the judicial issues conference, there is a current discretionary rule in existence. It provides:

> **7.5 Issues conferences**
>
> (1) The Judge may at any time, on the Judge's own initiative or if the parties agree, order an issues conference for any defended proceeding to advance the identification and refinement of the issues, and set the date and agenda for that issues conference.

[25] The Report, above n 1, at p 52.

(2) The Judge may issue a direction before an issues conference that requires the attendance at the conference of all or any of the following:

(a) instructing solicitors:

(b) all counsel engaged:

(c) the parties (or, in the case of corporate parties, their senior officers or authorised representatives).

(3) If any conflict arises between the pleadings and the issues as identified and refined before or at an issues conference, the pleadings prevail.

[40] The Committee has decided that that rule be adapted in the following way to establish the required judicial issues conference:

7.5 Judicial Issues Conference

(1) A judicial issues conference shall take place for all defended proceedings unless the Court determines that no such conference is required to meet the overriding objective.

(2) The parties, and their solicitors and counsel, have a duty to co-operate in preparing for and participating at any judicial issues conferences.

(3) The purpose of a judicial issues conference is to-

(a) identify issues in the case; and

(b) identify the position of the parties on those issues; and

(c) taking into account the overriding objective-

(i) consider the procedural requirements for fair disposition of the case; and

(ii) consider whether it is possible to resolve the proceeding by alternative means.

(4) Unless the Court directs otherwise, the agenda for the conference will be:

(a) the identification of the issues and the position of the parties on the issues (including whether any amendment to pleadings is appropriate):

(b) whether there are any issues of tikanga raised in the proceedings, and what steps should be taken as a consequence:

(c) whether any further disclosure is required:

(d) timetabling or resolving any interlocutory applications:

(e) whether any expert evidence is to be relied upon and, if so what directions are appropriate (including the specified topics to which

such evidence should be directed, the conference of experts, joint reports and the sequencing of such evidence at trial under r 9.46):

(f) whether steps should be taken to consider settlement by means of mediation or otherwise:

(g) whether there are steps that can be taken to minimise the matters in dispute through facilitation, mediation or otherwise:

(h) the nature of any significant facts that are disputed between the parties:

(i) the manner and timing by which the parties' draft chronologies will be finalised and combined into a merged trial chronology pursuant to rule 9.9:

(j) whether the proceedings can be set down for trial:

(k) the timing of the service of the narrative of events revealed by the documentary record under [r]: and[26]

(j) the requirements for trial.

(5) The Judge may issue a direction before an issues conference that requires the attendance at the conference of all or any of the following:

(a) instructing solicitors:

(b) all counsel engaged:

(c) the parties (or, in the case of corporate parties, their senior officers or authorised representatives).

(6) Unless directed otherwise the following directions apply:

(a) 10 working days before the conference the plaintiff shall file and serve a position paper, and a bundle of its key evidence and documents.

(b) 5 working days before the conference the defendant(s) shall file and serve a position paper, and a bundle of key evidence and documents.

(7) At the judicial issues conference the Court will give such directions as it considers appropriate for the proceedings to meet the overriding objective.

(8) The Court may direct that a further judicial issues conference should take place.

[41] Part of the objective of the Committee's recommendations is to put greater emphasis on the need for the parties, and particularly their counsel, to cooperate in achieving the disposition of proceedings in a manner consistent with the overriding objective in r 1.2. As indicated above, there is a duty of cooperation in relation to

[26] See [70] below.

discovery in the existing r 8.2. For that reason the Committee considers it appropriate to include a specific rule that introduces a duty of cooperation not just in relation to disclosure, but also in relation to the fair disposition of the proceedings generally. As part of that it considers it appropriate to enact a rule that contemplates that counsel will actually have spoken to each other about the appropriate procedures required for the case rather than simply engaging in correspondence or email exchanges. The Committee has accordingly agreed upon a rule in the following terms:

> **General duty to co-operate**
>
> (1) All parties, and their solicitors and counsel, have a duty to cooperate in determining the procedures to be followed for preparing a proceeding for trial, and the implementation of those procedures, in accordance with the overriding objective.
>
> (2) In complying with this duty the lawyers representing a party are expected to have direct discussions with the other party's lawyers (or the other party in case of self-represented litigants) to attempt to agree on what is required for the conduct of the proceedings.
>
> (3) For specific duties to cooperate under the rules, see the following:
>
> (a) Rule 8.2 and sch 9 (disclosure):
>
> (b) Rule [ ] (further disclosure):
>
> (c) Rule [7.5(2)] (judicial issues conference):
>
> (d) Rule 9.4 (preparation of common bundle):
>
> (e) Rule 11.22 (sale of property).

[42] Some criticism has been directed towards a perceived lack of emphasis on mediation within the new procedures proposed in the Report.[27] The Committee has always seen this as a key purpose of the judicial issues conference, however, and it is the reason for the requirements in the proposed r 7.5(3)(f) and (g). The Committee is also proposing greater involvement of facilitation and/or mediation in conjunction with expert evidence as addressed at [54]–[55] below.

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[27] Hayden Wilson and Madison Dobie *"Does compromise compromise justice? The Role of Mediation in Access to Justice"* (AMINZ Conference, 23 August 2023).

Standard directions

[43] The implementation of an approach that centres around a judicial issues conference effectively replaces the current very detailed case management rules. The Committee's new structure for the proceeding overall was set out in the following table in the report:[28]

<table>
<tr><td>I</td><td colspan="3">PLEADINGS AND INITIAL DISCLOSURE: initial disclosure to be enhanced to include known adverse documents.</td></tr>
<tr><td>II</td><td colspan="3">INITIAL KEY INTERLOCUTORY APPLICATIONS, eg: strike-out, summary judgment, security for costs.</td></tr>
<tr><td>III</td><td colspan="3">SERVICE OF EVIDENCE INCLUDING:
(1) FACTUAL "WILL SAY" OR WITNESS STATEMENTS
(2) CHRONOLOGY OF EVENTS to be established by reference to documents nominated for agreed bundle.</td></tr>
<tr><td>IV</td><td colspan="3">JUDICIAL ISSUES CONFERENCE
Purpose is to distil issues and help ensure that the pathway to trial is just, speedy, inexpensive and proportionate. Six key topics:
➢ Identification of key issues with pleading amendments if required.
➢ What [disclosure] is required beyond initial disclosure to address those issues?
➢ Further interlocutory applications.
➢ Expert evidence: (a) usually one per issue; (b) conferencing and joint reports.
➢ Settlement, including mediation / judicial settlement conference.
➢ Where possible, scheduling the trial.</td></tr>
<tr><td>V</td><td>FURTHER INTERLOCUTORIES
(presumptively online)</td><td>FURTHER [DISCLOSURE]
(if any, as ordered)</td><td>EXPERT REPORTS
(including conferencing and joint reports)</td></tr>
<tr><td>VI</td><td colspan="3">TRIAL
➢ Key events established by common bundle and chronology(ies).
➢ Factual witnesses only address factual disputes/issues.</td></tr>
</table>

[28] The Report, above n 1, at p 42.

[44] The steps contemplated by I and II are addressed by the existing rules, but the steps in III and IV involve a change to the case management rules contemplated by sub-pt 1 of pt 7. We consider that the existing rr 7.1AA-7.4, setting up categories of proceedings for case management, and setting out this first and second case management conferences and what is to be addressed, be repealed and replaced by the following rule 7.1:

> **7.1. Standard directions prior to judicial issues conference**
>
> (1) Subject to (2) below the following standard directions shall apply for steps in a proceeding between the filing of pleadings and the scheduling of a judicial issues conference:
>
> (a) Prior to a judicial issue issues conference, notices (and, if necessary, applications) for joinder, and applications for intervention, should be filed and served within sufficient time, so that: (i) the directions set out below can be complied with by all parties to a proceeding and (ii) all persons with rights to appear in the proceeding may attend the judicial issues conference on an informed basis.
>
> (b) If a party wishes to apply, before the judicial issues conference, for security for costs under r 5.45, summary judgment (including any necessary application for leave) under Part 12, dismissal or stay without trial (strike-out) under r 15.1 or the inherent jurisdiction–
>
> (i) They must:
>
> 1. Notify all other parties and the Court that they intend to do so within five working days from the date of service of the last pleading served for a defending party; and
>
> 2. File the application within 10 working days from the date its notice is given; and
>
> (ii) The Registrar must allocate a hearing date under r 7.33(1):
>
> (c) If notice is not given or an application is not filed in accordance with paragraph (a), paragraph (c) applies to a plaintiff and paragraph (d) applies to a defending party:
>
> (d) The plaintiff must serve the following on the defending party within 20 working days from the date of service of the last pleading by a defending party:
>
> (i) Factual witness statements:

(ii) A draft chronology of events that refers to all pleaded material facts or any further events or facts they intend to establish by the documentary record (see form [G]):

(e) The defending party[29] must then serve the documents described in paragraph (d)(i) and (ii) within 40 working days from the date they received the plaintiff's evidence:

(f) The Registrar must schedule a judicial issues conference following the service of the evidence from all parties under this rule.

(2) A party may otherwise apply to the Court for a case management conference seeking alternative directions which can be made if the Court is satisfied that the overriding objective will be better achieved by alternative directions.

[45] The new form G-[•] will provide a template for parties' chronologies to ensure they are standardised and compatible, specifying columns for date, description and evidence. A chronology should not include every event or occurrence but should rather focus on pleaded material facts. This includes any important factual context as well as linking facts needed to support the pleaded material facts or denials of material facts in another party's pleading, refute contrary factual inferences and/or establish the overall narrative. The final column of the chronology should list documents upon which a party intends to rely to prove the specified factual proposition.

[46] The Committee considers that the following consequential amendments should be made to other rules in this sub-part:

(a) Rule 7.6 — allocation of key dates — this can be retained but should refer to these dates being allocated at the judicial issues conference rather than the first case management conference.

(b) Rule 7.7 — steps after close of pleadings date restricted — should be retained.

(c) Rule 7.8 — pre-trial conferences — should be retained.

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[29] The Committee is conscious that these rules will need to apply with appropriate modifications to counterclaim plaintiffs, defendants suing third parties and third parties suing fourth parties etc. The Committee requests, by these drafting instructions, that appropriate and efficient provision is made for these various combinations.

(d) Rule 7.9 — Cancellation of conference — this can potentially be retained, but not in relation to the judicial issues conference. It could also be repealed as unnecessary as the rule was designed to prevent case management being avoided and the compulsory judicial issues conference achieves this.

(e) Rule 7.10 — Limitation of right of appeal — can be retained.

(f) Rules 7.11–7.13 — in relation to Registry obligations — can most likely be repealed.

(g) Rules 7.14–7.17 — which concerns specialised case management under other parts of the rules — can be retained.

Recommendation 20: Interlocutories

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.[30]

[47] It is important to note, at the outset, that the new proposals do not treat all interlocutory applications in the same way. Potentially dispositive interlocutories, being early applications for security for costs, and applications for strike out and summary judgment, are addressed separately and would be heard in person unless the parties otherwise agreed.

[48] There are other kinds of interlocutories, such as without notice applications and pre-commencement actions, for which the Registrar should liaise with a Judge to determine the most appropriate mode of hearing.

[49] There are then interlocutories that remain outstanding heading into a judicial issues conference. The steps required to resolve interlocutory matters is one of the matters required to be addressed at the judicial issues conference. Presiding judges will have various options available to them. The Report suggested both that outstanding interlocutories could be "consolidated" and addressed at a single hearing and that they could be presumptively heard by remote means with time limits. The consolidation suggestion remains sensible, but is best promoted not by a rule change but by creating conditions for a meaningful judicial conference so that outstanding interlocutory issues are considered and articulated and, if applications are pursued, can be efficiently timetabled.

[50] The proposal that there be a presumption that interlocutories be addressed by remote means was supported by the Law Society, subject to a right to an in person hearing for potentially dispositive interlocutories. Bell Gully did not support the proposal arguing that "remote hearings for contentious applications are less efficient than in-person hearings". That may sometimes be that case, but often will not be, in particular because remote hearings can often in practice lead to more efficient

[30] The Report, above n 1, at p 55.

hearings. The Committee considers that inefficiencies have only arisen when there have been technology failures such as the use of inadequate internet connections or hardware by participants. The experience of administering civil cases during the COVID-19 pandemic, the progression of technology, and the increase of remote working, all point to the good sense of the court seeking to make use of remote disposition where appropriate and practicable. The best balance is a presumption of a remote hearing, which can then be considered against any particular application in light of the overriding objective.

[51] It is accordingly suggested that pt 7(1) of the Rules be amended as follows:

(a) Rule 7.33 should be replaced as follows:

> **7.33 Hearing of Interlocutory Applications**
>
> (1) On or following the filing, pursuant to rule 7.1, of an interlocutory application for security for costs under rule 5.45, summary judgment under Part 12, dismissal or stay without trial (strike-out) under rule 15.1 or the inherent jurisdiction, the Registrar must allocate an in-person hearing date for the application unless the parties agree on an alternative means of hearing the application which is approved by a Judge.
>
> (2) On or following the filing of an on notice interlocutory application made following, and in accordance with directions made at, a judicial issues conference, a Registrar must proceed in accordance with those directions.
>
> (3) On or following the filing of:
>
> (a) a notice of opposition to any other on notice application; or
>
> (b) a without notice application,
>
> the Registrar is to liaise with a Judge as to whether, in accordance the overriding objective, a hearing of the application is required, whether it should proceed by remote means, or the application is to be determined on the papers.

(b) Rule 7.34(1) should add "and remotely by video link" after "in chambers", and ", unless the application falls within rule 7.33(1)".

(c) Rule 7.34(2) should be replaced as follows:

(2) The standard time for the hearing of an interlocutory application, save for applications falling within 7.33(1), is 2 hours, unless a Judge otherwise directs.

(d) Rule 7.37 should be repealed.

Recommendation 21: Expert evidence

That expert evidence be subject to the following presumptions.

- *One expert witness per topic per party.*
- *That there be a requirement for expert conferral before expert evidence may be led at trial.*[31]

[52] The feedback to the Committee's Report generally supported the presumption of limiting parties to one expert witness per topic and requiring expert conferral before expert evidence is led at trial.

[53] The Committee has also decided that r 9.42(1) be replaced as follows, with the existing subclauses and internal cross-references being renumbered (2) and (3) respectively:

> (1) Unless a Judge otherwise directs, at or after the judicial issues conference, each party may call 1 expert witness on each specified topic.

[54] The Committee also considers that there should be changes to the rule concerning expert conferral in the following ways:

> **9.44 Court may direct conference of expert witnesses**
>
> (1) The court ~~may, on its own initiative or on the application of a party to a proceeding,~~ must, unless the Judge considers the overriding objective is better served by a different order, direct expert witnesses to confer, and may direct them to:~~—~~
>
> (a) confer on specified matters:
>
> (b) confer in the absence of the legal advisers of the parties:
>
> (c) try to reach agreement on matters in issue in the proceeding:
>
> (d) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement:
>
> (e) prepare the joint witness statement without the assistance of the legal advisers of the parties.
>
> ~~(2) The court must not give a direction under subclause (1)(b) or (e) unless the parties agree.~~

[31] The Report, above n 1, at p 57.

(~~3~~2) The court may, on its own initiative or on the application of a party to the proceeding,—

(a) appoint an independent ~~expert~~ person to convene and ~~conduct~~ facilitate the conference of expert witnesses:

(b) give any directions for convening and ~~conducting~~ facilitating the conference the court thinks just.

~~(4) The court may not appoint an independent expert or give a direction under subclause (3) unless the parties agree.~~

(~~5~~3) Subject to any subsequent order of the court as to costs, the court may determine the remuneration of an independent ~~expert~~ person and the party by whom it must be paid.

(~~6~~4) The matters discussed at the conference of the expert witnesses must not be referred to at the hearing unless the parties by whom the expert witnesses have been engaged agree.

(~~7~~5) An independent ~~expert~~ person appointed under subclause (2) may not give evidence at the hearing unless the parties agree.

[55] The third party who facilitates the expert conference need not be an expert themselves, but could be a professional facilitator/mediator. It is important that the Court be able to direct that this occur even if the parties do not consent, and also give directions regarding cost of the facilitator's services (which can then be subsequently addressed in the costs of the proceedings). The Court should also be able to give directions, such as a direction that lawyers not attend an expert conferral, in order to facilitate the greater success of expert conferencing irrespective of the parties agreement. These suggestions are consistent with the proposals made by those who have suggested that there should be a greater focus on mediation in the new High Court procedures.

Recommendation 22: Evidence at trial

That the rules for evidence at trial be changed so that:

- *The core events are to be established by the documentary record evidenced by the documents in the agreed bundle, and chronologies setting out facts to be drawn from the documents will be required.*
- *The provisions in the Evidence Act 2006 and the High Court Rules be amended to allow such documents to be admissible as to the truth of their contents.*
- *Evidence given by witnesses will not be expected to traverse the events disclosed by the documentary record, or engage in argument, but address genuine issues of fact.*
- *Witness statements are allowed to be taken as read, and supplemented by further statements or viva voce evidence.*[32]

Documents

[56] There are two interrelated objectives of these reforms:

(a) To place greater emphasis on the contemporaneous documents for the purposes of the Court's factual findings.

(b) To remove the lengthy recital of documentation in witness statements which are frequently accompanied by commentary or argument.

[57] The Committee said in the report:[33]

> A key aspect of the Committee's proposals is that the primary evidence of events should be taken from the documentary record, and that, subject to any specific obligation to be resolved at trial, the documents nominated for inclusion in the agreed bundle should be received as evidence of these events without the need for witnesses to traverse those events or produce documents in their evidence. A chronology setting out the facts to be drawn from the documents will be required. As part of these recommendations the Committee proposes that the documents in the agreed bundle be admissible as to the truth of their contents. This change may in turn require some changes to ss 130 and 132 of the Evidence Act 2006 as well as rr 9.5 and 9.6 of the Rules, although an effective change might be possible by amending the Rules alone.

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32 The Report, above n 1, at p 58.
33 At [237].

[58] The interaction between the Rules and the Evidence Act raises a number of issues. The Committee's consideration and previous consultation, has focused on documentary hearsay. But that is potentially not the only issue: there is also a limitation on the ability to rely on documents in s 35 of the Act — the prior consistent statements rule — which may also create uncertainties.

[59] In terms of documentary hearsay s 17 means that hearsay statements offered in reliance on other provisions of the Act must nevertheless also comply with the hearsay rule unless the operation of the hearsay rule is excluded (as it is in ss 27(3) and 138(3)).[34] Section 132 of the Evidence Act currently provides:

> **132 Documents required to be discovered or included in common bundle**
>
> (1) This section applies only to a civil proceeding.
>
> (2) A document in a common bundle is received in evidence when the relevant conditions set out in rules of court have been complied with.
>
> (3) A document required by rules of court to be included in a party's affidavit or list made for the purposes of discovery but which has not been so included, may be produced in evidence at the hearing only with—
>
> (a) the consent of the other party; or
>
> (b) the leave of the Judge.
>
> (4) Each document contained in the common bundle is subject to presumptions as to nature and origin that—
>
> (a) are specified in rules of court; and
>
> (b) are rebuttable in circumstances and in the manner set out in those rules.

[60] Section 132 provides a recognised exception to the general regime established by s 130 for offering documents as evidence without calling a witness (see s 130(7)). But neither s 132 nor s 130 provide a general exception to the s 17 hearsay rule, meaning that, in principle, every document must be produced by its maker or else the ss 18 or 19 exceptions must be complied with. Section 19 has an exception for documentary hearsay, but only in relation to business records. Section 132(4) has been interpreted to mean that the Rules can only make provision deeming that the document is what it purports to be, and that inclusion in the bundle takes the matter no further

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[34] See, eg, E McDonald & S Optican (eds) Mahoney on Evidence: Act & Analysis (2018, Thomson Reuters, Wellington) at [EV17.01].

— the document is not thereby admissible as to the truth of its contents.[35] Under r 9(1), however, the Court can admit inadmissible evidence with the agreement of the parties.

[61] In addition, s 35(2) restricts the circumstances in which a previous statement of a witness that is consistent with the witness's evidence is admissible, although it can be admissible when it "forms an integral part of the events before the Court" (s 35(2)(b)). The Court has also emphasised that s 35 should be interpreted in light of its purpose.[36]

[62] It is significant that the Law Commission | Te Aka Matua o te Ture's recent review of the Evidence Act identifies problems with the admission of documents in civil proceedings.[37] The Commission suggests in its Issues Paper that the current position is undesirable. As the Commission points out, documents are received by the Court as evidence as to the truth of their content as a matter of practice when no objection is raised.[38] The NZLS, in its submission to the Law Commission (which was kindly shared with the Rules Committee), supported changes to the Evidence Act, provided they were made coherently as part of the Committee's signalled wider civil procedural reforms:[39]

> The Law Society supports the proposal to limit the hearsay rule as it applies to documentary evidence, but only in a way that ensures there is no proliferation of evidence. A measure such as a chronology should be required to justify the inclusion of any hearsay statements.

[63] It may not be possible to completely resolve the difficulties that have been identified (and which will be addressed by the Commission) through changes to the Rules. But the Committee has given consideration to how the Rules could be amended

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35 *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561 at [68]; *Zespri Group Ltd v Gao* [2020] NZHC 109 at [12] of the Schedule; and *Burrell Demolition Ltd v Wellington City Council* HC Wellington CIV-2006-485-1274, 12 March 2008 at [126]. But see also *Matvin Group Ltd v Crown Finance Ltd* [2022] NZHC 2239 at [15] as an example of how matters are addressed as a matter of practice. See too *Mahoney on Evidence*, above n 34, at [EV132.02].

36 *R v Hitchison* [2010] NZCA 388 at [26].

37 Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [3.57]–[3.89].

38 See [3.73].

39 New Zealand Law Society | Te Kāhui Ture o Aotearoa "Submission to Law Commission | Te Aka Matua o te Ture on Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006" (13 July 2023) at [3.13].

to reduce the difficulties, and to give effect to the Committee's recommendations whilst remaining consistent with the Evidence Act as presently drafted.

[64] The submissions received on the Committee's proposals, both in response to its Report, and to the earlier consultation papers, can largely be categorised into two groups. The first group supported the Committee's proposals that the documents in the common bundle should be admissible as to the truth of their content. The second group raised concerns with the proposal, including because of a concern that such a change would mean that there would be an increase in argument between the parties to the litigation on whether the documents should be included in the common bundle or not.[40] The Committee considers that there is a way that the Rules can be amended that minimises the difference between current civil litigation practice and the provisions in the Evidence Act, and which also responds to the concerns of submitters. Section 132(2) and (4) contemplate that the Rules can regulate the procedures to be followed in relation to documentary admissibility, including to the point of having rebuttable presumptions.

[65] The Committee suggests an amendment to the current rule 9.5 in the following way:

> **9.5 Consequences of incorporating document in common bundle**
>
> (1) Each document contained in the common bundle is, unless the court otherwise directs, to be considered—
>
> ~~(a) to be admissible; and~~
>
> (a) to be accurately described in the common bundle index; and
>
> (b) to be what it appears to be; and
>
> (c) to have been signed by any apparent signatory; and
>
> (d) to have been sent by any apparent author and to have been received by any apparent addressee; and

[40] For example Alan Galbraith KC "I have reservations … that the contents of documents be admissible as to the truth. It seems to me that it will add further complexity and cost because of the necessity of an added process what in a array of documents is relevant, claimed to be truth, and will have to be considered for challenge. Inevitable that is going to add further written processes. Written processes cost money." (Written submission 1 July 2021).

(f) to have been produced by the party indicated in the common bundle index.

~~(2) If a party objects to the admissibility of a document included in the common bundle, or to the application of any of subclause (1)(b) to (f) to a document, the objection must, if practicable, be recorded in the common bundle, and must be determined by the court at the hearing or at any prior time that the court directs.~~

~~(3) The fact that a document has been included in the common bundle is not relevant to the determination under subclause (2) of an objection that relates to the document.~~

(~~4~~2) A document in the common bundle is automatically received into evidence and presumed to be admissible if –

(a) it is referred to –

(i) in a witnesses evidence:

(ii) in a- chronology of events submitted pursuant to r 9.2(3A):

(iii) by counsel in submissions (except closing submissions); and

(b) no objection to admissibility under r 9.5A is upheld.

~~(5) A document in the common bundle may not be received in evidence except under subclause (4).~~

(~~6~~3) The court may direct that this rule or any part of it is not to apply to a particular document.

[66] This will allow the chronologies to be used to introduce documentary evidence, and removes the requirement to record objections in the index to the bundle.

[67] The Committee has then decided on a new rule along the following lines:

9.5A Objections to admissibility of documents in common bundle

(1) A party may object to the admissibility of a document in the common bundle notwithstanding that it is presumed to be admissible.

(2) The court should address the objection to admissibility in accordance with the overriding objective, and it may consider:

(a) whether any concerns would be more sensibly dealt with as a matter of weight;

(b) if the objection is allowed, whether an opportunity should be given to adduce the evidence by other means; and

(c) whether any costs consequences ought to apply to the objection in light of the overriding objective.

[68] This rule contemplates that parties are able to object to the admissibility of documents in accordance with the Evidence Act, including on the basis of documentary hearsay. But the rule regulates when and how such objections can be made as a matter of procedure. If objections are not made then the evidence is duly received without objection in accordance with the presumption, and the implicit agreement of the parties. This rule is also formulated in a manner that disincentivises technical objections being advanced. The Court can uphold the technical objection, but give the other party an opportunity to address the evidential issue by calling a witness and also make costs awards against the party who may have caused unnecessary cost.

[69] This approach allows greater emphasis to be placed on the documentary record, but also responds to the concerns raised in submissions that relaxing the documentary hearsay rule would cause unproductive arguments about the content of the bundle. It will mean that objections to documents based on the Evidence Act will likely only be raised when they are actually of importance. The Evidence Act will still strictly apply to all documents in the bundle (subject to the presumption in r 9.5), but its provisions will be applied to specific documents only when the evidential challenge is of significance. This approach extends what is already the existing practice in relation to the common bundle.

Events arising from documents in narrative form

[70] It is recognised that removing the reference to the events disclosed by the documentary record from the witness statements may mean that, at some point, a party will wish to set out the events arising from the documentary record in narrative form. The chronology submitted will identify the relevant documents, but the party may want to explain what overall narrative those documents reveal. We consider it most appropriate that this be by a separate document served before trial, or in opening submissions served before trial. Currently r 9.16 provides that a plaintiff's synopsis of opening must be provided no later than two working days before the trial. We consider that there should be a new default rule requiring a plaintiff to file a document

concisely outlining the narrative of material events arising from the documentary record 30 working days before trial, and for parties in the position of the defendant no later than 20 working days before trial subject to alternative directions by the Court. Those alternative directions could involve a direction that such a narrative can be provided instead in opening submissions which are filed and served at some other specified time before trial. However it is prepared, requiring such a narrative to be provided in advance notwithstanding removing the advocacy from the witness statements, achieves an objective of ensuring that a concise narrative of events is formulated, which also ensures fair notice to the other parties.

Ancillary changes

[71] Ancillary changes to pt 9(1) will also be required to reflect the above changes. All references to briefs should be changed to witness statements. In addition:

(a) Rule 9.2 should be amended as follows:

(1) subclause (1) should include a new paragraph (b) "documents referred to in a parties' chronology of events", and renumber the existing paragraphs (b) and (c);

(2) subclause (3) should be amended to read:

> (3) Documents to be relied upon at the trial or hearing but additional to those already disclosed may be disclosed at any time, but not later than a date fixed by the court at ~~a case management, issues or pre-trial conference~~ the judicial issues or other conference.

(3) a new rule 9(3A) should be inserted to read:

> (3A) A party must finalise and file and serve its chronology of events (as originally prepared in draft pursuant to rule 7.1) at a date fixed by the court at the judicial issues or other conference, but not later than the date on which the common bundle is served under rule 9.4(6).

(4) Subclause (4) should be amended to read:

(4) Subclause (3) does not affect a party's ongoing obligations in relation to ~~discovery~~ disclosure.

(b) Rule 9.4(6) should be amended by replacing the phrase "when the last brief of any party is served under rule 9.7" with "a date fixed by the court at a judicial issues or other conference".

(c) Rule 9.6(2) and (3) should be amended to refer to "disclosed" rather than "discovered" documents.

(d) Rule 9.9 should be repealed and replaced as follows:

9.9 Preparation of merged chronology

(1) The plaintiff must, by the time set out in subclause (2) file and serve a merged chronology incorporating the chronologies of the parties submitted pursuant to r 9.2(3A) and indicating the following entries in an appropriate way (such as by colour coding):

(a) entries that are agreed:

(b) entries that are not agreed, and in each case the party who asserts that the entry is correct.

(2) The merged chronology must be filed and served either –

(a) not later than 10 days after the common bundle has been served under r 9.4(6); or

(b) at the time directed at the judicial issues conference.

(e) Rule 9.10 should be amended by repealing subclauses (1) and (2). The requirement to bring disputed significant facts to the court's attention is included instead in the proposed rules 7.1(1)(d) and 7.5(3)(f). The utility of this requirement was a matter noted by the New Zealand Law Society in its feedback on the report.[41]

Evidence taken as read

[72] The Committee recommended that witness statements be allowed to be taken as read. This is consistent with current practice as briefs of evidence are frequently

[41] New Zealand Law Society | Te Kāhui Ture o Aotearoa, "Feedback on *Improving Access to Justice* Report" (27 February 2023) at [4.5].

taken as read by the witness. Strictly speaking, however, the current rules do not permit this. The current rule provides:

> **9.12 Evidence-in-chief at trial**
>
> (1) A brief by a witness—
>
> (a) must, subject to the terms of an oral evidence direction made under rule 9.10, be read by the witness at the trial as the witness's evidence-in-chief; and
>
> (b) is, when read by the witness at the trial, the evidence-in-chief given by the witness at the trial; and
>
> (c) must, after being read by the witness at the trial, be endorsed by or on behalf of the Registrar with the words "Given in evidence on [date]".
>
> (2) Any portion of the brief that is the subject of an oral evidence direction under rule 9.10 becomes part of the evidence-in-chief of the witness only if and when it is given orally.

[73] Rule 9.10 is an oral evidence direction — that is that the evidence must be given orally. So the current r 9.12(1)(a) provides that the briefs of evidence must otherwise be read. The Committee has decided that the rule be replaced with the following:

> **9.12 Evidence-in-chief at trial**
>
> (1) The evidence in chief of a witness at trial:
>
> (a) may be given by the witness reading the witness statement as the witness' evidence in chief;
>
> (b) if the Court so directs, may be in the form of the witness statement taken as read if the witness confirms it is true and correct;
>
> (c) may include further oral evidence permitted by the Court; or
>
> (d) may comprise any evidence given pursuant to an oral evidence direction under r 9.10; or
>
> (e) may be in the form of a witness statement received by the Court as the witness' evidence without the witness confirming their witness statement under oath, provided that the witness has declared that their witness statement is true and correct in accordance with the Oaths and Declarations Act 1957.

[74] The form of r 9.12(1)(e) allows a witness statement to be received as evidence without the witness appearing in court and confirming that their witness statement is true and correct provided that the witness has confirmed the truth and accuracy of the statement under an oath or declaration under the Oaths and Declarations Act 1957. The law of perjury under s 108 of the Crimes Act 1961 would accordingly apply.

Cross-examination duties

[75] There is a further element of the evidence at trial that we suggest would involve a rule change. The Committee said in the Report:[42]

> The requirement that the evidence of witnesses be directed to questions of fact that are in dispute (with the exception of expert evidence) is intended to limit not just the evidence-in-chief given by those witnesses, but also cross-examination. Cross-examination should not involve putting arguments to witnesses or inviting arguments in answers. Arguments arising from the facts are properly dealt with in submissions of counsel. It may be necessary to reconsider the extent of the duty to cross-examine in s 92 of the Evidence Act 2006, by limiting that duty to situations of factual dispute.

[76] Rule 9.15 currently provides:

> **9.15 Cross-examination duties**
>
> The exchange of briefs under this subpart does not affect the cross-examination duties referred to in section 92 of the Evidence Act 2006.

[77] Section 92 of the Evidence Act provides:

> **92 Cross-examination duties**
>
> (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
>
> (2) If a party fails to comply with this section, the Judge may—
>
> (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or

[42] The Report, above n 1, at [191].

(b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or

(c) exclude the contradictory evidence; or

(d) make any other order that the Judge considers just.

[78] The Committee considers that these cross-examination duties are frequently misunderstood. In particular it is common for counsel to cross-examine witnesses by putting the party's case to that witness and inviting a comment on an understanding that that is a requirement. This is not what s 92 requires. The Law Commission's 1999 Report expresses the view that the duty concerned challenges to a witnesses veracity only.[43] Even if the duty is a little broader than this, it does not mean that a party's whole case needs to be put to the leading witnesses for the other party. The real focus of s 92 is procedural fairness.[44] A party cannot invite the Court not to accept a witness's evidence, particularly on the basis that it is untrue, without that evidence being challenged. That rule of procedural fairness does not entail an obligation for a party to put their whole case to the witness. But there is apparently a wider view of s 92 — that a parties witnesses must have an opportunity to respond to the case presented by the other party, especially when it has not been made apparent by prior disclosures. It may be that that is a misunderstanding of the scope of s 92.

[79] The uncertainty about the scope of s 92 is reflected in the submission of Andrew Barker KC during the Committee's earlier consultation processes.[45] He said:

> I also think that the Committee should consider abandoning the rule in *Browne v Dunn* and the obligation to put your case in cross-examination. I find this often to be a largely pro-forma and meaningless obligation, given the filing of substantive briefs of evidence and reply evidence (whether in writing or as led by counsel). Some counsel take a very broad approach to this obligation. Others are very careful and particular and devote a significant amount of time in putting each aspect of their case to every witness. The same variability and approach to the obligation applies to the judiciary.

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43 Law Commission *Evidence: Evidence Code and Commentary* (NZLC r 55, Vol 2, 1999) at [c 334].

44 See *R v Soutar* [2009] NZCA 227 at [27].

45 Letter to the Committee 8 July 2021.

[80] The Law Commission has also more recently identified this issue, and is proposing a possible amendment to s 92 as a consequence. It says in its recent Issues Paper:[46]

> Our review of case law and commentary identified some uncertainty as to the purpose of s 92 and what it requires of cross-examining counsel. There is concern that this may be resulting in mechanical and over cautious cross-examination in civil proceedings and improper or repetitive cross-examination in some criminal proceedings.

[81] This misunderstanding, and problem, is not limited to New Zealand. As the Federal Court of Australia's Case Management Handbook states:[47]

> Judges are frequently confronted with the task of listening to a cross-examination which, extensively and seriatim puts to the witness every aspect in which the opponent's case is at variance with the witness, evidence. This practice stems from a misunderstanding of the rule in Browne v Dunn (1893) 6R67 …

[82] In the Law Commission's recent Issues Paper it outlines a preferred solution which involves an amendment to s 92 so that "the duty to cross-examine is only engaged when a party or witness has not otherwise been put on notice of the cross-examining party's case".[48] Whether that legislative change is made is obviously a question for the Commission, and then Parliament, and any such change would address both civil and criminal proceedings. But the Committee has decided that it is desirable to make a change to the Rules as part of these reforms, to at least signal that an overcautious application of s 92 is not required. It contemplates greater judicial control of such cross-examination. The current rule should be replaced with the following:

> **9.15 Cross-examination duties**
>
> Before questioning a witness in order to meet what are perceived to be cross-examination duties under section 92 of the Evidence Act a party may first raise with the Court when questioning is required, and the extent of the questioning.

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46 Above n 37, at [14.12].
47 Above n 9, at [10.55].
48 At [14.30].

Recommendation 23: Remote hearings

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.[49]

[83] The feedback to the Committee's earlier report was generally supportive of continued use of remote hearings. In practice, this recommendation overlaps with recommendation 20 relating to interlocutory applications. As noted above, Bell Gully supported increasing use of remote hearings as part of the standard practice and procedure of the High Court, but did not support a presumption of remote hearings for contested interlocutory applications. The Committee has addressed this submission above.

[84] We note that the High Court is in the process of considering when remote hearings should be used. We also note the *Digital Strategy for Courts and Tribunals* led by Goddard J and published in March 2023 by the Office of the Chief Justice. That document sets out a pathway to electronic filing and document management which should now be followed. No rule change is required to further the Committee's recommendation as the existing powers allow remote hearings to take place.

[49] The Report, above n 1, at p 61.